Australian Government

Australian Law Reform Commission

Traditional Rights and Freedoms—Encroachments by Commonwealth Laws

FINAL REPORT

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The office of the ALRC is at Level 40 MLC Tower, 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

Email: info@alrc.gov.au
Website: www.alrc.gov.au

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Australian Government

Australian Law Reform Commission

Senator the Hon George Brandis QC

Attorney-General of Australia

Parliament House

Canberra ACT 2600

23 December 2015

Dear Attorney-General

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

On 19 May 2014, the Australian Law Reform Commission received Terms of Reference to undertake a *Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges.* On behalf of the Members of the Commission involved in this Inquiry and in accordance with the *Australian Law Reform Commission Act 1996,* I am pleased to present you with the Final Report on this reference *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Final Report 129, 2015).

Yours sincerely,

Professor Rosalind Croucher AM

President

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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 (Acting)

Senior Legal Officer

Justine Clarke (from May 2015)

Legal Officers

Robyn Gilbert (from May 2015)

Dr Julie Mackenzie (from May 2015)

Brigit Morris (until August 2015)

Shreeya Smith (from November 2014)

Advisory Committee

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

The Hon Robert Austin, Barrister at Law, Level 22 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

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

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, Barrister at Law, 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

Patricia Lane, Barrister at Law, St James Hall Chambers, Sydney

Professor John McMillan AO, Australian Information Commissioner

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

Legal Interns

Rosalind Acland

Claudia Crause

Sally Embelton

Annette Haddad

William Isdale

Neha Kasbekar

Rosetta Lee

Tristan Orgill

Justin Pen

Sarah Sacher

Kali Schellenberg

Robert Size

Jordan Tutton

Visiting Intern

Jessica Uguccioni, Lawyer, The Law Commission of England and Wales

1. Executive Summary

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The Freedoms Inquiry

1.1 The Australian Law Reform Commission was asked to identify and critically examine Commonwealth laws that encroach upon traditional rights, freedoms and privileges recognised by the common law. The ALRC referred to this large and challenging project as the ‘Freedoms Inquiry’.

1.2 In the Report, the ALRC discusses the source and rationale of many important rights and freedoms and provides an extensive survey of current Commonwealth laws that limit them. The ALRC also discusses how laws that limit traditional rights and freedoms might be critically tested and justified and whether some of these laws merit further scrutiny. Central to this task is the question of how rights should be balanced

with other rights and with the public interest, when these interests conflict. An important consideration is how laws are scrutinised by parliamentary committees and others to ensure they do not unjustifiably encroach on rights.

1.3 Identifying and critically examining laws that limit rights plays a crucial part in protecting rights, and may inform decisions about whether, and if so how, such laws might be amended or repealed. This may be seen to complement work that considers other ways to protect rights—such as by creating new causes of action or new offences, or by enacting a bill of rights. The Report contributes to broader discussion and debate about protecting rights in democratic societies. Law and law reform has an important role to play in this ongoing discussion.

Traditional rights, freedoms and privileges

1.4 The Terms of Reference,[1] provided by the Attorney-General, Senator the Hon George Brandis QC, state that laws that encroach on 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;

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1 The Terms of Reference are set out at the front of the Report and on the ALRC website: <www.alrc.gov.au/inquiries/freedoms>.

- give executive immunities a wide application;
- restrict access to the courts; and
- interfere with any other similar legal right, freedom or privilege.

1.5 There are other important rights not expressly included in the extensive list in the Terms of Reference.[2] There were calls for some of these other rights to be more fully considered in this Inquiry, including: the right to personal liberty—'the most elementary and important of all common law rights';[3] the right not to be unlawfully or arbitrarily detained; the right to privacy—'upon which the exercise of many other rights depends';[4] and the right not to be tortured.[5] Some of these are considered to some extent in the Report, in an integrated way, in chapters concerned with related rights. The broad right to personal liberty, for example, is served by many of the rights listed in the Terms of Reference, including the rights to freedom of speech, movement, assembly and religion and the right to a fair trial.[6]

Common law and constitutional settings

1.6 The rights, freedoms and privileges set out in the Terms of Reference have a long and distinguished heritage. Many have been recognised by courts in Australia, England and other common law countries for centuries. Some are recognised as human rights and are protected in international agreements and bills of rights in other jurisdictions. Human rights have been said to 'incorporate or enhance' rights at common law. In their history and development, common law rights and human rights clearly influenced each other.

1.7 Some common law rights and freedoms are considered to be so important that they have constitutional status, including in countries without a bill of rights. While in Australia 'common law constitutionalism' has not been applied by courts to invalidate statutes, the special status of some rights is reflected in how courts interpret legislation. Applying the 'principle of legality', courts will not interpret a statute so that it encroaches on, or limits, a fundamental right or common law principle unless Parliament has made it unmistakably clear that it intended the statute to do so. This is similar to interpretation provisions in some human rights statutes.

1.8 The *Australian Constitution* expressly protects a handful of rights and has been found to imply certain others, including freedom of political communication. The High Court may also have moved towards entrenching procedural fairness in courts as a constitutional right. However, the *Constitution* does not directly and entirely protect many rights and freedoms, because those who framed the *Constitution* chose to leave

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2 A list of many other traditional rights and freedoms was included in the last chapter of the Issues Paper.

3 Australian Human Rights Commission, *Submission 141*.

4 Australian Privacy Foundation, *Submission 116*.

5 Refugee Advice & Casework Service, *Submission 119*.

6 Notwithstanding this, some stakeholders would have preferred dedicated chapters on these other rights. However, given the extensive scope of this Inquiry, the ALRC chose to focus on the rights listed in the Terms of Reference.

most matters of policy to Parliament, and relied on the common law and other mechanisms to protect rights.

1.9 International instruments that Australia has ratified, such as the *International Covenant on Civil and Political Rights*, also provide rights and freedoms with some protection from statutory encroachment, but generally only through the interpretation of statutes that are unclear or ambiguous. Although international law is an important influence on the common law, it does not create binding domestic law in Australia nor does it abrogate the power of the Commonwealth Parliament to make laws that limit rights.

1.10 The jurisprudence in relation to international human rights law is a valuable resource for laws makers. While the focus of the Inquiry is upon common law rights and freedoms, the ALRC is required, under its Act, to aim to ensure its recommendations are consistent with Australia's international obligations.[7]

Approach

1.11 The Terms of Reference set out two main tasks. The first was to identify Commonwealth laws that encroach upon traditional rights, freedoms and privileges. The second task was to critically examine those laws to determine whether the encroachments are appropriately justified. The ALRC was asked to consider, among other areas of law, commercial and corporate regulation, environmental regulation, and workplace relations.

1.12 Most chapters of the Report are structured to include the following elements with respect to each right, freedom or privilege:

- an analysis of the source and rationale of the right;
- an overview of how the right is protected from statutory encroachment by the *Constitution*, the principle of legality, and international law;
- a general discussion of how limits on the right might be justified;
- an extensive survey of current Commonwealth laws that may limit the right; and
- a discussion of the justifications for some of these laws, with some laws being identified as possibly unjustified and therefore deserving further review.

1.13 The 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, without making concluded judgments about whether these laws are appropriately justified.[8]

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

8 A list of Commonwealth laws cited in the Report, including those that may interfere with rights and freedoms, appears in Appendix 1. Lists of laws identified as limiting rights are set out in G Williams, *Submission 76*; Institute of Public Affairs, *Submission 49*. See also Simon Breheny and Morgan Begg, 'The State of Fundamental Legal Rights in Australia: An Audit of Federal Law' (Occasional Paper, Institute of Public Affairs, 2014).

1.14 It is widely recognised that there are reasonable limits to most rights. Only a handful of rights are considered to be absolute. Limits on traditional rights are also recognised by the common law, although such limits may be regarded as part of the *scope* of common law rights. But how can it be determined whether a law that limits an important right is justified? Proportionality tests are now the most widely accepted tool for structuring this analysis.

1.15 Proportionality is used to test limits on constitutional rights by the High Court and by constitutional courts and law makers around the world. This involves considering whether a given law that limits rights has a legitimate objective and is suitable and necessary to meet that objective, and whether—on balance—the public interest pursued by the law outweighs the harm done to the individual right. The use of proportionality tests suggests that important rights and freedoms should only be interfered with reluctantly—when truly necessary. In the Report, the ALRC often draws upon proportionality analyses when considering whether particular laws that limit rights are justified.

1.16 The ALRC's approach in this Inquiry was to determine a forward-looking law reform response that met the essential aspects of the Terms of the Reference across its broad range. Hence in many chapters of the Report, laws are identified that may be unjustified and therefore warrant further review.

1.17 The highlighted laws have been selected following consideration of a number of factors, including whether the law has been criticised for limiting rights in submissions, parliamentary committee reports or other commentary. The fact that a law limits multiple rights has also sometimes suggested the need for further review. Where a law has been identified as being amenable to further review, the conclusion may be that the appropriate action is:

- a review of specific statutes or provisions;
- a review in a coordinated fashion across Commonwealth, state and territory laws;
- consideration as part of existing regular review and monitoring processes; and/or
- a new periodic review.

1.18 The fact that a law has been identified as meriting further review does not imply that the ALRC has concluded the law is unjustified. Further evidence and analysis would be necessary to support such specific conclusions.[9]

1.19 While some stakeholders said the ALRC should have recommended specific changes to laws, others recognised that this was not possible and supported the approach taken.[10] It was acknowledged that the Inquiry was 'extremely large and

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9 There may also be other laws that deserve further review, which are not highlighted in the Report.

10 See, eg, Law Council of Australia, *Submission 140*; Australian Institute of Company Directors, *Submission 105*.

complex'[11] and covered 'very broad terrain'.[12] Professor Graeme Orr, for example, said that, with 'all the goodwill in the world, it is hard to see how the ALRC can inform itself expertly of the myriad of social contexts needed to cover the vast terrain of issues and laws flagged in its interim report'.[13] Given the breadth of the Inquiry, the ALRC considered that more detailed recommendations for reform—other than the reviews suggested—would require dedicated projects and further evidence, consultation and analysis. In a number of specific areas the ALRC has already undertaken inquiries, and the recommendations in the final reports of those inquiries provide a foundation upon which Government may act.[14]

1.20 The Report also provides a thorough analysis of how laws are scrutinised by government agencies, parliamentary committees and others for compatibility with rights. This is part of what has been called a 'democratic culture of justification'.[15] The Report describes the role of bodies, such as the Independent National Security Legislation Monitor, the Australian Human Rights Commission and, indeed, the ALRC itself, in contributing to a general vigilance about encroachments on rights.

1.21 The Report discusses how some scrutiny processes might be improved, for example, by: providing additional guidance and assistance to policy makers; improving the quality of explanatory material and statements of compatibility; reducing overlap between the work of the three parliamentary scrutiny committees; giving the committees longer to conduct their scrutiny; and ensuring Parliament has sufficient time to consider committee reports.

1.22 The Councils for Civil Liberties said that the Inquiry had 'provided an opportunity for a national focus on the rapidly increasing numbers of statutes which undermine our rights and freedoms'.[16] The Australian Institute of Company Directors expressed appreciation of 'the extensive work the ALRC has undertaken' that has 'shone a light on traditional rights and freedoms that have been eroded by legislation, commonly without recognition, fanfare or compelling justification'.[17] The Australian Human Rights Commission commended the Interim Report's 'comprehensive review of the source of traditional rights, freedoms and privileges'.[18]

Encroachments on rights, freedoms and privileges

1.23 Chapters 2 and 3 of the Report lay the foundations for the ALRC's analysis of laws that encroach on rights, freedoms and privileges. Chapters 4 to 20 each consider

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11 Refugee Advice & Casework Service, *Submission 119*.
12 Public Interest Advocacy Centre, *Submission 133*.
13 G Orr, *Submission 79*.
14 Secrecy provisions, discussed in Ch 4, for example, were the subject of an ALRC inquiry in 2008–09: Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009). A list of ALRC reports referred to in the Report is included at Appendix 2.
15 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.
16 Councils for Civil Liberties, *Submission 142*.
17 Australian Institute of Company Directors, *Submission 105*. The AICD said that the ALRC's discussion would also 'benefit State and Territory Governments in their approach to law making'.
18 Australian Human Rights Commission, *Submission 141*.

one or two of the listed rights, freedoms or privileges in the Terms of Reference. Chapters are grouped around related rights, beginning with a set of chapters on the 'freedoms' in the list, and finishing with chapters on property rights. Each chapter identifies areas where further review may be merited. In some cases laws may encroach on a number of different common law rights and freedoms, as in the case of counter-terrorism and national security laws, and migration laws.

Freedom of speech

1.24 Freedom of speech has been described as 'the freedom *par excellence*; for without it, no other freedom could survive' and is closely linked to other fundamental freedoms, such as freedom of religion, thought, and conscience.

1.25 In Australia, legislation prohibits, or renders unlawful, speech or expression in many different contexts—including in relation to various terrorism offences and terrorism-related secrecy offences, other secrecy laws and the *Racial Discrimination Act 1975* (Cth) (*RDA*). At the same time, many limitations on speech have long been recognised by the common law itself, such as incitement to crime, obscenity and sedition.

1.26 The ALRC has not established whether s 18C of the *RDA* has, in practice, caused unjustifiable interferences with freedom of speech. Part IIA of the *RDA*, of which s 18C forms a part, would benefit from more thorough review in relation to freedom of speech. However, any such review should take place in conjunction with consideration of anti-vilification laws more generally.

1.27 There is also reason to review the range of legislative provisions that protect the processes of tribunals, commissions of inquiry and regulators; and whether Commonwealth secrecy laws provide for proportionate limitations on freedom of speech.

Freedom of religion

1.28 Religious freedom encompasses freedom of conscience and belief, the right to observe or exercise religious beliefs, and freedom from coercion or discrimination on the grounds of religious (or non-religious) belief.

1.29 There are very few, if any, provisions in Commonwealth laws that interfere with freedom of religion. The main areas of tension arise where religious freedom intersects with anti-discrimination laws, which have the potential to limit the exercise of freedom of conscience outside liturgical and worship settings.

1.30 There is no obvious evidence that Commonwealth anti-discrimination laws significantly encroach on freedom of religion in Australia, especially given the existing exemptions for religious organisations. Nevertheless, concerns about freedom of religion should be considered in future initiatives directed towards the consolidation of Commonwealth anti-discrimination laws, or harmonisation of Commonwealth, state and territory anti-discrimination laws.

Freedom of association and assembly

1.31 Freedom of association concerns the right of all persons to group together voluntarily for a common goal or to form and join an association, such as a political party, a professional or sporting club, a non-governmental organisation or a trade union. Freedom of association is different from, but also closely related to, freedom of assembly. Australians are generally free to associate with whomever they like and to assemble to participate in activities including, for example, a protest or demonstration.

1.32 A wide range of Commonwealth laws may be seen as interfering with freedom of association or freedom of assembly. These include counter-terrorism and other criminal laws and laws concerning public assembly, workplace relations, migration, and anti-discrimination. Many of these laws provide limitations on freedom of association or assembly 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. Areas of most concern include aspects of counter-terrorism and the character test in migration law.

1.33 Workplace relations laws in Australia have been subject to criticism on the basis of lack of compliance with International Labour Organization Conventions. However, while some of these provisions may offend ILO norms, they do not necessarily infringe common law freedom of association.

Freedom of movement

1.34 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. Freedom of movement has commonly—both in theory and practice—been subject to exceptions and limitations. For example, the freedom does not extend to people trying to evade punishment for a crime and, in practice, a person’s freedom to leave one country is limited by the willingness of other countries to allow that person to enter.

1.35 A range of Commonwealth laws may be seen as interfering with freedom of movement. 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 passport controls, and quarantine.

1.36 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. The areas of concern include various counter-terrorism measures, including aspects of the control and preventative detention order provisions and declared area offences in the *Criminal Code* (Cth). Provisions of the *Bankruptcy Act 1966* (Cth), which provide that a bankrupt person must automatically give their passport to the trustee, also warrant review.

Fair trial

1.37 The right to a fair trial is an absolute right and a requirement of the rule of law. Fundamentally, a fair trial is designed to prevent innocent people being convicted of

crimes. Fair trials protect life, liberty, property, reputation and other fundamental rights and interests.

1.38 Some widely recognised components of a fair trial that have been subject to statutory limits include: a trial should be held in public; a defendant has a right to a lawyer; and a defendant has the right to confront the prosecution's witnesses and test their evidence, and to obtain and adduce their own evidence. Other components of a fair trial, such as the burden of proof and the privilege against self-incrimination, are discussed in separate chapters.

1.39 The common law and statute both feature some limits on fair trial rights, for example to protect vulnerable witnesses and to protect national security interests. Some Commonwealth laws that may be said to affect fair trial rights are uncontentious, but others may need to be reviewed to ensure they are justified. Changes to trial procedures for national security reasons have been criticised, as have laws that protect certain confidential communications even from a defendant seeking to obtain the communications to help prove their innocence in a criminal trial.

Burden of proof

1.40 In criminal trials, the prosecution bears the burden of proof. This has been called 'the golden thread of English criminal law' and 'a cardinal principle of our system of justice'. This principle and the related principle that guilt must be proved beyond reasonable doubt are fundamental to the presumption of innocence.

1.41 A number of Commonwealth laws reverse the legal burden of proof on some elements of a criminal offence and may be seen as interfering with the principle that a person is presumed innocent until proved guilty according to law. Reversal of the legal burden of proof on an issue essential to culpability in an offence arguably provides the greatest interference with the presumption of innocence, and its necessity requires the strongest justification.

1.42 Further review of the reversals of the legal burden of proof in these laws may be warranted. Laws that may merit further review include deeming provisions in relation to the requisite intention or belief for serious drug offences, and directors' liability for taxation offences committed by a corporation. Any such review should consider whether placing an evidential rather than legal burden on the defendant would be sufficient to balance the presumption of innocence with the legitimate objectives pursued by these laws.

Strict or absolute liability

1.43 The criminal justice system presumes that an evil intention or knowledge of the wrongfulness of the act (*mens rea*) is necessary to found criminal liability. However, some statutes impose strict or absolute liability on one or more elements of an offence.

1.44 There are strict and absolute liability offences across many areas of law, including corporate and commercial regulation, environmental regulation, work health and safety, customs and border protection, counter-terrorism and national security, and copyright. Areas of particular concern are: various terrorism offences, including declared area offences and offences relating to dealing with terrorism-related assets and

financial transactions; reporting requirements under customs legislation; and the imposition of strict liability in relation to commercial scale infringement offences in copyright law.

1.45 Strict and absolute liability provisions should be reviewed to ensure they provide a consistent and uniform standard of safeguards. Any such review should include consideration of provisions in corporations law and prudential and environmental regulation.

Privilege against self-incrimination

1.46 The privilege against self-incrimination allows a person to refuse to answer any question, or produce any document or thing, if doing so would tend to expose the person to conviction for a crime. Many Commonwealth statutes provide coercive information-gathering and investigation powers to Commonwealth agencies, and many of these statutes abrogate the privilege against self-incrimination. Instead, the statutes provide that the information provided under compelled questioning (and in some cases, information discovered as a result of that questioning) is not admissible in subsequent proceedings.

1.47 The High Court has expressed concern that, in certain circumstances, the compelled questioning of persons, without the protection of the privilege against self-incrimination, could fundamentally change the nature of the adversarial system.

1.48 There should be further review of the privilege against self-incrimination and this could consider whether its abrogation in Commonwealth laws has been appropriately justified, and whether the statutory immunities offer appropriate protection.

Legal professional privilege

1.49 Legal professional privilege allows a person to resist a demand to reveal communications between the person and their lawyer. The privilege is rarely abrogated in Commonwealth laws.

1.50 Five statutes concerned with open government and the prevention of corruption, and two concerned with terrorism and the proceeds of crime, provide coercive information-gathering powers and abrogate the privilege. However, the statutes contain immunities to compensate for the loss of the privilege. In each case, the statute provides that communications between client and lawyer revealed under compulsion are not admissible in subsequent proceedings.

1.51 Laws that require monitoring of communications between a client and lawyer may not limit the privilege, but do breach the underlying principle that communications between client and lawyer should be confidential. Further review may be warranted.

Retrospective laws

1.52 At common law, it is abhorrent to impose criminal liability on a person for an act that was lawful when it was done. The Australian Parliament has rarely created offences with retrospective application. The few offences that have been enacted have concerned behaviour that could never have been considered innocent, legitimate or

moral, such as war crimes and offences against Australians overseas, and could be justified on this basis.

1.53 Amendments made in 2011 to the people smuggling offences in the *Migration Act 1958* (Cth) may have enlarged the scope of the criminal offence with retrospective effect to 1999, thereby criminalising behaviour that was not unlawful when it occurred.

1.54 Retrospective civil laws, that is, laws that retrospectively change legal rights and obligations, are reasonably common. Retrospective laws are not an effective way of deterring behaviour, but may serve other policy objectives such as ensuring fairness, protecting the public, or addressing the consequences of a court decision that unsettled previous understandings of the law.

1.55 Taxation laws with significant periods of retrospectivity may create uncertainty and inconvenience. Migration laws that have the stated intention of deterring behaviour, but apply to behaviour that occurred before the commencement of the legislation, could be further reviewed to ensure that their retrospective nature is proportionate and appropriately justified.

Procedural fairness

1.56 A fair procedure for decision making is an important component of the rule of law. The common law recognises a duty to accord a person procedural fairness before a decision that affects them is made.

1.57 A number of Commonwealth laws affect the common law duty to afford procedural fairness to persons affected by the exercise of public power. Excluding procedural fairness may be justified in some instances—in particular, where urgent action needs to be taken in the public interest.

1.58 Some migration laws that encroach on the duty to afford procedural fairness would benefit from further review, given the gravity of the consequences for those affected by the relevant decision. Migration laws that might be further scrutinised include those relating to the mandatory cancellation of visas and the fast track review process for decisions to refuse protection visas.

Judicial review

1.59 Access to the courts to challenge administrative action is an important common law right and superior courts of record have an inherent jurisdiction to conduct judicial review.

1.60 The primary mechanism used to restrict access to the courts is the privative clause—essentially a legislative attempt to limit access to judicial review in a certain field. However, the courts have construed privative clauses so narrowly that they are sometimes largely or even entirely deprived of effect.

1.61 Privative clauses in Commonwealth laws should be reviewed. Consideration should be given to whether alternative solutions that do not restrict access to the courts may be implemented to achieve the underlying policy objective of the provision (for example, to avoid delays in implementing administrative decisions).

Immunity from civil liability

1.62 Immunity provisions in legislation can limit the legal protection given to important rights and freedoms. Although sometimes necessary, laws that give immunity from civil liability and authorise what would otherwise be a tort operate to limit individual rights and deny civil redress—and therefore require careful justification.

1.63 Many Commonwealth statutes give some immunity to the federal police and other law enforcement agencies, customs officials, defence personnel, immigration officials, security agencies and others. The immunities protect these agencies from liability that might otherwise arise from the exercise of their statutory powers, including powers to arrest or detain people, to seize or retain property, and to carry out intrusive investigations. Such powers and associated immunities are commonly justified on the grounds that they are necessary to prevent crime, protect national security and otherwise enforce the law.

1.64 Executive immunities warrant careful justification and consideration should be given to their appropriate scope. This issue was reviewed more fully in the ALRC's 2001 report, *The Judicial Power of the Commonwealth*. Some of the recommendations in that report warrant further consideration by Government.

Delegating legislative power

1.65 From the separation of powers doctrine, and from the principle that it is Parliament's role to make laws on important matters of policy, may be derived the principle that legislative power should not be inappropriately delegated to the Executive.

1.66 Laws that will have a significant impact on rights and liberties, and laws creating offences with high penalties, should usually be in primary, not delegated, legislation. More generally, wide and vague delegations of legislative power undermine the separation of powers doctrine by allowing those who enforce the law also to make the law.

1.67 However, delegating legislative power to the Executive is now commonplace and is said to be essential for efficient and effective government. Parliament delegates such power not only to government ministers, but also to various government agencies such as the Australian Taxation Office and the Australian Securities and Investments Commission.

1.68 Given the quantity of delegated law in Australia, careful and ongoing scrutiny—built into the law making process—may be the most suitable way to limit inappropriate delegations of legislative power.

Property rights

1.69 The common law has long regarded a person's property rights as fundamental. However, property rights could be encroached upon by legislative action, so long as any deprivation was not arbitrary and reasonable compensation was given.

1.70 In relation to personal property rights, the key areas of concern include banking and taxation laws, personal property securities, intellectual property and criminal laws. Many have been the subject of recent reviews or extended consideration by parliamentary committees or the High Court. The breadth of the *Proceeds of Crime Act 2002* (Cth) is one area that may require further consideration. The Parliamentary Joint Committee on Law Enforcement provides ongoing scrutiny of the Commonwealth legislation and the Australian Federal Police provide annual reports. However, given the potential impact of unexplained wealth measures on personal property, and the proposal for a national coordinated scheme by the Committee, the ongoing scrutiny needs to ensure that such a scheme is proportionate in light of its objectives to meet the obligations agreed to under the *United Nations Convention Against Corruption*. In addition, the ALRC also suggests that a further review be scheduled in due course.

1.71 With respect to real property and the rights of land owners, the main focus of concern is on interferences with the right to use the land and water. State environmental laws are not the concern of this Inquiry; however, from the landholders' perspective the complexity of the 'interference' can only be understood in the light of both state and Commonwealth laws. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*) interferes with the right to use land to a limited extent. The next scheduled review of the *EPBC Act* could reassess whether the interferences are proportionate and explore a range of compensatory mechanisms. This review may also afford an opportunity for consideration of the interrelationship of Commonwealth and state laws. The *Water Act 2007* (Cth) does not interfere in a negative way with the water entitlements in the Murray-Darling Basin that have been established under state and territory statutes. However, it may be appropriate for the Act to be reviewed periodically.

Counter-terrorism and national security laws

1.72 Acts of terrorism are a gross violation of fundamental rights to life and safety and the Government has both a right and a duty to take action to protect its citizens.[19] This may require the enactment of legislation that places limits on traditional rights and freedoms. National security is recognised as a legitimate objective of such limitations, at common law and in international human rights law.[20]

1.73 Counter-terrorism and national security laws that encroach on rights and freedoms should nevertheless be justified, to ensure the laws are suitable, necessary and represent a proper balance between the public interest and individual rights.

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19 See, eg, United Nations Security Council, Resolution 1373 (2001), Adopted by the Security Council at its 4385th Meeting, 28 September 2001. This resolution required States to ensure that terrorists, their accomplices and supporters be brought to justice and that terrorist acts are established as serious criminal offences in domestic laws and the punishment duly reflects the seriousness of such terrorist acts.

20 See, eg, *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 161. For example, under the ICCPR national security is recognised expressly as a permissible limitation in relation to freedom of movement, freedom of expression, the right to peaceful assembly and freedom of association: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 12.3; 19.3; 21; 22.2 respectively.

1.74 In the Report, a range of counter-terrorism and national security laws are identified that interfere with traditional rights and freedoms. These include laws that limit freedom of speech (for example, laws about advocating terrorism and disclosing intelligence operations); freedom of association and assembly (for example, control orders, preventative detention orders, and laws about foreign incursions and recruitment); laws that impose strict or absolute liability (for example, in relation to offences for disclosing certain classified operational information); laws that change fair trial procedures (for example, to protect sensitive information about national security).

1.75 Some counter-terrorism laws engage multiple rights. For example, the control order and preventative detention order regimes contained in divs 104–105 of the *Criminal Code* have implications for freedom of speech, freedom of association and freedom of movement.

1.76 Counter-terrorism and national security laws should be subject to ongoing and careful review, given the extent to which they may interfere with individual rights. While some of these laws have been subject to significant scrutiny, including by parliamentary committees and the Independent National Security Legislation Monitor (INSLM), it has been suggested that many are not proportionate, and would benefit from further consideration and analysis.

1.77 Ongoing review of these laws falls within the functions of the INSLM[21] and the Parliamentary Joint Committee on Intelligence and Security (Intelligence Committee).[22] INSLM and Intelligence Committee review of legislation is discussed further in Chapter 3.

Migration laws

1.78 A number of migration laws have also been identified as encroaching on traditional rights and freedoms, including freedom of association and assembly (the operation of the 'character test' in the *Migration Act*); the right not to be subject to retrospective laws (the *Migration Act* people smuggling offence and provisions converting applications for permanent protection visas into applications for temporary protection visas); the right to procedural fairness (for example, the fast track review process for decisions to refuse protection visas); and the right to judicial review (for example, the privative clause in the *Migration Act*).

1.79 Migration laws pursue the objective of regulating, in the national interest, the coming into, and presence in, Australia of non-citizens.[23] Pursuit of this objective may involve some limitations on traditional rights and freedoms. However, such limitations should be proportionate.

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21 *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1B). At 1 November 2015, the Acting INSLM was preparing a report on any impact on journalists in the operation of s 35P of the *ASIO Act* concerning offences for the disclosure of information relating to a 'special intelligence operation' and was seeking public submissions concerning the adequacy of the safeguards relating to the control order regime provided for by div 104 of the *Criminal Code*.

22 *Intelligence Services Act 2001* (Cth) s 29(1)(bb).

23 *Migration Act 1958* (Cth) s 4.

1.80 In this Inquiry, significant concerns were expressed that a number of migration laws are not proportionate. The ALRC suggests that these laws would benefit from further analysis to ensure that the laws do not interfere unjustifiably with traditional rights and freedoms.[24]

Further consideration or review

1.81 A range of Commonwealth laws appear to warrant further consideration or review. Some of these laws might be reviewed by a parliamentary committee, a government department, or a body such as the INSLM or the ALRC itself. Others may simply warrant reconsideration by government, given their effect on traditional rights and freedoms.

Freedom of speech

- *Racial Discrimination Act 1975* (Cth) pt IIA—review in conjunction with consideration of anti-vilification laws more generally.
- Legislative provisions that protect the processes of tribunals, commissions of inquiry and regulators, for example *Veterans' Entitlements Act 1986* (Cth) s 170.
- Secrecy offences, including the general secrecy offences in *Crimes Act 1914* (Cth) ss 70, 79.
- *Criminal Code* s 80.2C (advocating terrorism), ss 102.1, 102.3, 102.5, 102.7 (prescribed terrorist organisations), s 105.41 (preventative detention orders)—review by INSLM and the Intelligence Committee as part of their ongoing roles.
- *Australian Security Intelligence Organisation Act* 1979 (Cth) (*ASIO Act*) s 35P (special intelligence operations)—review by INSLM and the Intelligence Committee as part of their ongoing roles.

Freedom of association and assembly

- *Criminal Code* s 102.8, divs 104–105 (control orders and preventative detention orders), s 119 (foreign incursions and recruitment)—review by INSLM and the Intelligence Committee as part of their ongoing roles.
- *Migration Act* s 501 (character test).

Freedom of movement

- *Criminal Code* divs 104–105 (control orders and preventative detention orders), s 119 (declared area offences)—review by INSLM and the Intelligence Committee as part of their ongoing roles.
- *Bankruptcy Act 1966* (Cth) s 77, which provides that a bankrupt person must automatically give their passport to the trustee in bankruptcy.

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24 The Law Council of Australia has suggested that an independent body should be appointed to review immigration legislation: Law Council of Australia, *Submission 140*.

Fair trial

- Uniform Evidence Acts pt 3.10 (client legal privilege and a privilege for religious confessions without exceptions for defendants seeking to adduce evidence in support of their defence).

Burden of proof

- *Criminal Code* deeming provisions in relation to the fault elements for drug offences, for example *Criminal Code* s 302.5.
- *Taxation Administration Act 1953* (Cth) s 8Y, in relation to directors' liability for taxation offences committed by a corporation.

Strict or absolute liability

- Legislative provisions that provide for strict and absolute liability in corporations law and prudential and environmental regulation, for example, *Corporations Act 2001* (Cth) s 588G.
- Legislative provisions that provide for strict liability in relation to commercial scale copyright infringement offences under the *Copyright Act 1968* (Cth)—review by the Productivity Commission as part of its current review into intellectual property arrangements.
- *Criminal Code* ss 102.5, 102.8 (associating with a terrorist organisation), ss 119.1, 119.2 (declared area offences)—review by INSLM and the Intelligence Committee as part of their ongoing roles.
- *ASIO Act* s 34ZS (disclosure of operational information concerning an ASIO warrant)—review by INSLM and the Intelligence Committee as part of their ongoing roles.
- *Charter of the United Nations Act 1945* (Cth) ss 20–21 (freezable assets or giving freezable assets to a proscribed person or entity)—review by INSLM and the Intelligence Committee as part of their ongoing roles.

Privilege against self-incrimination

- Legislative provisions that abrogate the privilege against self-incrimination, particularly those that provide only use immunity, for example *Australian Crime Commission Act 2002* (Cth) s 30.
- *Taxation Administration Act 1953* (Cth) sch 1 s 353–10, which abrogates the privilege against self-incrimination and provides no immunity.

Legal professional privilege

- *Criminal Code* s 105.38(1), which requires contact between a lawyer and a detained person to be capable of being monitored.
- *ASIO Act* s 34ZQ(2), which requires contact between a lawyer and a detained person to be capable of being monitored.

Retrospective laws

- *Migration Act* s 228B, which defines the scope of the offence of people smuggling.
- *Income Tax Assessment Act 1997* (Cth) div 13, regarding transfer pricing.
- *Migration Act* s 45AA and *Migration Regulations 1994* (Cth) reg 2.08F, which converted applications for permanent protection visas into temporary protection visas.

Procedural fairness

- *Migration Act* s 501(3A) and associated provisions relating to the mandatory cancellation of visas on character grounds;
- *Migration Act* pt 7AA (fast track review process for decisions to refuse protection visas).

Judicial review

- Privative clauses that restrict access to judicial review, for example *Migration Act* s 474.

Property rights

- *Proceeds of Crime Act 2002* (Cth)—ongoing scrutiny by the Parliamentary Joint Committee on Law Enforcement and, in due course, by a further independent review.
- *EPBC Act*—as part of the next scheduled independent review.
- *Water Act*—in due course, by a further independent review.

Law reform process

1.82 A major aspect of building the evidence base to support the formulation of ALRC recommendations for reform is consultation, acknowledging that widespread community consultation is a hallmark of best practice law reform.[25] Under the provisions of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC 'may inform itself in any way it thinks fit' for the purposes of reviewing or considering anything that is the subject of an inquiry.[26]

1.83 The process for each law reform project may differ according to the scope of the inquiry, the range of stakeholders, the complexity of the laws under review, and the period of time allotted for the inquiry. For each inquiry the ALRC determines a consultation strategy in response to its particular subject matter and likely stakeholder interest groups. The nature and extent of this engagement is normally determined by

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25 Brian Opeskin, 'Measuring Success' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 202.

26 *Australian Law Reform Commission Act 1996* (Cth) s 38.

the subject matter of the reference and the timeframe in which the inquiry must be completed under the Terms of Reference. While the exact procedure is tailored to suit each inquiry, the ALRC usually works within an established framework, outlined on the ALRC's website.[27]

1.84 Following ALRC established practice, a multi-pronged strategy of seeking community comments was used in this Inquiry. Two consultation documents were released to facilitate focused consultations in a staged way throughout the Inquiry: an Issues Paper, in December 2014 and an Interim Report in July 2015.[28]

1.85 Two national rounds of stakeholder consultation meetings, teleconferences and roundtables were also conducted following the release of each of the consultation documents. The Terms of Reference for this Inquiry directed the ALRC to 'identify and consult with relevant stakeholders, including relevant Commonwealth departments and agencies, the Australian Human Rights Commission, and key non-government stakeholders'. The individuals, departments, agencies and the many bodies consulted in the Inquiry are listed in Appendix 3. In a broad-reaching inquiry of this kind, the consultations and the submissions received were particularly valuable in assisting the ALRC to achieve the balance in breadth and depth necessary to discharge the brief set out in the Terms of Reference.

1.86 The ALRC received 151 submissions.[29] Submissions were received from a wide range of people and agencies, including: individuals; academics; lawyers; unions; employer organisations; employment agencies; community legal centres; law societies and representative groups; state and federal government agencies; and peak bodies.

1.87 In this Inquiry the ALRC also conducted a national series of symposia, in September and October 2015, focusing on aspects of the Inquiry raised in the Interim Report. The first, held in Brisbane, focused on property rights. In Perth the focus was 'Freedom's Limits: Speech, Association and Movement in the Australian Legal System'. In Melbourne, the topic was 'Fair trial, procedural fairness and other traditional rights'; and the Sydney topic was 'Proportionality and the Constitution'.[30]

1.88 The ALRC acknowledges the contribution of all those who participated in the consultation rounds, the symposia and in preparing submissions. It is the invaluable work of participants that enriches the whole consultative process and the ALRC records its deep appreciation for this contribution.

1.89 The ALRC also convened an Advisory Committee of experts, which met twice during the Inquiry. The Committee comprised 13 members, and their names appear at the beginning of the Report. Professor Barbara McDonald of the University of Sydney also provided crucial assistance, particularly in the preparation of the Issues Paper.

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27 <www.alrc.gov.au/law-reform-process>.

28 Australian Law Reform Commission, *Traditional Rights and freedoms—Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014); Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Interim Report No 127 (2015).

29 These are all published on the ALRC website. Seven confidential submissions were also received.

30 Presentations from the symposia are available on the ALRC website.

1.90 In this Inquiry, the ALRC was 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 six expert readers who commented on certain chapters of the report. Their names appear at the beginning of the Report.

1.91 While the ultimate responsibility in each inquiry remains with the Commissioners of the ALRC, the establishment of a panel of experts as an Advisory Committee, and the enlisting of expert readers, are invaluable aspects of ALRC inquiry processes—assisting in the identification of key issues, providing quality assurance in the research and consultation effort, and assisting with the development of reform proposals. The ALRC acknowledges the considerable contribution made by the Advisory Committee and the expert readers in this Inquiry and expresses its gratitude to them for voluntarily providing their time and expertise.

1.92 Once tabled in the Australian Parliament, the Report becomes a public document.[31] ALRC reports are not self-executing documents. The ALRC is an advisory body and provides recommendations about the best way to proceed—but implementation is a matter for others. However, the ALRC has a strong track record of having its advice followed. The Annual Report 2014–15 records that 60% of ALRC reports are substantially implemented and 26% are partially implemented, representing an overall implementation rate of 86%.[32]

Outcomes

1.93 The overall effect of the Report will be to provide a significant contribution to a broader discussion and debate about protecting rights in democratic societies. The specific outcomes of the ALRC's review include :

- discussion of the source and rationale of the traditional rights and freedoms listed in the Terms of Reference;
- consideration of the protection from statutory encroachment given to traditional rights and freedoms by the *Constitution*, principles of statutory interpretation and international law—complementing work that considers other ways to protect rights;
- an extensive survey of Commonwealth laws that encroach on the listed traditional rights and freedoms recognised by the common law;
- analysis of the justification for a range of these laws;
- discussion of a proportionality test to provide a structured method of reviewing the justification of laws that limit rights and freedoms;

31 The Attorney-General is required to table the report within 15 sitting days of receiving it: *Australian Law Reform Commission Act 1996* (Cth) s 23.

32 Australian Law Reform Commission, *Annual Report 2014–2015*, Report No 128 (2015) 27. See also Appendixes F and G.

- analysis of the law-making processes for testing compatibility of laws with fundamental rights and how these can be improved to ensure that laws that limit traditional rights and freedoms are thoroughly scrutinised; and
- the highlighting of laws that warrant further consideration or review—to provide a road map for future work to ensure that encroachments on rights, freedoms and privileges are avoided or appropriately justified.

2. Rights and Freedoms in Context

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Summary

2.1 This chapter provides the conceptual foundation for the Inquiry and considers such questions as: 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 law and bills of rights? To what extent 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?

Common law foundations

2.2 The rights, freedoms and privileges set out in the Terms of Reference have a long and distinguished heritage. Many have been recognised 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,[1] the settlement of parliamentary supremacy following the

1 'The liberties often associated with the *Magna Carta* were a product of the institutions of Parliament and the Courts, over the course of centuries. However, the development of those institutions was significantly influenced by the *Magna Carta*': James Spigelman, 'Magna Carta: The Rule of Law and Liberty' (Centre for Independent Studies, 15 June 2015) 1. 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, St James' Church, Sydney, 14 June 2015).

Glorious Revolution of 1688 and the enactment of the *Bill of Rights Act 1688*.[2] They were recognised and developed by the courts and some were declared and affirmed by historic statutes and further developed by modern legislation.

2.3 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.[3]

2.4 Many traditional rights and freedoms are recognised now as 'human rights'. Murphy J referred to 'the common law of human rights'[4] and Professors George Williams and David Hume have written that the common law is 'a vibrant and rich source of human rights.'[5]

2.5 Traditional rights recognised by the common law are now found in international agreements and bills of rights in other jurisdictions—including, the *Universal Declaration of Human Rights,* the *International Covenant on Civil and Political Rights*, the bills of rights in the United States and Canadian constitutions, and the human rights Acts in the United Kingdom, New Zealand and two Australian jurisdictions, the Australian Capital Territory and Victoria. French CJ has said that the human rights and freedoms in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Victorian Charter) 'in significant measure incorporate or enhance rights and freedoms at common law'.[6]

2.6 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 the UK, Australia, New Zealand and Canada. 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 in the UK were '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'.[7]

> 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

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2 *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.

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

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

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

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

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

> unthreatened by the grosser forms of interference with personal liberty, such as officially sanctioned torture, or prolonged detention without trial.[8]

2.7 To the extent that Australian law has protected and fostered rights and freedoms, it has long been statutes and judge-made law that have done so.[9] 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 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.[10]

2.8 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'.[11]

2.9 Identifying and critically examining laws that limit rights is a crucial part of protecting rights, and may inform decisions about whether, and if so how, such laws might need to be amended or repealed. This may be seen to complement work that considers other ways to protect rights—such as by creating new offences and new causes of action, or by enacting a bill of rights.[12] Whether the introduction of a bill of rights in Australia is desirable is widely debated,[13] and draws in part upon historical arguments about whether the courts or parliaments are better guardians of individual rights.[14] However, the question is not the subject of this Inquiry.[15]

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8 Ibid.

9 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.

10 J D Heydon, 'Are Bills of Rights Necessary in Common Law Systems?' (Lecture, Oxford Law School, 23 January 2013).

11 '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': Ibid.

12 A bill of rights might give courts the power to strike down, or make declarations about, laws that unjustifiably limit rights.

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

14 See, eg, Jeremy Waldron, 'The Core of the Case against Judicial Review' [2006] *The Yale Law Journal* 1346. 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.

15 Some stakeholders nevertheless took the opportunity to argue that the most appropriate way to protect traditional rights is to enact a Commonwealth Human Rights Act: National Association of Community Legal Centres, *Submission 143*; Law Council of Australia, *Submission 140*; Australian Privacy Foundation, *Submission 116*; Kingsford Legal Centre, *Submission 110*.

2.10 The focus of this Inquiry is on identifying and critically examining Commonwealth laws that encroach upon traditional rights. However, as part of the context of this analysis, it is useful to first consider how these rights are protected in law from statutory encroachment. Broadly speaking, some protection is provided by the *Australian Constitution* and by rules of statutory construction, such as the principle of legality. These are discussed generally below and more fully throughout the report.

Australian Constitution

2.11 The *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;
- 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.

2.12 Section 51(xxxi) of the *Constitution* provides that if the Commonwealth compulsorily acquires property, it must do so on 'just terms'—which may also be conceived of as a right.[16]

2.13 The High Court has also found certain rights or freedoms to be implied in the *Constitution*—notably, freedom of political communication.[17] 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'.[18] The High Court has often said the freedom is not a personal right, but rather is 'best understood as a constitutional restriction on legislative power'.[19]

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

17 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. The High Court has said that 'freedom of association to some degree may be a corollary of the freedom of communication': *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 181, [148] (Gummow and Hayne JJ).

18 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.

19 *McCloy v New South Wales* [2015] HCA 34 [30]. See also *Unions NSW v New South Wales* (2013) 252 CLR 530 at 554 [36]. Ratnapala and Crowe question the accuracy and usefulness of this distinction: Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 3rd ed, 2012) 421.

2.14 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 'reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government'.[20]

2.15 The High Court may have moved towards entrenching procedural fairness in courts as a constitutional right.[21] Chapter III of the *Constitution* vests the judicial power of the Commonwealth in the High Court and in other courts that Parliament creates or invests with federal jurisdiction. In *Leeth v Commonwealth*, Deane and Toohey JJ observed that investing judicial power in 'courts' implies that courts 'exhibit the essential attributes of a court and observe, in the exercise of that judicial power, the essential requirements of the curial process, including the obligation to act judicially'.[22] In *Dietrich v The Queen*, the High Court drew natural justice implications from the nature of judicial power and held that a person accused of a serious crime might in some circumstances be denied a fair trial, if they were not represented by a lawyer.[23] In *Polyukhovich v Commonwealth,* Deane J said:

> Common sense and the provisions of Ch III, based as they are on the assumption of traditional judicial procedures, remedies and methodology, compel the conclusion that, in insisting that the judicial power be vested only in the courts designated by Chapter III, the Constitution's intent and meaning were that judicial power would be exercised by those courts acting as courts with all that notion essentially requires.[24]

2.16 In *Polyukhovich*, it was accepted that bills of attainder violate the constitutional separation of powers.[25] The legislature cannot therefore usurp the distinctly judicial power of the courts to determine criminal guilt.

2.17 If procedural fairness were considered an essential characteristic of a court, Williams and Hume write, 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.[26]

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

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20 *Roach v Electoral Commissioner* (2007) 233 CLR 162, [85] (Gummow, Kirby and Crennan JJ). See also, *Rowe v Electoral Commissioner* (2010) 243 CLR 1.
21 Williams and Hume, above n 5, 375.
22 *Leeth v Commonwealth* (1992) 174 CLR 455, 486–7.
23 *Dietrich v The Queen* (1992) 177 CLR 292, 315, 337, 362, 374.
24 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607.
25 A bill of attainder is a statute that states that a specific person is 'guilty of an offence constituted by past conduct and impos[es] punishment in respect of that offence': Ibid [30].
26 Williams and Hume, above n 5, 376.

2.19 The *Constitution* does not 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 writes, 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.[27]

2.20 Professor Jeffrey Goldsworthy has written that the constitutional tradition Australia inherited from Britain was 'obviously not opposed to rights such as freedom of speech, but was opposed to judges having power to protect them from interference by legislation':[28]

> With a few exceptions, our framers relied on other mechanisms for protecting rights, including constitutional conventions; the common law; presumptions of statutory interpretation; and community attitudes, of tolerance and respect for rights, expressed through the ballot box.[29]

2.21 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.[30]

A common law constitution?

2.22 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'.[31] Under this theory, the common law is said to incorporate fundamental moral principles, against which the legality of governmental decisions, and even Acts of

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

28 Jeffrey Goldsworthy, 'Constitutional Implications Revisited' (2011) 30 *University of Queensland Law Journal* 9, 25.

29 Ibid.

30 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, [23]. Mason CJ said: 'The framers of the Constitution accepted, in accordance with prevailing English thinking, that the citizen's rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy': Ibid [31].

31 Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 17.

Parliament, may be tested.[32] Many of the rights and freedoms listed in the Terms of Reference, even those not fully protected by the *Australian Constitution*, would be considered constitutional in this way.

2.23 Commonly associated with the writing of Professor Trevor Allan[33] and Lord Justice John Laws,[34] common law constitutionalism has been called 'a potent phenomenon within contemporary public law discourse'.[35] Allan has written that 'the common law is prior to legislative supremacy, which it defines and regulates':[36]

> 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.[37]

2.24 Some even suggest that courts may invoke this common law constitution to invalidate Acts of Parliament.[38] The theory has been said to invert the traditional relationship between statute law and the common law.[39] 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.[40] The political constitution, Thomas Poole writes, is 'turned on its head in favour of a system of constitutional politics whose central institution is the common law court'.[41]

2.25 The theory has its leading proponents in the UK, which lacks a written and rigid constitution. In Australia, it has not been applied to invalidate unambiguous statutes. In *South Australia v Totani*, French CJ said that it 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.[42]

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32 Thomas Poole, 'Dogmatic Liberalism? TRS Allan and the Common Law Constitution' (2002) 65 *The Modern Law Review* 463, 463.

33 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).

34 See, eg, John Laws, *The Common Law Constitution* (Cambridge University Press, 2014). Paul Craig, Jeffrey Jowell and Dawn Oliver are the other 'prime movers' behind this 'quiet revolution' identified by Poole: Thomas Poole, 'Questioning Common Law Constitutionalism' (2005) 25 *Legal Studies* 142, 142.

35 Poole, above n 32.

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

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

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

39 Goldsworthy, *Parliamentary Sovereignty*, above n 31, 15.

40 Ibid.

41 Poole, above n 32, 463.

42 *South Australia v Totani* (2010) 242 CLR 1, [31]. In a speech, Chief Justice French 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

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

The principle of legality

2.27 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 Terms of Reference.[43] In fact, as Spigelman has said, the 'protection which the common law affords to the preservation of fundamental rights is, to a very substantial degree, secreted within the law of statutory interpretation'.[44]

2.28 The principle of legality may go back at least as far as Blackstone and Bentham.[45] It may be a new label for a traditional principle.[46] Early Australian authority may be found in the 1908 High Court case, *Potter v Minahan*.[47] 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.[48]

2.29 The rights or freedoms protected by the principle of legality 'often relate to human rights and are sometimes described as having a constitutional character'.[49] The principle 'extends to the protection of fundamental principles and systemic values'.[50] There is no settled list of rights protected by the principle, but in *Momcilovic*, Heydon J set out the following examples:

> [F]reedom from trespass by police officers on private property; procedural fairness; the conferral of jurisdiction on a court; and vested property interests …; rights of

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common law limitation. However, the question has been left, at least theoretically, open': Robert French, 'Common Law Constitutionalism' (Robin Cooke Lecture, Wellington, New Zealand, 27 November 2014).

43 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 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 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*.

44 Spigelman, above n 43, 9. See also Robert French, 'The Common Law and the Protection of Human Rights' (Speech, Anglo Australasian Lawyers Society, Sydney, 4 September 2009) 2.

45 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 43, 380.

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

47 '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.

48 *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).

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

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

> 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.[51]

2.30 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.[52]

2.31 The 'political cost' of the decision was also something referred 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'.[53] 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'.[54]

2.32 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.[55]

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51 *Momcilovic v The Queen* (2011) 245 CLR 1, [444] (Heydon J) (citations omitted). In *Malika Holdings v Stretton*, McHugh J said: 'No doubt there are fundamental legal principles—a civil or criminal trial is to be a fair trial, a criminal charge is to be proved beyond reasonable doubt, people are not to be arrested or searched arbitrarily, laws, especially criminal laws, do not operate retrospectively, superior courts have jurisdiction to prevent unauthorised assumptions of jurisdiction by inferior courts and tribunals are examples. Clear and unambiguous language is needed before a court will find that the legislature has intended to repeal or amend these and other fundamental principles': *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, [28]. Other lists appear in: Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014); Spigelman, above n 43; Williams and Hume, above n 5. See also Australian Law Reform Commission, *Traditional Rights and freedoms—Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014) Ch 19.

52 *R v Secretary of State for the Home Department; ex parte Simms* [2002] 2 AC 115 131.

53 Robert French, 'The Common Law and the Protection of Human Rights' (Speech, Anglo Australasian Lawyers Society, Sydney, 4 September 2009) 2.

54 *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.

55 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*).

2.33 The principle of legality is similar to interpretation provisions in some human rights Acts, such as s 32(1) of the Victorian Charter, which 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'.[56] French CJ has said that this provision is 'analogous to the common law principle of legality'.[57] The principle of legality could be similarly codified in a Commonwealth statute, such as the *Acts Interpretation Act 1901* (Cth). This could act as a clear statement of parliamentary support for the principle of legality and further protect fundamental rights and freedoms from statutory limitation.

2.34 Finally, it should be stressed that the principle 'does not constrain legislative power'.[58] Subject to the *Constitution*, Parliament has the power to modify or extinguish common law rights. Chief Justice Robert French has said while the principle has a 'significant role to play in the protection of rights and freedoms', it does not 'authorise the courts to rewrite statutes'.[59] The principle of legality will have a very limited application where encroaching on a right is a clear object of a statute.[60]

International law

2.35 Each chapter of this 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),[61] to which Australia is a party.[62]

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56 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1). See also *Human Rights Act 1998* (UK) s 3(1).

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

58 *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, Queensland Supreme Court, Brisbane, 4 August 2013).

59 Chief Justice Robert French, *The Courts and the Parliament* (Queensland Supreme Court Seminar, Brisbane, 4 August 2012).

60 '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).

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

62 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).

2.36 Instruments such as the ICCPR 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:[63]

> 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.[64]

2.37 In *Mabo v Queensland [No 2],* 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'.[65]

2.38 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.[66]

2.39 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'.[67]

2.40 International law protects rights in other ways. For example, Australia periodically reports to and appears before relevant United Nations human rights treaty bodies.[68] And as discussed below and in Chapter 3, Australian parliamentary committees scrutinise laws for compatibility with core international human rights

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63 In *Coleman v Power,* Gleeson CJ distinguished between statutes enacted before ratification of a particular international treaty and those statutes enacted after ratification, arguing that only the latter can be interpreted in line with the relevant treaty: *Coleman v Power* (2004) 220 CLR 1, [19].

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

65 *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.

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

67 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J). Similarly, in *The Malaysian Declaration Case*, Kiefel J said that 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'. *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, [247].

68 See Attorney-General's Department, *United Nations Human Rights Reporting* <http://www.ag.gov.au>.

treaties. The United Nations Human Rights Committee also considers communications from individuals who claim to be victims of a human rights violation.[69]

2.41 While the focus of the Terms of Reference is upon common law rights and freedoms,[70] international human rights law informs approaches to domestic law and also the ALRC's obligations in conducting inquiries.[71]

The nature of common law rights

2.42 Some of the rights and freedoms listed in the Terms of Reference directly give rise to legal obligations and may be enforced in courts of law. Others are more like freedoms or liberties and are protected in Australia by virtue of the fact, and largely only to the extent, that laws do not encroach on the freedom.[72] 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'.[73]

2.43 Many common law rights may therefore be largely residual,[74] and perhaps for this reason, more vulnerable to statutory encroachment.[75]

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69 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) First Optional Protocol, art 1.

70 The Terms of Reference do not expressly refer to Australia's legal obligations under international human rights instruments, as pointed out by Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 140*; Refugee Advice & Casework Service, *Submission 119*. See also Monash University Castan Centre for Human Rights, *Submission 18*.

71 The ALRC must aim to ensure that the laws, proposals and recommendations it reviews, considers or makes are, as far as practicable, consistent with Australia's international obligations that are relevant to the matter: *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(b).

72 The most comprehensive and compelling explanation of the nature of rights and liberties and the jural relations that they create was provided by the American jurist Wesley Newcomb Hohfeld: Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16. For a discussion, see Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2009) ch 13. In a speech about common law protections of human rights, Chief Justice French said that it was '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': Chief Justice Robert French, 'Protecting Human Rights Without a Bill of Rights' (Speech, John Marshall Law School, Chicago, 26 January 2010).

73 *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. The corollary of this principle is that no person or authority may interfere with the liberty of a person except by authority of law: see, eg, *Entick v Carrington* (1765) 19 St Tr 1029.

74 '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

2.44 In some other jurisdictions, rights and freedoms are afforded additional protection from statutory encroachment by bills of rights and human rights statutes. The degree of protection offered by these statutes varies. A constitutionally entrenched bill of rights, such as that found in the United States Constitution, allows the judiciary to declare a law invalid. This may be contrasted with the *Human Rights Act 1998* (UK), which does not give courts the power to strike down legislation, but 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 rights and freedoms set out in the *European Convention on Human Rights*.[76] The Victorian Charter has a similar provision, quoted above.[77]

2.45 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. While some common law rights are often conceived of as residual, human rights are rarely thought of in this way. Moreover, human rights have been said to tend to grow in content and form. 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.[78]

2.46 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.[79]

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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.

75 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.

76 *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.

77 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1).

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

79 The Report focuses on the rights and freedoms listed in the Terms of Reference.

Extra-territorial application

2.47 In the absence of a specific legislative restriction which is consistent with the *Constitution*, the enjoyment of most common law rights and freedoms is not confined to Australian citizens.[80]

2.48 At common law, people who are not Australian citizens ('aliens'), other than enemy aliens, are to be treated, while they are in Australia, 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 such people are entitled to the same protection with respect to civil rights as the law affords to Australian citizens.[81]

2.49 A related issue concerns whether common law rights have extra-territorial effect—that is, do they apply to people who are outside Australia, or on their way to Australia. Generally, Australian common law does not apply of its own force in areas beyond the limits of Australia.[82] In *Ruddock v Vadarlis*, Beaumont J held that asylum seekers aboard the MV *Tampa* had not, and could not, assert a common law right to enter Australia; and it is unlikely they had other Australian common law rights that could be enforced.[83]

2.50 There is a common law presumption that legislation does not have extra-territorial application. Australian law may be given extra-territorial effect in legislation—for example, as has been done in relation to child sex offences.[84] Where Australian law has extra-territorial effect, common law rights may apply. For example, an Australian military tribunal operating outside Australia would be expected to observe natural justice.

Identifying laws that limit rights and freedoms

2.51 The first of the tasks of this Inquiry is to identify Commonwealth laws—not state and territory laws—that encroach upon traditional rights, freedoms and privileges.[85] 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',[86] although

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80 At common law, freedom of movement concerns the freedom of citizens to leave and return to their own country. Therefore, migration laws applying to non-citizens are not generally considered to directly engage this particular right. See Ch 7.

81 *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).

82 In *Commonwealth v Yarmirr*, the High Court held that native title rights and interests were capable of being recognised by the common law in respect of the sea and sea-bed beyond the low-water mark: *Commonwealth v Yarmirr* (2001) 208 CLR 1, [34]–[35]. However, there was no suggestion that the common law extended beyond the territorial sea.

83 *Ruddock v Vadarlis* (2001) 110 FCR 491, [97]. Beaumont J stated that the absence of a common law claim was fatal to the case for relief in the form of the common law prerogative writ of *habeas corpus*. See also *CPCF v Minister for Immigration* [2015] HCA 1.

84 *Criminal Code* div 272.

85 See Terms of Reference.

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

perhaps fewer encroach on the most important and fundamental of common law rights.[87] 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, without making a judgment about the justification for them.[88]

2.52 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.[89] These laws are highlighted throughout this Report.

2.53 Having identified laws that affect traditional rights and freedoms, the second task was to ask whether the laws were appropriately justified. The following section discusses justifications for limits on important rights and principles at a general level—and particularly the framing principle of proportionality. More particular justifications are then discussed throughout the Report, in the context of the rights listed in the Terms of Reference.

Justifying limits on rights and freedoms

2.54 Laws that interfere with traditional rights and freedoms are sometimes considered necessary for many reasons—such as public order, national security, public health and safety. The mere fact of interference will rarely be sufficient ground for criticism.

2.55 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 convicted murderers must generally lose their liberty, in part 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.

2.56 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.[90] Limits on traditional rights are also recognised by the common law. In fact, some laws that limit traditional rights may be as traditional as the rights themselves. However, such laws are generally regarded as part of the *scope* of common law rights, rather than as limits or encroachments on those rights.

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87 Although in this same passage, McHugh J also said that 'times change': 'What is fundamental in one age or place may not be regarded as fundamental in another age or place… [C]are needs to be taken in declaring a principle to be fundamental': *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, [28] (McHugh J).

88 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*.

89 The Terms of Reference are also clear that this Inquiry is not to be limited to these areas.

90 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 6, 7, 8 (paras 1 and 2) 11, 15, 16 and 18: art 4.2. See, eg, Williams and Hume, above n 5, [5.3]. See also Attorney-General's Department, *Absolute Rights* <http://www.ag.gov.au>.

2.57 Bills of rights in other jurisdictions and international human rights covenants and related guidelines also feature limitations provisions. For example, limits on rights in the ICCPR are recognised in the text of the ICCPR and are elaborated upon in the 'Siracusa Principles'.[91]

2.58 Nevertheless, much of the value of calling something a right will be lost if the right is too easily qualified or diluted. Many common law rights were developed carefully over long periods of time and have been applied in many cases. In many jurisdictions, these rights 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 a law does encroach on a traditional right, the encroachment should be justified.

2.59 '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.[92]

2.60 The ALRC has been asked to consider whether limits on traditional rights and freedoms are 'appropriately justified'.[93] 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.

2.61 The second level concerns the processes that lead to the making of the law—the *procedural* justification. It is not suggested, however, that procedural justification implies substantive justification. Both of these types of justification are discussed below.

Proportionality

2.62 A common way of determining whether a law that limits rights is justified is by asking whether the law is proportionate. This concept is commonly used by courts to test the validity of laws that limit rights protected by constitutions and statutory bills of

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91 United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984). These principles were formulated at a conference sponsored by non-governmental organisations in Siracusa, Italy, in 1984. The object of the conference was to achieve a consistent interpretation and application of the limitation and restriction clauses of the ICCPR.

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

93 See Terms of Reference.

rights.[94] However, proportionality tests can also be a valuable tool for law makers and others to test the justification of laws that limit other important—even if not strictly constitutional—rights and principles.[95]

2.63 In short, a structured proportionality analysis involves considering whether a given law that limits important rights has a **legitimate objective** and is **suitable** and **necessary** to meet that objective, and whether—on **balance**—the public interest pursued by the law outweighs the harm done to the individual right.

2.64 A 2014 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?
>
> 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?[96]

2.65 Proportionality has been called the 'most important doctrinal tool in constitutional rights law around the world for decades'[97] and 'the orienting idea in contemporary human rights law and scholarship'.[98]

> 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

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94 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.

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

96 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 94, 3.

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

98 Huscroft, Miller and Webber, above n 96, 1.

> proportionality, some argue that the various levels of scrutiny adopted by the US Supreme Court are analogous to the standard questions posed by proportionality.[99]

2.66 Proportionality may now also be said to have been received to some extent into the constitutional doctrine of courts in Australia. For example, in *McCloy v New South Wales*, the High Court applied a structured proportionality test to determine whether a law infringed the constitutional right to political communication.[100] More commonly the courts have considered this question in terms of whether the law is 'reasonably appropriate and adapted to serve a legitimate end', which reflects a form of proportionality analysis.[101]

2.67 The Court in *McCloy* explained how proportionality has been used in various contexts in Australian law:

> The term 'proportionality' in Australian law describes a class of criteria which have been developed by this Court over many years to determine whether legislative or administrative acts are within the constitutional or legislative grant of power under which they purport to be done. Some such criteria have been applied to purposive powers; to constitutional legislative powers authorising the making of laws to serve a specified purpose; to incidental powers, which must serve the purposes of the substantive powers to which they are incidental; and to powers exercised for a purpose authorised by the Constitution or a statute, which may limit or restrict the enjoyment of a constitutional guarantee, immunity or freedom, including the implied freedom of political communication. Analogous criteria have been developed in other jurisdictions, particularly in Europe, and are referred to in these reasons as a source of analytical tools which, according to the nature of the case, may be applied in the Australian context.[102]

2.68 Proportionality is 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

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99 Ibid. The Siracusa Principles, noted above, includes a proportionality test: United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984) [10], [11]. 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).

100 *McCloy v New South Wales* [2015] HCA 34 (7 October 2015).

101 'What upon close scrutiny is disproportionate or arbitrary may not answer to the description reasonably appropriate and adapted for an end consistent or compatible with observance of the relevant constitutional restraint upon legislative power': *Roach v Electoral Commissioner* (2007) 233 CLR 162, [85] (Gummow, Kirby and Crennan JJ). The question of whether a law is reasonably appropriate and adapted to advance a legitimate object 'involves what is referred to in these reasons as "proportionality testing" to determine whether the restriction which the provision imposes on the freedom is justified': *McCloy v New South Wales* [2015] HCA 34 (7 October 2015) [2] (French CJ, Kiefel, Bell and Keane JJ). See also 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.

102 *McCloy v New South Wales* [2015] HCA 34 (7 October 2015) [3] (French CJ, Kiefel, Bell and Keane JJ).

> objective, the limitation may still not be justified because of the severity of its impact on individuals or groups.[103]

2.69 In a public sector guidance sheet about permissible limits on rights, the Attorney-General's Department includes a list of 'useful questions to ask when assessing whether a measure limiting a right is reasonable, necessary and proportionate':

> Will the limitation in fact lead to a reduction of that problem? Does a less restrictive alternative exist, and has it been tried? Is it a blanket limitation or is there sufficient flexibility to treat different cases differently? Has sufficient regard been paid to the rights and interests of those affected? Do safeguards exist against error or abuse? Does the limitation destroy the very essence of the right in issue?[104]

2.70 A classic discussion of the principle of proportionality may be found in the 1986 Canadian Supreme Court case of *R v Oakes*.[105] This case concerned a drug control statute that 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 prescribed by law as can be demonstrably justified in a free and democratic society'.[106]

2.71 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. The first 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.[107]

2.72 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

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103 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guide to Human Rights* (2014) 8.

104 Attorney-General's Department (Cth), *Permissible Limitations*, available at <www.ag.gov.au>.

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

106 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.

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

> 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'.[108]

2.73 In each case, Dickson CJ said, courts will be 'required to balance the interests of society with those of individuals and groups'.[109] There are variations, but the language in *Oakes* is reflected in most proportionality tests.

2.74 Proportionality—'a single flexible standard'—has been contrasted with the law of the First Amendment to the *United States Constitution*, which 'uses a multitude of less flexible, but more precise, rules designed to respond to particular kinds of cases'.[110]

2.75 In *Roach v Electoral Commissioner*, Gleeson CJ expressed reservations about an 'uncritical translation' of proportionality into Australia from jurisdictions with human rights instruments and wider powers of judicial review.[111] In *Momcilovic*, Heydon J suggested that the proportionality test in the Victorian Charter created 'difficult tasks' that should be for legislatures, not judges.[112] Professor John Finnis has said that all the proportionality criteria 'involve matters of fact (including counter-factuals) and evaluative opinion in which legal learning is of little assistance and forensically ascertainable evidence is unavailable':

> [T]here is little or nothing judicial—nothing *law applying*—about assessments of proportionality in relation to rights such as those in the [*European Convention on Human Rights*], when these assessments are made by courts coming fresh to them in the context of general legislative or legislatively approved arrangements for social life.[113]

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108 Ibid.

109 Ibid.

110 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.

111 Human rights instruments '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).

112 '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].

113 John Finnis, 'Judicial Power: Past, Present and Future' (Speech, Gray's Inn Hall, London, 20 October 2015) 21.

2.76 However, some of these concerns may not arise when the proportionality analysis is being applied by law makers, parliamentary committees and others to test the merits of laws, rather than by courts.[114]

2.77 Other criticisms of proportionality apply more broadly.[115] Some have suggested that proportionality tests give insufficient weight to rights, or call for the comparison of incommensurable values. Others have said it 'suggests a far more rigorous algorithm of criteria than is in fact or law available'.[116] Proportionality has even been called an 'assault on human rights'.[117] To balance rights may be to 'miss the distinctive moral status that a rights claim presupposes and affirms'.[118] Far from rights being 'trumps',[119] a balancing approach might suggest that everything is 'up for grabs'.[120]

2.78 Nevertheless, in submissions to this Inquiry, a number of stakeholders said that proportionality was the appropriate concept to apply.[121] 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.[122]

2.79 In its submission to this Inquiry, the Human Rights Law Centre stated that

> 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

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114 The role of parliamentary committees is discussed below and in Ch 3.

115 For criticisms of proportionality reasoning, 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 97; Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012).

116 John Finnis, 'Judicial Power: Past, Present and Future' (Speech, Gray's Inn Hall, London, 20 October 2015) 20.

117 Tsakyrakis, above n 115.

118 Ibid 489.

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

120 Tsakyrakis, above n 115, 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.

121 National Association of Community Legal Centres, *Submission 143*; Australian Human Rights Commission, *Submission 141*; Law Council of Australia, *Submission 140*; Public Interest Advocacy Centre, *Submission 133*; ANU Migration Law Program, *Submission 107*; Law Council of Australia, *Submission 75*; Human Rights Law Centre, *Submission 39*. See also Centre for Comparative Constitutional Studies, *Submission 58*. Although in most submissions, the justification for laws limiting rights was not discussed at this more general level.

122 Law Council of Australia, *Submission 75*.

> balancing competing rights and enables other important public concerns, such as national security and public order, to be duly taken into account.[123]

2.80 The Public Interest Advocacy Centre endorsed the use of the principle and suggested that it could be 'more deeply embedded' in Australian law.[124]

2.81 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 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.

2.82 While the ALRC does not propose that one particular method must always be used to test the justification for laws that limit traditional rights and freedoms, proportionality tests offer a valuable way of structuring the critical analysis. They call for a considerable degree of rigour, and are clearly more thorough than mere unsupported statements that a law is justified because it is in the public interest. Proportionality is also used widely 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

2.83 A law that limits important rights may be said to be justified in another more limited 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 fundamental procedural justification for laws might be, for example, that they are made by a democratically elected parliament in a country with a free press. Another important process is scrutiny by parliamentary committees.

2.84 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-

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123 Human Rights Law Centre, *Submission 39*.
124 It also suggested how might this be done: Public Interest Advocacy Centre, *Submission 133*.

> inspired approach that relies almost exclusively on judicial review for judgments about rights.[125]

2.85 In Chapter 3, the ALRC discusses some procedural protections of traditional rights in more detail, with a particular focus on scrutiny by parliamentary committees. 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 rights. Bills and disallowable legislative instruments presented to Parliament must have a 'statement of compatibility' that assesses the legislation's 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 helps agencies prepare statements of compatibility.[126]

2.86 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.

2.87 The Independent National Security Legislation Monitor reviews Australia's counter-terrorism and national security laws and considers whether such laws are proportionate, necessary and contain safeguards to protect individual rights. 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.[127]

2.88 Because of the close relationship between many traditional common law rights and human rights protected by international covenants and instruments, an important role is also played by the Australian Human Rights Commission. The Commission,

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125 Hiebert, above n 14, 9. See also Janet L Hiebert and James B Kelly, *Parliamentary Bills of Rights* (Cambridge University Press, 2015) 4.

126 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 (Cth), *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 2013* [7], [54].

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

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.[128]

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

2.90 Clearly, there are already many processes for testing the compatibility of proposed laws with important rights and freedoms. Some are relatively new, such as 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 3, 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.

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128 Shearer, above n 65, 55.

3. Scrutiny Mechanisms

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Summary

3.1 Existing and proposed laws are scrutinised for compatibility with rights and principles, including the traditional rights and freedoms identified in the Terms of Reference for this Inquiry, at a number of stages and by a number of different agencies, 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.

3.2 Scrutiny of laws for compatibility with 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]

3.3 Such scrutiny can provide a check on legislative interferences with rights. 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.

3.4 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]

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

3.6 Policy makers are provided with assistance at the policy development and legislative drafting stages. Additionally, there is a long history of subjecting bills to scrutiny by parliamentary committees. Scrutiny may also continue after enactment where bodies such as the Australian Law Reform Commission (ALRC) and the Australian Human Rights Commission (AHRC) review legislation. Others such as the Independent National Security Legislation Monitor (INSLM) are tasked with undertaking reviews for specific areas warranting particular attention.

3.7 This chapter discusses a number of areas for further improvements in the processes that provide checks on legislative encroachments on rights. These include:

- additional guidance and assistance for policy makers during the policy development and legislative drafting stages;

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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. See also, Hunt, above n 1; David Kinley, Finding and Filling the Democratic Deficit in Human Rights in Murray Hunt, Hayley Hooper and Paul Yowell (eds) *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 29; John Uhr, 'The Performance of Australian Legislatures in Protecting Rights' in Adrienne Stone, Jeffrey Goldsworthy and Tom D Campbell (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate Publishing, Ltd., 2013).

3 Hiebert, above n 2, 40.

- the quality of explanatory material and statements of compatibility, including the range of rights covered by each Committee, and the differences in the scrutiny applied;
- the level of overlap between the work of the three parliamentary scrutiny committees;[4]
- the time available for scrutiny committees to conduct their scrutiny; and
- the extent to which the Parliament considers scrutiny committee reports.

3.8 This chapter discusses a variety of approaches to implement such further improvement. In doing so, it draws upon analogous approaches in other jurisdictions, parliamentary inquiries and expert commentators.

Policy development and legislative drafting

3.9 Policy is usually developed by government departments. The Office of Parliamentary Counsel (OPC) drafts legislation on instructions provided by the government department with policy responsibility. Policy development and legislative drafting are not undertaken in a rights vacuum. Guidance on developing rights-compatible legislation is provided in the *Legislation Handbook* and *Legislative Instruments Handbook*,[5] in drafting directions prepared by the OPC,[6] and other guidance documents.[7]

Drafting and policy development

3.10 The *Legislation Handbook* published by the Department of Prime Minister and Cabinet states 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* (ICCPR).[8]

3.11 The drafting directions prepared by the OPC specifically alert policy makers to the types of provisions that have drawn adverse comment from the Senate Standing Committee on the Scrutiny of Bills (Scrutiny of Bills Committee).[9]

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4 The Senate Standing Committee for the Scrutiny of Bills, Parliamentary Joint Committee on Human Rights and Senate Standing Committee on Regulations and Ordinances are required to scrutinise Commonwealth laws for encroachments on rights.

5 Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (1999) [8.19]; Office of Parliamentary Counsel, *Legislative Instruments Handbook* (2014) ch 6.

6 Office of Parliamentary Counsel (Cth), *Drafting Directions*.

7 See, eg, Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011); Office of Parliamentary Counsel (Cth), *OPC's Drafting Services—A Guide for Clients* (2012).

8 Department of the Prime Minister and Cabinet (Cth), above n 5, [6.34].

9 See, eg, *Drafting Direction No 3.5—Offences, Penalties, Self-Incrimination, Secrecy Provisions and Enforcement Powers 2013* pt 7.

3.12 The Attorney-General’s Department has published a number of guidance documents for policy makers about human rights issues.[10] Guidance sheets are available on a range of issues including, fair trial and fair hearing rights, the presumption of innocence, retrospective criminal laws, and freedom of movement.[11] The Attorney-General’s Department also provides guidance on ‘permissible limitations’ on rights included in the ICCPR.[12] This is based on the Siracusa Principles,[13] 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. The guidance sets out useful questions to ask in conducting this analysis.

3.13 The Attorney-General’s Department also provides guidance and performs a scrutiny role in specific subject areas. For example, the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides guidance on a variety of issues relating to criminal offences, including when it is appropriate to: impose strict or absolute liability; reverse the burden of proof; or abrogate the privilege against self-incrimination.[14] It also guides policy makers to relevant areas within the Attorney-General’s Department for other issues, such as when it may be appropriate to abrogate legal professional privilege.[15] The Security and Intelligence Law Branch of the Attorney-General’s Department scrutinises all draft Bills and legislative instruments containing secrecy provisions. It provides an advisory assessment as to whether the provision is appropriately tailored and adequately justified and may also suggest alternative drafting.

Explanatory material

3.14 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 goes back to 1932 and the 1950s respectively.[16]

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10 Attorney-General’s Department, *Tool for Assessing Human Rights Compatibility* <www.ag.gov.au>. This includes guidance sheets on a number of issues, including, for example, fair trial and fair hearing rights, the presumption of innocence, prohibition on retrospective criminal laws, and freedom of movement.

11 Ibid.

12 Attorney-General’s Department, *Permissible Limitations* <http://www.ag.gov.au>.

13 See Ch 2.

14 Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) [2.2.6], [4.3], [9.5].

15 Ibid [9.5.8].

16 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).

3.15 Explanatory material is prepared by the government department with policy responsibility for the Bill or instrument, for approval by the relevant Minister. It contains the policy objectives of the Bill or legislative instrument, and contains a short explanation about each of the clauses. Explanatory material ought, where possible, to address matters relating to the principles considered by the Scrutiny of Bills Committee[17] or Senate Standing Committee on Regulations and Ordinances (Regulations and Ordinances Committee).[18]

3.16 The OPC may also indicate, as part of the drafting process, that particular matters—such as those that have been of interest to the Scrutiny of Bills Committee—should be explained in the explanatory memorandum.[19]

3.17 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.[20] These are prepared by the relevant department for approval by the relevant Minister.

3.18 Following the introduction of this requirement, the Attorney-General's Department developed a tool for assessing human rights compatibility. Templates and example statements of compatibility assist departments in the drafting of statements of compatibility.[21] The Attorney-General's Department provides specific assistance and advice to departments on statements of compatibility where requested and assists policy makers in responding to requests for further information from the Parliamentary Joint Committee on Human Rights (Human Rights Committee).[22]

3.19 Additionally, the 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'.[23]

Consultation on draft Bills

3.20 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'.[24] Cabinet endorsement or Prime Ministerial approval (for Bills that do not include measures endorsed by Cabinet) is required before an exposure draft is released.[25] This is in addition to consultation with other government agencies, which provides an additional opportunity for potential encroachments on rights to be brought to the attention of policy makers.

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17 Department of the Prime Minister and Cabinet (Cth), above n 5, [8.19].
18 Office of Parliamentary Counsel, *Legislative Instruments Handbook* (2014) [177].
19 Office of Parliamentary Counsel (Cth), above n 7, [68].
20 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 8–9.
21 Attorney-General's Department, above n 10.
22 The Human Rights Committee's scrutiny role and processes are discussed below.
23 Parliamentary Joint Committee on Human Rights, *Drafting Statements of Compatibility* (Guidance Note No 1, Parliament of Australia, 2014).
24 Department of the Prime Minister and Cabinet (Cth), above n 5, [4.7(i)].
25 Ibid [7.9].

Parliamentary scrutiny processes

3.21 Parliamentary debate is the ultimate forum for the scrutiny of, and judgments about, encroachments on rights. 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 rights. This process began with the Regulations and Ordinances Committee, established in 1932, to review delegated legislation.[26] The scrutiny function was expanded with the introduction of the Scrutiny of Bills Committee in 1981. Both Committees have a longstanding history of conducting a technical scrutiny function, without specifically assessing the policy merits of a particular provision.[27] In 2011, the Human Rights Committee was established to consider a set of human rights specifically tied to Australia's international human rights obligations.

3.22 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[28] (Legal and Constitutional Affairs Committee) review legislation which may have an impact on rights, including in relation to migration, counter-terrorism and national security legislation.

Senate Standing Committee on Regulations and Ordinances

3.23 The Regulations and Ordinances Committee was established in 1932. It is comprised of six Senators. It is required to review and, if necessary, report on whether disallowable instruments:[29]

- are in accordance with the applicable statute;

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26 The original terms of reference provided for the referral of '[a]ll Regulations and Ordinances" to the committee "for consideration and, if necessary, report there on. In 1979 A disallowable instrument is a legislative instrument subject to disallowance under the *Legislative Instruments Act 2003* (Cth). Under s 42 of the Act, a Senator or MP may, within 15 days of the tabling of a legislative instrument, move a notice of motion to disallow the instrument. If the motion is agreed to, the instrument is disallowed, and ceases to have effect. If the motion is not resolved or withdrawn within 15 days, the instrument is deemed to be disallowed, and ceases to have effect. A similar instrument cannot be made within six months after disallowance, unless the House that disallowed the regulation provides approval.

27 Laura Grenfell, 'An Australian Spectrum of Political Rights Scrutiny: "Continuing to Lead by Example?"' (2015) 26 *Public Law Review* 19, 22; Senate Standing Committee for the Scrutiny of Bills, *Submission 150*.

28 At the commencement of each parliament, eight legislative and general purpose committees are appointed. These are the Community Affairs, Economics, Education and Employment, Environment and Communications, Legal and Constitutional Affairs and Rural and Regional Affairs committees. Each of these committees is comprised of a legislation committee and a references committee. The legislation committee deals with bills, estimates processes and departmental oversight. The references committee conducts inquiries into matters referred to it by the Senate.

29 Under s 44 of the *Legislative Instruments Act 2003* (Cth), a number of legislative instruments are not subject to disallowance (exempt instruments). The Regulations and Ordinances Committee does not scrutinise such instruments. However, the Human Rights Committee is required to examine all legislative instruments (including exempt instruments), as part of its scrutiny function.

- unduly trespass on personal rights and liberties;[30]
- 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;[31] or
- contain matters more appropriate for parliamentary enactment.[32]

3.24 The Committee is supported by a secretariat and a legal adviser.[33] The legal adviser reviews all disallowable instruments against the Committee's scrutiny principles, and provides a report on compliance.[34]

3.25 Legislative instruments must be registered, and then tabled before both Houses of Parliament within 6 days of registration. Copies of the instruments are sent to the legal adviser, who provides the Committee with a report on compliance with the Committee's scrutiny principles.

3.26 Where an instrument raises a concern with respect to the matters being tested, the Regulations and Ordinances Committee usually writes to the relevant rule-maker[35] for further explanation, or to seek an undertaking for specific action to resolve the concern.[36] 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.

3.27 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.[37] The power to seek disallowance is a powerful tool, which acts as a discipline on rule-makers. The Senate has adopted all disallowance motions recommended by the Regulations and Ordinances Committee.[38]

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30 The Regulations and Ordinances Committee appears to have interpreted this statement broadly, allowing the Committee to scrutinise disallowable instruments to determine whether they encroach upon a variety of rights-type issues.

31 Scrutiny under this principle reflects the development of administrative law and its greater emphasis on merits and judicial review of government decisions.

32 Senate, Parliament of Australia, *Standing Order 23* (24 August 1994).

33 The appointment must be approved by the President of the Senate: Ibid cl (9).

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

35 Delegated legislation is made by a wide variety of executive and administrative authorities, including Ministers, Heads of Departments and agencies, and their delegates.

36 Senate Standing Committee on Regulations and Ordinances, *Report on the Work of the Committee in 2012–13* (Report No 118, 2013) [1.13].

37 Ibid [1.14]–[1.15].

38 Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012) 424.

Senate Standing Committee for the Scrutiny of Bills

3.28 The Scrutiny of Bills Committee was established in 1981, with its functions at first carried out by the Legal and Constitutional Affairs Committee.[39] In May 1982, the Scrutiny of Bills Committee was constituted as a separate Committee, and in 1987 as a Standing Committee of the Senate.[40] The scrutiny principles applied by the Committee are drawn from those of the Regulations and Ordinances Committee, and require it to consider whether Bills or Acts:

- trespass unduly on personal rights and liberties;
- 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.[41]

3.29 The Committee is comprised of six Senators, and is supported by a secretariat made up of a secretary, principal research officer and legislative research officer. The Committee is also supported by a legal adviser,[42] 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 Committee publishes, on each Wednesday of a Parliamentary sitting week, an *Alert Digest* containing an outline of each of the Bills introduced in the previous sitting week, along with any comments in relation to a particular Bill.

3.30 If concerns are raised in the *Digest,* the Committee writes to the Minister responsible for the Bill, inviting a response to its concerns, and sometimes suggesting an amendment. The Minister's response may include a revised version of a section of legislation or explanatory memorandum, or may better explain why the Bill has appeared in its current form. If the response does not allay the 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 on rights and freedoms in the Bill.

3.31 The Committee's concerns, the Minister's responses and the Committee's conclusions are published in a Report. Since February 2015, the Committee also

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39 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.

40 Ibid 5–7.

41 Senate, Parliament of Australia, *Standing Order 24* (15 July 2014).

42 Ibid cl (8).

publishes a newsletter highlighting key scrutiny issues. It focuses on 'information that may be useful when Bills are debated'.[43]

Parliamentary Joint Committee on Human Rights

3.32 The Human Rights Committee was established under s 4 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (*Parliamentary Scrutiny Act*). It must examine all Bills and legislative instruments (including exempt instruments) that come before either House of Parliament for compatibility with human rights, and report to both Houses on that issue.[44] The Human Rights Committee is an extension of existing parliamentary rights review mechanisms, and is explicitly focused on international human rights instruments.

3.33 The *Parliamentary Scrutiny Act* defines human rights as those rights and freedoms declared in the ICCPR and the *International Covenant on Economic, Social and Cultural Rights* (ICESR),[45] as well as a number of other international instruments relating to rights in the ICCPR and ICESR.[46]

3.34 The Committee is comprised of 10 members, drawn from the Senate and the House of Representatives,[47] and is supported by a legal adviser and secretariat, which includes two human rights lawyers.[48] If the Committee is not initially satisfied with the human rights compatibility of a Bill, it will write to the relevant Minister seeking further detail. The Committee also has the power to request a briefing, call for written submissions, hold public hearings and call for witnesses.[49]

3.35 On each Tuesday of a Parliamentary sitting week, the 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. The Committee also comments on responses received to comments it has made in earlier reports.

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

44 *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 *Charter of Human Rights and Responsibilities Act 2006* (Vic) and *Human Rights Act 2004* (ACT): Attorney-General's Department *National Human Rights Consultation Report* (2009).

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

46 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); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

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

48 Parliamentary Joint Committee on Human Rights, *Annual Report 2012–13* (2013) [1.15]. The appointment of the legal adviser must be approved by the Presiding Officers.

49 Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 2012, 7177 (Harry Jenkins).

3.36 The Committee seeks to determine 'whether any identified limitation of a human right is justifiable'[50] by reference to a proportionality analysis.[51]

Senate Standing Committee on Legal and Constitutional Affairs

3.37 The Senate Legal and Constitutional Affairs Committee (Legal and Constitutional Affairs Committee) is one of eight legislative and general purpose Standing Committees first established in 1970. Each Committee is allocated a group of departments and agencies to oversee.[52] The Legal and Constitutional Affairs Committee oversees the Attorney-General's Department and Department of Immigration and Border Protection.[53] It scrutinises a number of laws which have a significant impact on rights, such as migration law, and counter-terrorism and national security legislation.

3.38 These Committees are appointed under Senate Standing Order 25 at the commencement of each Parliament,[54] and are comprised of a pair of sub-committees, the Legislation sub-committee, which deals with Bills,[55] estimates processes and oversees departmental performance, and the References sub-committee, which deals with references from the Senate.[56]

3.39 In reviewing Bills, the Legislation and References Committee is required to take into account comments made by the Scrutiny of Bills Committee.[57] Consideration of the Bill on the floor of the Parliament is suspended while a legislative or general purpose Committee is scrutinising a Bill.[58] As a result, the Constitutional and Legal Affairs Committee must consider encroachments on rights 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.

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50 See, eg, Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report—Nineteenth Report of the 44th Parliament* (2015), v.

51 In considering whether a limitation on a right may be proportionate, the key factors the Human Rights Committee considers are whether there are less restrictive ways to achieve the policy objective, whether there are effective safeguards and controls over the measure, and the extent of the interference with a right: Parliamentary Joint Committee on Human Rights, 'Drafting Statements of Compatibility' (Guidance Note No 1, Parliament of Australia, 2014) pp 2–3. See ch 2 for a further discussion on proportionality tests.

52 Harry Evans and Rosemary Laing, above n 38, ch 16.

53 Ibid.

54 Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012), ch 16.

55 The Senate Standing Committee on the Selection of Bills selects the bills that will be considered by a legal and general purpose committee. It is comprised of the whips of the Government, Opposition and minor parties, and two government members, and two opposition members.

56 Senate, Parliament of Australia, *Standing Order 25* (15 July 2014) cl 2.

57 Ibid cl 2B.

58 Senate, Parliament of Australia, *Standing Order 115* (14 August 2006).

3.40 Each of the legislative and general purpose committees (including the Legal and Constitutional Affairs Committee) has six Senators.[59] The Committees have the power to appoint persons with specialist knowledge.[60]

Parliamentary Joint Committee on Intelligence and Security

3.41 The Parliamentary Joint Committee on Intelligence and Security (Intelligence Committee) was established in 2001, under s 28 of the *Intelligence Services Act 2001* (Cth) (*Intelligence Services Act*). It has eleven members.[61] Five members are drawn from the Senate and six from the House of Representatives.[62]

3.42 The Intelligence Committee is required to review any matter relating to Australia's intelligence and security agencies that is referred to it by the Attorney-General or a resolution of either House of Parliament.[63] This includes reviewing Bills relating to national security that come before the Parliament. The Committee may also request the Attorney-General to refer a matter to it.[64] 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).

3.43 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 March 2018: [65]

- *Australian Security Intelligence Organisation Act 1979* (Cth): pt III div 3;
- *Crimes Act 1914* (Cth): pt 1AA div 3A;
- *Criminal Code*: divs 104 and 105;[66] and
- *Criminal Code*: ss 119.2 and 119.3.

3.44 The Intelligence Committee is required to review pt 5-1A of the *Telecommunications (Interception and Access) Act 1979* (Cth) (*Interception and Access Act*) by 13 April 2020. Additionally, where a Bill seeks to amend provisions in the *Interception and Access Act* that would expand the scope of data retention powers, that Bill must be referred to the Intelligence Committee for review.[67]

59 Senate, Parliament of Australia, *Standing Order 25* (15 July 2014) cl 5.
60 Ibid cl 17. The appointment must be approved by the President of the Senate.
61 *Intelligence Services Act 2001* (Cth) s 28(3).
62 Ibid s 28(2).
63 Ibid s 28(1)(b).
64 Ibid s 28(2).
65 Ibid s 29(1)(bb).
66 *Criminal Code Act 1995* (Cth) sch 1 *(Criminal Code)*.
67 See, eg, *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth) s 187AA(4).

3.45 The Intelligence Committee is also required to monitor and review the performance of the Australian Federal Police's functions under pt 5.3 of the *Criminal Code*.[68]

3.46 While the *Intelligence Services Act* does not expressly require that the Intelligence Committee consider rights as part of its review of Bills, in practice the Committee considers whether the Bill provides adequate safeguards and accountability mechanisms.[69] These are matters that are relevant to whether encroachments on rights are justified.[70] The Intelligence Committee has the power to conduct private hearings,[71] which may allow it to conduct a more thorough evidence-based review of justifications for encroachments on rights based on national security concerns, as it can hear and take into account sensitive matters of national security that cannot be made public.

Parliamentary Joint Committee on Law Enforcement

3.47 The Parliamentary Joint Committee on Law Enforcement (Law Enforcement Committee) was established in December 2013, and is comprised of ten members.[72] Five members are drawn from the House of Representatives and five from the Senate.[73]

3.48 The Law Enforcement Committee is concerned mostly with the activities of the Australian Crime Commission (ACC) and the Australian Federal Police (AFP). 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.[74] It is also required to oversee the operation of pt 2–6 and s 20A of the *Proceeds of Crime Act 2002* (Cth).[75]

3.49 The Law Enforcement Committee is not expressly required to consider rights as part of its review. However, its oversight functions are designed to monitor the implementation and operation of legislative frameworks which may encroach upon rights.[76]

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68 *Intelligence Services Act 2001* (Cth) s 29(1)(baa).

69 See, eg, Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the National Security Legislation Amendment Bill (No 1) 2014* (September 2014) 2; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (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.

70 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'.

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

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

73 Ibid s 5(2).

74 Ibid s 7(1)(g).

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

76 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 2013–2014* (June 2015) [1.3].

Other review mechanisms

Australian Human Rights Commission

3.50 The AHRC, as part of its role under the *Australian Human Rights Commission Act 1986* (Cth), has the power to review laws to determine whether they are compatible with Australia's human rights obligations. Such a review may be conducted under a reference from the Attorney-General, or because it appears to the AHRC desirable to do so.[77] It is required to report to the Attorney-General on its review,[78] and to include any recommendations for amendments of an enactment to ensure it is not inconsistent with, or contrary to, any human right.[79] The Attorney-General is required to table a copy of any such report within 15 sitting days of receipt of the report.[80]

Independent National Security Legislation Monitor

3.51 The INSLM must review, on his or her own initiative, or arising from a reference from the Prime Minister or the Intelligence Committee, 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.[81] As part of its review, the INSLM must consider whether these laws contain appropriate safeguards to protect the rights of the individual, and are proportionate and necessary.[82] The INSLM is required to give the Prime Minister an annual report relating to the above functions.[83] The Prime Minister must table the annual report before Parliament within 15 sitting days.[84]

3.52 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

3.53 The ALRC conducts reviews into matters referred to it by the Attorney-General.[85] In conducting a review, the ALRC must aim to ensure that the laws, proposals and recommendations it reviews, considers or makes 'do not trespass unduly on personal rights and liberties'.[86] It is required to report on its review to the Attorney-General,[87] who must table the report within 15 sitting days.[88]

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77 *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(e).
78 Ibid.
79 Ibid s 29(1).
80 Ibid s 46.
81 *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1).
82 Ibid s 6(1)(b).
83 Ibid s 29(1).
84 Ibid s 29(5).
85 *Australian Law Reform Commission Act 1996* (Cth) s 21.
86 Ibid s 24(1)(a).
87 Ibid s 21(2).
88 Ibid s 23.

Efficacy of guidance materials and pre-legislative processes

3.54 This section considers how guidance materials for policy makers may be further improved and supplemented.

3.55 As set out above, there is a lot of guidance available to policy makers as they develop policy and prepare drafting instructions for OPC. The Attorney-General's Department has indicated, as at 1 November 2015, that it is in the process of updating it.

3.56 However, these materials may not be easily discoverable for policy makers as they begin the policy-making process. The guidance material is prepared by a number of government departments and agencies, and sometimes, by the relevant parliamentary scrutiny committee. It is sometimes organised by subject matter, and sometimes by reference to human rights.

3.57 The *Legislation Handbook*, which provides an overview of legislative processes, was last updated in 2000, before the establishment of the Human Rights Committee in 2011.[89] The *Legislation Handbook* would benefit from being updated, with specific reference to the approach to rights encroachments, the justifications for such encroachments, and the role of the various parliamentary scrutiny committees. It should also contain an up to date list of the additional guidance material available to assist in the legislative drafting process.[90]

3.58 One example of useful additional guidance relates to sunset clauses and review mechanisms. While some rights-encroaching legislation include time limits or 'sunset clauses',[91] and review or reporting mechanisms,[92] there is no general guidance about when sunset clauses or review mechanisms may be an appropriate safeguard for legislation identified as likely to be inconsistent with rights. Such guidance could be included in the *Legislation Handbook*, and might be an issue dealt with in guidance material published by the Attorney-General's Department.

3.59 The OPC has indicated that its role is to assist policy makers to translate their policy goals into a Bill. It seeks 'to assist instructors to develop and refine the policy so that the legislation is effective, clear and introduced within required timeframes'.[93] The OPC could provide further advice to departments about how avoid or minimise legislative encroachments on rights by, for instance, setting out whether less

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89 The Legislation Handbook discusses the role of the Scrutiny of Bills Committee and provides guidance on information that ought to be included in explanatory memoranda. Department of the Prime Minister and Cabinet (Cth), above n 5, [8.19], [14.53].

90 A recent report on reducing red tape recommended that the Legislation Handbook be amended. It also recommended that the information required to support the legislation process be streamlined, including by way of an electronic system: Barbara Belcher, *Independent Review of Whole of Government Internal Regulation* (2015) vol 1, [15.1]–[15.2]. The changes recommended here could be incorporated into any decision by the Government to adopt the recommendations made in that report.

91 See, eg, *Criminal Code* ss 119.2, 105.53.

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

93 Office of Parliamentary Counsel (Cth), above n 7, [64].

encroaching drafting options are available, and the relative merits of such options. The OPC currently takes this approach where policy makers know their desired outcome, but do not have detailed views on how to implement them.[94] Alternatively, the OPC may wish to follow the approach it takes where questions of constitutional validity arise. While the OPC does not refuse to draft 'constitutionally suspect provisions',[95] it will:

- draw attention to the constitutional doubts;
- ensure legal advice is obtained from the Australian Government Solicitor, Solicitor-General or Attorney-General; and
- where appropriate, advise on alternative approaches.[96]

3.60 Under such a model, the OPC might, for instance, draw attention to potential encroachments, direct the policymaker to relevant advisers (for example, the relevant sections of the Attorney-General's Department), and where appropriate, advise on alternative approaches. If the policymaker decides to continue with the rights encroaching approach, the OPC would follow such instructions.

Efficacy of scrutiny and review mechanisms

Overlapping parliamentary scrutiny

3.61 Since the establishment of the Human Rights Committee, the overwhelming majority of Bills which have an impact on the traditional rights, freedoms and privileges listed in the Terms of Reference have been subject to at least two separate streams of parliamentary committee review. This section considers the level of overlap, and whether streamlining the functions of the committees may be useful.

3.62 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 as to why a law that limits rights is justified.[97]

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94 Ibid [58]–[60].

95 Ibid [27]–[28]. As set out above, it is not the role of the OPC to determine constitutional validity, and the drafting of provisions by OPC is not an assertion that the provision is constitutionally valid. It is the role of the Commonwealth's primary advisers to ensure that the government does not propose legislation which it considers may be constitutionally invalid.

96 Ibid [28].

97 Compare 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.

3.63 However, where there are stronger concerns about the impact of a proposed law on human rights, it seems that only the Human Rights Committee regularly seeks evidence to justify an encroachment, and focuses on the measure as a whole.[98] A similar approach appears to be reflected in considering legislative instruments.[99]

3.64 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.[100] However, the Committee also noted that there were significant areas of difference. The Scrutiny of Bills Committee does not conduct its scrutiny function by reference to international law, and potentially does not cover many of the economic, social and cultural rights considered by the Human Rights Committee. Similarly, the Human Rights Committee does not usually address matters like administrative law principles that are covered by the Scrutiny of Bills Committee. This can result in the two Committees focusing on very different issues. Additionally, even where the two Committees consider the same right, the scope of the right discussed may vary. For example, in looking at provisions which have retrospective effect, the Human Rights Committee focuses only on retrospective criminal offences. By contrast, the Scrutiny of Bills Committee considers retrospective civil provisions, as well as other matters such as 'legislation by press release' in taxation matters.[101]

3.65 It may be useful to consider reviewing the scope of the work of the Committees, and the relationship between them. For instance, the Human Rights Committee might focus its attention only on the most significant limitations on a set of identified rights and liberties, while the Scrutiny of Bills Committee and Regulations and Ordinances Committees might continue to undertake a technical review of all Bills and disallowable instruments. Any consideration of the scope of the Committees and their relationship should take into account the range of rights considered by each Committee, and the application of each Committee's scrutiny principles.

3.66 The United Kingdom's experience provides an instructive precedent. The Joint Committee on Human Rights (UK Human Rights Committee) was established in 2001.[102] The UK Human Rights Committee has, since its inception, focused only on Bills which appear to raise 'significant questions of human rights'.[103] The legal adviser to the UK Human Rights Committee reviews all Bills at an early stage, and brings

98 Compare 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.

99 Compare Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 10th Report of 2013* (June 2013) [3.11], [3.19]; Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor No 6 of 2013* (June 2013) 2013 403–4.

100 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].

101 Senate Standing Committee for the Scrutiny of Bills, *Submission 150*.

102 Joint Committee on Human Rights, UK Parliament, *The Work of the Committee in the 2001–2005 Parliament—19th Report of Session 2004–05* (2005) [1].

103 Ibid [46].

those Bills which raise significant concerns to the Committee's attention.[104] 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.[105]

3.67 Since 2006, the UK Human Rights Committee has begun an additional sifting process, to further target its scrutiny. 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 broad public or media attention;
- 'reputable' stakeholders such as non-governmental organisations have commented on the Bill;
- the Explanatory Notes are incomplete; 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.[106]

3.68 Similar criteria adapted for Australia could, for example, be used by the Human Rights Committee. However, any such approach would need to be carefully adapted, given the comparative sizes of the two Parliaments, and the respective workloads of Parliamentarians.

Statements of compatibility and explanatory memoranda

3.69 Since January 2013, the Human Rights Committee has identified over 80 statements of compatibility that did not meet its expectations.[107] 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.[108]

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104 Joint Committee on Human Rights, UK Parliament, *The Work of the Committee in the 2001–2005 Parliament—19th Report of Session 2004–05* (2005) [47].

105 Ibid.

106 Joint Committee on Human Rights, UK Parliament, *The Committee's Future Working Practices—23rd Report of Session 2005–06* (July 2006) [29].

107 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.

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

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

> [t]he provision of proper Explanatory Memoranda is absolutely essential to the effective functioning of the [scrutiny process].[109]

3.71 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.[110]

3.72 In 2004, the Scrutiny of Bills Committee specifically considered the quality of explanatory memoranda. It recommended that an 'appropriately qualified person' check that the explanatory memorandum complies with requirements set out in a new Legislation Handbook, which would consolidate material contained in the existing *Legislation Handbook*, Legislation Circular and the OPC's *Drafting Directions*.[111]

3.73 The Human Rights Committee has also emphasised the need to include, in statements of compatibility, a detailed and evidence-based assessment of proposed provisions that interfere with rights.[112]

3.74 Statements of compatibility are also required in New Zealand, the UK, ACT and Victoria. In the ACT and New Zealand, the Attorney-General prepares the statement of compatibility. In Victoria and the United Kingdom, as in the Commonwealth, it is the Minister or the sponsor of the Bill who prepares the statement of compatibility.

3.75 The Law Council of Australia (Law Council) submitted that a more centralised approach to preparing statements of compatibility—for example, by an independent statutory body such as the AHRC—should be considered.[113]

3.76 At the Commonwealth level, the *Parliamentary Scrutiny Act* was designed to 'deliver improved policies and laws in the future by encouraging early and ongoing consideration of human rights issues in the policy and law-making process'.[114] Centralising the preparation of statements of compatibility, however, may reduce the extent to which a culture of human rights permeates among policy makers as a whole.

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109 Joint Committee on Human Rights, UK Parliament, *The Committee's Future Working Practices—23rd Report of Session 2005–06* (July 2006) [41].

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

111 Senate Standing Committee for the Scrutiny of Bills, *The Quality of Explanatory Memoranda Accompanying Bills—Third Report of 2004* (2004), 31.

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

113 Law Council of Australia, *Submission 140*. This was supported in Civil Liberties Australia, *Submission 94*.

114 Commonwealth, *Parliamentary Debates* House of Representatives Human Rights (Parliamentary Scrutiny) Bill 2010, Second Reading Speech, 30 September 2010, (Robert McClelland) 271.

3.77 Training for policy makers and parliamentarians on human rights and proportionality analyses may be useful. The Law Council submitted that the Attorney-General's Department should be provided with additional resources to conduct such training.[115] Other bodies such as the AHRC may also be well placed to conduct such training. The Human Rights Law Centre supported this approach.[116]

3.78 Additionally, it may be useful to consider stipulating in (primary or delegated) legislation, what must be included in statements of compatibility.[117] One approach may be to incorporate the Committee's expectations into pt 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).[118] 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 rights to allow the parliamentary scrutiny Committees to complete their review.

Time constraints and parliamentary consideration of Committee reports

3.79 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'.[119] Bills may pass into legislation with little or no consideration of the committees' reports.[120] Bills may even be 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. The Scrutiny of Bills Committee has indicated that the 'main difficulty the Committee encounters is

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115 Law Council of Australia, *Submission 140*.

116 Human Rights Law Centre, *Submission 148*.

117 There is some question about what is necessary for the Human Rights Committee to conduct its scrutiny role. For example, the Attorney-General, in responding to additional information and justification sought by the Human Rights Committee, wrote that while a detailed analysis 'is the Committee's preference based on its interpretation of [the relevant guidance materials], I do not agree with its apparent suggestion that there is a formal requirement that Statements must include "a separate and detailed analysis of each measure which may limit human rights". More particularly, I do not agree with the Committee's contention that such an itemised account is necessary in order for it to discharge or document in its reports any demonstrable attempt to discharge, its statutory mandate to undertake an analysis of the human rights compatibility of Bills introduced to the Parliament (especially those Bills which may limit human rights)': Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 16th Report of the 44th Parliament* (November 2014) 38.

118 Such a legislative codification of the Committee's expectations is likely to have persuasive effect. However, the lack of consequences for a failure to lodge a statement of compatibility, or lodging an inadequate statement of compatibility would remain a structural issue: Shawn Rajanayagam, 'Does Parliament Do Enough: Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act' (2015) 38 *UNSWLJ* 1046, 1073.

119 Carolyn Evans and 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.

120 See, eg, Senate Standing Committee for the Scrutiny of Bills, above n 39, 33, 96–7; Evans and Evans, above n 119, 342.

when legislation is introduced and passed before the Committee can complete its scrutiny process'.[121]

3.80 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 to 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.[122]

3.81 A number of parliamentarians[123] and commentators[124] support the imposition of minimum timeframes for scrutiny Committees to consider Bills.

3.82 As discussed above, where the Senate Standing Committee for Selection of Bills (Selection of Bills Committee) refers a Bill to a legislative or general purpose Committee for review, that Committee must take into account any comments made by the Scrutiny of Bills Committee. While the legislative or general purpose Committee is reviewing the Bill, debate in relation to the Bill is suspended. However, the Selection of Bills Committee has not published any guidance on its criteria for determining which Bills should be referred. One approach to ensure that sufficient time is provided may be to amend the Standing Orders to require all Bills which attract adverse comment by the parliamentary scrutiny Committees (Scrutiny of Bills Committee and Human Rights Committee) to be referred for review by a legislation or general purpose Committee.

3.83 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'.[125] A review of Bills before the Commonwealth

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121 Senate Standing Committee for the Scrutiny of Bills, *Submission 150*.

122 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) [4.26].

123 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': Evans and Evans, above n 119, 343.

124 See, eg, Law Council of Australia, Submission No 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 No 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 No 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 No 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 No 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.

125 G Williams, *Submission 76*.

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.[126]

3.84 In the UK, 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.[127] In a further seven instances, the Government issued guidance based on the UK Human Rights Committee's reports.[128]

3.85 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.[129]

3.86 However, 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'.[130] 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.

3.87 Since 2005, the UK Human Rights Committee has 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.[131] This has contributed to a dramatic increase in parliamentary consideration of its reports, increasing from 23 substantive references in the 2001–2005 Parliament to 1,006 substantive references in the 2005–2010 Parliament.[132]

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126 Carolyn Evans and Simon Evans, 'Australian Parliaments and the Protection of Human Rights' in *National Parliament, National Symbols: Lectures in the Senate Occasional Lecture Series 2006–2007* (Department of the Senate, 2007) figure 1.

127 Murray Hunt, Hayley Hooper and Paul Yowell, 'Parliaments and Human Rights: Redressing the Democratic Deficit' (Arts & Humanities Research Council Public Policy Series No 5, Arts & Humanities Research Council, 2012) 43–4.

128 Ibid 44.

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

130 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.

131 Murray Hunt, Hayley Hooper and Paul Yowell, above n 127, 22.

132 Ibid 41.

3.88 A more radical suggestion to facilitate greater parliamentary consideration of Committee reports is, in effect, to incorporate the scrutiny process into a Bill's passage through Parliament, with scrutiny Committees empowered to amend the text of a Bill. These amendments would be subject to rejection in a vote before the Parliament.[133] However, this has the potential to result in more politically partisan scrutiny Committees, subject to greater executive control.[134]

3.89 Alternatively, consideration might be given to providing 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'.[135] A number of stakeholders supported this approach.[136] For example, the Public Interest Advocacy Centre (PIAC) submitted that, outside of a 'clearly defined emergency', a Bill should not be passed unless the relevant parliamentary scrutiny Committee has considered the Bill, the relevant Minister has responded to questions raised, and the parliament has had the opportunity to read and debate the recommendations made in any report of such Committees.[137]

3.90 It may be constructive to consider reviewing the operations of the Committees and Senate procedures 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. While political interests may, in some circumstances, result in a Bill being passed without adequate time for review, or consideration by the Parliament, such procedures may assist in creating a rights-minded culture, and facilitate more informed decision-making by the legislature.

3.91 A number of submissions to the Scrutiny of Bills Committee's Inquiry into its future role and direction also noted that the Scrutiny of Bills Committee should have access to adequate resources to complete its scrutiny task.[138] The Law Council submitted to this Inquiry that the Human Rights Committee should be better resourced.[139] The need for specialist assistance for the Intelligence Committee was also

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133 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.

134 Ibid.

135 Senate Standing Committee for the Scrutiny of Bills, above n 39, 97.

136 Human Rights Law Centre, *Submission 148*; Public Interest Advocacy Centre, *Submission 133*.

137 Public Interest Advocacy Centre, *Submission 133*.

138 Australian Law Reform Commission, Submission No 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 No 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 No 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 No 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 No 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 No 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; Michael Tate, Submission No 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.

139 Law Council of Australia, *Submission 140*.

raised in consultations during this Inquiry. In particular, it was suggested that the Intelligence Committee may benefit from specialist intelligence assistance provided by seconding members of the intelligence community to work with the Committee.

Review bodies

3.92 Some stakeholders raised questions about the capacity of the INSLM to conduct comprehensive and transparent reviews of counter-terrorism and national security laws. PIAC, for example, expressed concern about scrutiny being 'left to a body that only recently was entirely defunded by the Government, the position only being restored when the Government sought to pass a number of controversial counter-terror laws'.[140] The National Association of Community Legal Centres stated that ongoing support and funding for the INSLM is required.[141]

3.93 The INSLM noted, in its 2014 Annual report, that there has been no Government response to any of the INSLM's recommendations.[142] Since this statement, while the INSLM has commenced a number of inquiries, these are still ongoing. The Law Council submitted that this highlighted a need for the *Independent National Security Legislation Monitor Act 2010* (Cth) to be strengthened, for example, by requiring the Government to respond to the INSLM's recommendations within certain timeframes.[143]

3.94 The Law Council also noted reductions in the budget for the Australian Human Rights Commission, and the lack of government response to a number of its reports and publications. It submitted that the government should be required to table a response to any report on complaints within six months of receiving the report.[144]

Conclusion

3.95 The mechanisms and processes for the scrutiny of laws for compatibility with rights and freedoms could be further improved by, for example:

- providing additional guidance and assistance for policy makers during the policy development and legislative drafting;
- improving the quality of explanatory material and statements of compatibility;

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140 Public Interest Advocacy Centre, *Submission 133*. PIAC supported 'a stand-alone reference to the ALRC to investigate the impact of counter-terrorism laws on human rights and the broader implications for the community'. These concerns were echoed in Monash University Castan Centre for Human Rights, *Submission 99*.

141 National Association of Community Legal Centres, *Submission 143*.

142 See Independent National Security Legislation Monitor, Australian Government, *Annual Report* (2014) 2. The INSLM has not concluded any further inquiries since the statement in the 2014 Annual report.

143 Law Council of Australia, *Submission 140*.

144 Ibid. The National Association of Community Legal Centres supports this approach, and suggests extending the requirement to respond to ALRC reports: National Association of Community Legal Centres, *Submission 143*.

- considering the level of overlap between the work of the three scrutiny Committees, including the range of rights covered by each Committee, and the differences in the scrutiny applied;
- increasing the time available for scrutiny committees to conduct its scrutiny; and
- improving the extent to which the Parliament considers scrutiny committee reports.

4. Freedom of Speech

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Summary

4.1 Freedom of speech has been described as 'the freedom *par excellence*; for without it, no other freedom could survive'.[1] Freedom of speech is 'closely linked to other fundamental freedoms which reflect … what it is to be human: freedoms of religion, thought, and conscience'.[2]

4.2 This chapter discusses the source and rationale of the common law right of freedom of speech; 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.

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1 Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 113.
2 Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 13.

4.3 Free speech and free expression are understood to be integral aspects of a person's right of self-development and fulfilment. The 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.[3]

4.4 At the same time, it is widely recognised that freedom of speech is not absolute. In Australia, legislation prohibits, or renders unlawful, speech or expression in many different contexts. Some limitations on speech have long been recognised by the common law itself, such as obscenity and sedition, defamation, blasphemy, incitement, and passing off.

4.5 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. 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 the context of workplace relations, anti-discrimination law—including the general protections provisions of the *Fair Work Act 2009* (Cth)—prohibit certain forms of speech and expression.

4.6 Some areas identified as being of concern are:

- various counter-terrorism offences provided under sch 1 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*) and, in particular, the offence of advocating terrorism;
- various terrorism-related secrecy offences in the *Criminal Code*, *Crimes Act 1914* (Cth) and *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*) and, in particular, those relating to 'special intelligence operations';
- Commonwealth secrecy offences generally, including the general secrecy offences in ss 70 and 79 of the *Crimes Act*; and
- anti-discrimination law and, in particular, s 18C of the *Racial Discrimination Act 1975* (Cth) (*RDA*).

4.7 Counter-terrorism and national security laws, including those mentioned above, should be subject to further review to ensure that the laws do not interfere unjustifiably with freedom of speech, or other rights and freedoms. Further review on this basis could be conducted by the Independent National Security Legislation Monitor

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

(INSLM) and the Parliamentary Joint Committee on Intelligence and Security (Intelligence Committee).

4.8 The ALRC has not established whether s 18C of the *RDA* has, in practice, caused unjustifiable interferences with freedom of speech. However, it appears that pt IIA of the *RDA*, of which s 18C forms a part, would benefit from more thorough review in relation to freedom of speech.

4.9 In particular, there are arguments that s 18C lacks sufficient precision and clarity, and unjustifiably interferes with freedom of speech by extending to speech that is reasonably likely to 'offend'. In some respects, the provision is broader than is required under international law to prohibit the advocacy of racial hatred, broader than similar laws in other jurisdictions, and may be susceptible to constitutional challenge.

4.10 However, any such review should take place in conjunction with a more general review of anti-vilification laws. This could consider not only existing encroachments on freedom of speech, but also whether existing Commonwealth laws serve their purposes, including in discouraging the urging of violence towards targeted groups distinguished by race, religion, nationality, national or ethnic origin or political opinion. Greater harmonisation between Commonwealth, state and territory laws in this area may also be desirable.

4.11 There is also reason to review the range of legislative provisions that protect the processes of tribunals, commissions of inquiry and regulators. Some of these laws may unjustifiably interfere with freedom of speech—and may be unconstitutional—in prohibiting criticism of public officers engaged in performing public functions.

4.12 Finally, the Australian Government should give further consideration to the recommendations of the ALRC in its 2009 report on secrecy laws,[4] and to whether Commonwealth secrecy laws—including the *Australian Border Force Act 2015* (Cth)—provide for proportionate limitations on freedom of speech.

The common law

4.13 Freedom of speech has been characterised as one of the 'fundamental values protected by the common law'.[5] 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'.[6]

4.14 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

4 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).

5 *Nationwide News v Wills* (1992) 177 CLR 1, 31.

6 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, [145] (Heydon J). See Ch 2.

> 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'.[7]

4.15 In relation to defamation, the common law defence of qualified privilege has been extended on the basis of the constitutionally protected freedom of communication, discussed below. In *Lange v Australian Broadcasting Corporation* (*Lange*), the High Court determined that, as the development of the common law in Australia cannot run counter to constitutional imperatives, the common law rules of qualified privilege should properly reflect the requirements of ss 7, 24, 64, 128 and related sections of the *Australian Constitution*.[8]

4.16 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.[9] Australian common law has long recognised limits to free speech, for example, in relation to the criminal law of incitement and conspiracy, and in obscenity and sedition law.

Protections from statutory encroachment

Australian Constitution

4.17 In Australian law, particular protection is given to political speech, recognising 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.[10]

4.18 Beginning with a series of cases in 1992,[11] the High Court has recognised that freedom of political communication is implied in the *Constitution*. This freedom 'enables the people to exercise a free and informed choice as electors'.[12] The *Constitution* has not been found to protect free speech more broadly.

4.19 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.[13]

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

8 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566, 571.

9 *Brandenburg v Ohio* 395 US 444 (1969).

10 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 139 (Mason CJ). See also *Nationwide News v Wills* (1992) 177 CLR 1, 74 (Brennan J).

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

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

13 *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' (University of Melbourne Legal Studies Research Paper 476) 12.

> 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?[14]

4.20 The freedom is not absolute. For one thing, it only protects some types of speech—political communication.[15] In *Lange*, 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*'.[16]

4.21 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.[17] French CJ has advocated a broader understanding of the meaning of 'political communications' to include 'matters potentially within the purview of government'.[18] This interpretation has not so far commanded support from a majority of the High Court.[19]

4.22 The limited scope of the communications covered by the implied freedom is illustrated by the decision of the High Court in *APLA Ltd v Legal Services Commissioner (NSW)*.[20] This concerned prohibitions, in New South Wales legislation, on advertising by barristers and solicitors. The High Court held that the prohibitions did not burden the implied freedom of political communication, because the advertising was not communication about government on political matters.[21]

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14 *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.

15 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.

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

17 See George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 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].

18 *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 (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, [67]. The case left open the possibility that religious preaching may constitute 'political communication'.

19 See Williams and Hume, above n 17, 185.

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

21 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: Ibid [343]. 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 jurisdiction', which 'cannot stand with the text, structure and implications of the Constitution': Ibid [272].

4.23 In *Lange*, the High Court formulated a two-step test to determine whether an impugned law infringes the implied freedom. In *Attorney-General (SA) v Corporation of the City of Adelaide*, the *Lange* test (as modified in *Coleman v Power*)[22] was described as involving 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?[23]

4.24 In *McCloy v New South Wales*, the High Court expressly adopted a proportionality test to be applied, where the purpose of a law and the means adopted to achieve that purpose are legitimate:

> The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test—these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:
>
> *suitable*—as having a rational connection to the purpose of the provision;
>
> *necessary*—in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;
>
> *adequate in its balance*—a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.[24]

4.25 Commonwealth and state legislative limits on freedom of speech have been subject to constitutional challenge under the implied freedom of political communication doctrine. These have included criminal laws,[25] restrictions on public canvassing,[26] and electoral funding laws.[27]

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

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

24 *McCloy v New South Wales* [2015] HCA 34 (7 October 2015) [3] (French CJ, Kiefel, Bell and Keane JJ) footnote omitted.

25 *Criminal Code* s 471.12; *Monis v The Queen* (2013) 249 CLR 92. Also vagrancy laws: *Coleman v Power* (2004) 220 CLR 1.

26 *Local Government Act 1999* (SA), By-law No 4—Roads [2.3], [2.8]; *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1. The High Court upheld the validity of a by-law that restricted preaching, canvassing, haranguing and handing out printed matter.

27 *Election Funding, Expenditure and Disclosures Act 1981* (NSW) pt 6 div 4A; *McCloy v New South Wales* [2015] HCA 34 (7 October 2015). The High Court upheld the validity of an Act that imposed a cap on political donations, prohibited property developers from making such donations, and restricted indirect campaign contributions.

4.26 The constitutionality of provisions of the *Criminal Code*, 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] 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 burdened freedom of communication about government or political matters. As a result, the decision of the New South Wales Court of Criminal Appeal—that the provision was valid—was affirmed.

4.27 The three judges who held that the provision was invalid did so on the basis that preventing offence through a postal or similar service was not a 'legitimate end', as referred to in the *Lange* test.[30] 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.[31] Read this way, the law went no further than was reasonably necessary to achieve its protective purpose.[32]

4.28 Another constitutional aspect of freedom of speech concerns parliamentary privilege, which protects the freedom of speech of parliamentarians and witnesses before Parliament and its committees. Section 49 of the *Constitution* provides that the 'powers, privileges, and immunities' of Parliament 'shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth'.

4.29 The effect of this provision is to incorporate into the constitutional law of Australia a branch of the common and statutory law of the United Kingdom as it existed in 1901, and to empower the Commonwealth Parliament to change that law in Australia by statute.[33]

Principle of legality

4.30 The principle of legality provides some further protection to freedom of speech. 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.[34]

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28 *Criminal Code* s 471.12.

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

30 Ibid [73]–[74] (French CJ), [97] (Hayne J), [236] (Heydon J).

31 Ibid [327]–[339] (Crennan, Kiefel and Bell JJ).

32 Ibid [348].

33 Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012) 39.

34 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, [42]–[46]; *Evans v 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.

4.31 For example, in *Attorney-General (SA) 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.[35]

4.32 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.[36]

International law

4.33 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'.[37]

4.34 The United Nations 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.[38]

4.35 The freedom of political communication doctrine in Australia applies to a narrower range of speech, as compared to protections in other countries (including the US, 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'.[39] From one perspective, common law

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35 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, [44] (French CJ).

36 *Monis v The Queen* (2013) 249 CLR 92, [331].

37 *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).

38 United Nations Human Rights Committee, *General Comment 34 on Article 19 of the ICCPR on Freedoms of Opinion and Expression*, UN Doc CCPR/C/GC/34 (12 September 2011) [11].

39 George Williams, 'Protecting Freedom of Speech in Australia' (2014) 39 *Alternative Law Journal* 217, 218.

'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'.[40]

4.36 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

4.37 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 US,[43] UK,[44] Canada[45] and New Zealand.[46] 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.[47]

4.38 This legislative right may not necessarily be different from the freedom recognised at common law: in the *Spycatcher* case, several members of the House of Lords expressed the opinion that in relation to freedom of speech there was, in principle, no difference between English law and art 10 of the Convention.[48]

4.39 The First Amendment to the *United States Constitution* provides significant protection to free speech. In *New York Times v Sullivan,* the US Supreme Court 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'.[49]

4.40 There are also protections for free speech in the Victorian *Charter of Human Rights and Responsibilities* and the *Human Rights Act 2004* (ACT).[50]

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

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

42 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

43 *United States Constitution* amend I.

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

45 *Canada Act 1982* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 2(b).

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

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

48 *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109. This view 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.

49 *New York Times v Sullivan* 376 US 254 (1964) 270 (Brennan J).

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

Justifications for limits on freedom of speech

4.41 In the US, doctrine on First Amendment freedom of speech is said to be characterised by a categorical approach to justification, according to which the law is dominated by relatively inflexible rules, each with application to a defined category of circumstances.[51]

4.42 In other jurisdictions, bills of rights generally allow for limits on rights provided the limits are reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[52] Article 19.3 of the ICCPR and the Siracusa Principles[53] also provide guidelines on when limits on freedom of speech may be justified.

4.43 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'.[54]

4.44 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, in particular by establishing a direct and immediate connection between the expression and the threat.[55]

4.45 Some stakeholders expressly endorsed proportionality as a means of assessing justifications for interferences with freedom of speech.[56] As discussed above, in relation to the constitutional implied freedom of political communication, a form of proportionality test has been expressly endorsed by the High Court.[57]

Legitimate objectives

4.46 The threshold question in a proportionality test is whether the objective of a law is legitimate. Outside constitutional contexts, some guidance on the legitimate

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51 Stone, above n 13, 8.

52 *Canadian Charter of Rights and Freedoms* 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.

53 United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984).

54 Stone, above n 13, 21.

55 United Nations Human Rights Committee, *General Comment 34 on Article 19 of the ICCPR on Freedoms of Opinion and Expression*, UN Doc CCPR/C/GC/34 (12 September 2011) [35].

56 National Association of Community Legal Centres, *Submission 143*; 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*.

57 *McCloy v New South Wales* [2015] HCA 34 (7 October 2015).

objectives of a law that interferes with freedom of speech may be derived from the common law and international human rights law.

4.47 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.

4.48 In the context of the constitutional implied freedom of political communication, the purpose of a law limiting freedom of speech must be compatible with the constitutionally prescribed system of government. On this approach, the High Court may consider an objective to be legitimate provided simply that it is *not directed* to regulating political communication.[58]

4.49 Another judicial approach is to address the question of legitimate objective by reference to considerations of the common law. For example, in *Monis*, Hayne J observed that 'the common law has never recognised any general right or interest not to be offended'[59] and that it would be incongruent with common law rules of defamation, to find as legitimate, a statutory purpose of preventing serious offence without any defence of truth or qualified privilege.[60]

4.50 Associate Professor James Stellios has written that the broader High Court approach should be preferred 'as it allows for political processes to determine legitimate ends; not traditional conceptions of legally cognisable rights or interests'. That is, provided a law is 'not directed to regulating political communication, it should be considered to be legitimate, and then subjected to the rigour and transparency of a proportionality analysis'.[61]

4.51 International law gives some other guidance on what legitimate objectives may justify restrictions on freedom of speech more generally. 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;

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58 James Stellios, 'The Second Limb of Lange: The Continuing Uncertainties with the Implied Freedom of Political Communication' (Research Paper 14–49, ANU College of Law, 2015) 6. Referring to *Monis v The Queen* (2013) 249 CLR 92 [349] (Crennan, Kiefel and Bell JJ); *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, [221] (Crennan, Kiefel and Bell JJ). Of course, a purpose may still be legitimate even where it is directed to regulate political communication, but it must do so for a legitimate purpose, for example, to prevent corruption in the political process.

59 *Monis v The Queen* (2013) 249 CLR 92 [223].

60 Ibid [213].

61 Stellios, above n 58, 8.

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.[62]

4.52 Many laws that restrict freedom of speech can be seen as pursuing these objectives. For example, many 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.[63]

4.53 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.[64] 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.

4.54 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.[65] Avoiding this harm may more easily be seen as implicating 'public order', in the sense used in the ICCPR.

4.55 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, because protecting tribunal proceedings can be seen as essential to the proper functioning of society. A limitation to freedom of speech based upon protecting the reputation of others should not be used to 'protect the state and its officials from public opinion or criticism'.[66]

4.56 However, the justification of proceedings for contempt of court or Parliament 'lies not in the protection of the reputation of the individual judge or parliamentarian

62 *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.

63 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': United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984) [22]. The Siracusa Principles also state that 'respect for human rights is part of public order'.

64 See, eg, Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) Ch 8.

65 Ibid [8.145].

66 United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984) [37]. Cf *Nationwide* in relation to the constitutional implied right in Australia: *Nationwide News v Wills* (1992) 177 CLR 1.

but in the need to ensure that parliaments and courts are able effectively to discharge the functions, duties and powers entrusted to them by the people'.[67]

4.57 Restrictions on freedom of speech under anti-discrimination laws may also be justified under the ICCPR if they are necessary to respect the rights or reputations of others, including the right to effective protection against discrimination, as provided by art 26.

4.58 Laws to prevent or restrict dissemination of indecent or classified material, such as the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*), may be justified as protecting public health or morals. As discussed below, limitations on unsolicited telemarketing calls contained in the *Do Not Call Register Act 2006* (Cth) have been justified as protecting privacy; and tobacco advertising prohibitions as protecting public health.[68]

4.59 There remain other laws restricting freedom of speech and expression that do not as obviously fall within the permissible limitations referred to in art 19 of the ICCPR.

Balancing rights and interests

4.60 Eric Barendt has 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'.[69] The difficulty is always balancing the respective rights or objectives.

4.61 The UN Human Rights Committee has 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'.[70] This is consistent with the additional constitutional protection afforded under Australian common law to political communication.

4.62 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.[71]

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67 *Theophanous v The Herald and Weekly Times Ltd* (1994) 182 CLR 104, 187 (Deane J).

68 Tobacco advertising prohibitions are discussed in Ch 19, in relation to property rights.

69 Barendt, above n 2, 21.

70 United Nations Human Rights Committee, *General Comment 34 on Article 19 of the ICCPR on Freedoms of Opinion and Expression*, UN Doc CCPR/C/GC/34 (12 September 2011) [34].

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

4.63 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.

4.64 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 that limit the distribution of leaflets directed at preventing litter were given as examples of content-neutral laws.[72]

4.65 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'.[73] 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 said to require a higher level of protection, and laws that operate to interfere with political speech should require special justification.[74]

4.66 These views are consistent with High Court statements that a distinction may be made between 'restrictions on communication which target ideas or information and those which restrict an activity or mode of communication by which ideas or information are transmitted'.[75] Under a proportionality test, a more compelling justification for the burden on political communication is required for restrictions on content rather than mode of communication.

Laws that interfere with freedom of speech

4.67 A wide range of Commonwealth laws may be seen as interfering with freedom of speech and expression, broadly conceived. Commonwealth laws prohibit, or render unlawful, speech or expression in many different contexts and include:

- criminal laws;
- secrecy laws;
- privilege and contempt laws;
- anti-discrimination laws;
- media, broadcasting and telecommunications laws;

72 Ibid.
73 Ibid.
74 Ibid.
75 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 143 (Mason CJ). See also 234–5 (McHugh J).

- information laws; and
- intellectual property laws.[76]

4.68 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 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.[77]

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

Criminal laws

4.70 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.

4.71 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.[78]

4.72 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*:

- s 80.1AA (Treason—materially assisting enemies);

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76 Other laws that interfere with freedom of speech include 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 does not consider the operation of these state and territory laws.

77 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) 56 *Columbia Law Review* 1129, 1130.

78 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report No 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 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (Commonwealth of Australia, 1991). This wording became part of the treason and sedition offences in the *Criminal Code*, as enacted in 2005.

- 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).

4.73 In addition, the offence of treachery contained in s 24AA of the *Crimes Act* 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*.

4.74 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.[79] 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.[80]

4.75 Counter-terrorism offences were criticised in some submissions on the grounds that their potential interference with freedom of speech was not justified.[81]

> 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.[82]

4.76 Counter-terrorism and national security laws, including those mentioned above, should be subject to further review to ensure that the laws do not interfere unjustifiably with freedom of speech, or other rights and freedoms.

Advocating terrorism

4.77 Section 80.2C of the *Criminal Code* 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

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79 *Criminal Code* ss 101.2, 101.5, 102.2, 102.4, 102.5, 102.7.

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

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

82 Public Interest Advocacy Centre, *Submission 55*.

have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters'.[83]

4.78 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.[84]

4.79 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.[85]

4.80 The Human Rights Committee concluded that the provision was 'likely to be incompatible with the right to freedom of opinion and expression'.[86] 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 additional 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.[87]

4.81 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'.[88] It also noted existing offences in the *Criminal Code* which may already cover conduct intended to be captured by the proposed offence.[89]

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83 *Criminal Code* s 80.3(1)(d).

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

85 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 2014* (2014).

86 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 14th Report of the 44th Parliament* (2014) [1.259].

87 Ibid [1.258].

88 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *14th Report of 2014* (October 2014) 795.

89 Ibid. Citing *Criminal Code* ss 80.2, 80.2A, 80.2B, 101.5, 102.4.

4.82 The Attorney-General responded to these concerns by emphasising that terrorist offences generally require a person to have: 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.[90]

4.83 In relation to the availability of other offences, the Attorney-General advised that where the Australian Federal Police (AFP) has sufficient evidence, the existing incitement or 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'.[91]

4.84 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 assist people in 'prospectively knowing the scope of their potential criminal liability'.[92] The Bill was not amended in this respect.

4.85 Stakeholders in this Inquiry submitted that the scope of the offences in s 80.2C of the *Criminal Code* constituted an unjustified encroachment on freedom of speech.[93]

4.86 For example, 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'.[94] Such an approach 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'.[95] Councils for Civil Liberties considered that the provision 'disproportionately burdens free speech beyond what is necessary to protect national security'.[96]

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90 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, 14th *Report of 2014,* (October 2014) 796.

91 Ibid.

92 Ibid 797. This conclusion was consistent with recommendations of the Intelligence Committee: 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.

93 Councils for Civil Liberties, *Submission 142*; Australian Lawyers for Human Rights, *Submission 106*; National Association of Community Legal Centres, *Submission 66*; Public Interest Advocacy Centre, *Submission 55*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

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

95 Ibid.

96 Councils for Civil Liberties, *Submission 142*.

4.87 Problems with the offence were said to include:

- the broad meaning of the word ‘advocates’;
- the use of a recklessness standard;
- the limited scope of defences; and
- the existence of other offences covering similar conduct.

4.88 Councils for Civil Liberties submitted that a person exercising free speech and arguing publicly in support of ‘oppressive and non-democratic’ regimes may be a person who ‘advocates’ (which is defined to include ‘encourages’) the doing of a terrorist act ‘merely because that regime has engaged in terrorist activity in the past’.[97] The National Association of Community Legal Centres (NACLC) stated that the breadth of the definition of ‘advocates’ poses a ‘significant risk of criminalising legitimate exercises of free speech by seriously impacting on the confidence of individuals and organisations to voice radical and controversial (albeit not illegal) views regarding overseas conflicts and terrorism’.[98]

4.89 The use of a recklessness standard was criticised, among other reasons, because a person can never be certain as to whether they are acting recklessly in making a statement and, therefore, such a test may ‘discourage public speech, in particular robust speech concerning contentious national and international political and military matters’.[99] The offence was said to go 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).[100]

4.90 The Law Council of Australia (Law Council) observed that the good faith defence in s 80.3(1)(d) may not address concerns about the criminal liability of ‘those engaged in publishing or reporting on matters that could potentially fall within the broad scope of the offences’.[101]

4.91 Stakeholders also questioned the need for s 80.2C, 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,[102] which covers urging another person to commit a terrorist act.[103]

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97 Ibid.

98 National Association of Community Legal Centres, *Submission 143*.

99 Councils for Civil Liberties, *Submission 142*. The implications for journalism, notwithstanding the defences, were also highlighted. See also Public Interest Advocacy Centre, *Submission 55*.

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

101 Law Council of Australia, *Submission 75*.

102 *Criminal Code* s 11.4.

103 Public Interest Advocacy Centre, *Submission 55*. See also National Association of Community Legal Centres, *Submission 143*; Councils for Civil Liberties, *Submission 142*.

Prescribed terrorist organisations

4.92 Similar concerns about overreach have been identified in relation the definition of a terrorist organisation under div 102 of the *Criminal Code*. These provisions allow an organisation to be specified 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.[104]

4.93 The prescription of a terrorist organisation by the Minister is by disallowable instrument, subject to review by the Parliamentary Joint Committee on Intelligence and Security,[105] and judicial review.

4.94 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'.[106]

4.95 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.[107]

4.96 Councils for Civil Liberties considered that the definition of what constitutes a terrorist organisation has the potential to capture organisations 'which are legitimate religious or other organisations' because an organisation can be prescribed where it is 'indirectly … fostering the doing of a terrorist act'.[108] If a legitimate religious organisation is found to be a 'terrorist organisation' under the provisions, its members 'may come within the associated criminal offence provisions in carrying out day to day activities such as worship, welcoming new followers, making donations and fundraising'.[109]

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104 *Criminal Code* s 102.1. Related criminal offences include those concerning being a member of, training with, or providing support or resources to a terrorist organisation: Ibid ss 102.3, 102.5, 102.7.

105 *Criminal Code* s 102.1A.

106 Williams, above n 39, 220.

107 Gilbert and Tobin Centre of Public Law, *Submission 22*. A similar perspective was expressed by NACLC: National Association of Community Legal Centres, *Submission 143*. 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 39, 220.

108 Councils for Civil Liberties, *Submission 142*. Referring to *Criminal Code* s 102.1(2).

109 Councils for Civil Liberties, *Submission 142*.

Using a postal service to menace, harass or cause offence

4.97 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*.[110]

4.98 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:

- it applies to core political speech—the broad scope of the provision means that it can operate to suppress core political speech; and
- the 'offensiveness' standard is not sufficient to justify a law that criminalises political speech.[111]

4.99 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'.[112] Alternatively, the provision could specify matters that the court must consider when determining whether the communication was offensive.[113]

Other criminal laws

4.100 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;[114] distributing child pornography material;[115] and counselling the committing of suicide.[116]

4.101 Section s 474.29A of the *Criminal Code* makes it an offence to use a carriage service to access, transmit or publish material that counsels or incites committing or attempting to commit suicide. Civil Liberties Australia stated that this law is used to restrict access to materials relating to euthanasia and clearly restricts freedom of speech. It observed that the law is 'a rare (and perhaps the only instance) where it is an offence to counsel the commission of an act that is not in itself an offence'.[117]

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

111 Compare *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*.

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

113 Ibid. Cf *Criminal Code* s 473.4.

114 *Criminal Code* ss 136, 137.1, 137.2.

115 Ibid div 273, ss 471.16–471.20.

116 Ibid s 474.29A.

117 Civil Liberties Australia, *Submission 94*.

Incitement and conspiracy laws

4.102 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.

4.103 Under s 11.4 of the *Criminal Code* 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.[118]

4.104 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.[119]

4.105 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 is necessary to achieve the putative objective and is not specific enough to avoid capturing less serious conduct'.[120]

Secrecy laws

4.106 The secrecy of government information has a long history.[121] 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.[122]

4.107 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.

4.108 The constitutional implied freedom of political communication is particularly relevant in this context. In *Bennett v HREOC*, for example, a blanket secrecy provision

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118 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* s 11.4(2).

119 *Criminal Code* s 11.5.

120 Law Council of Australia, *Submission 75*.

121 See Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) Ch 2.

122 Ibid [2.4].

in reg 7(13) of the *Public Service Regulations 1999* (Cth) was held to be constitutionally invalid by the Federal Court.[123]

4.109 Finn J applied the *Lange* test and found that, under the second limb of the test, while there may be public interests, or 'legitimate ends', that justify the burden that secrecy provisions impose on freedom of political communication—including national security, cabinet confidentiality, protection of privacy and the maintenance of an impartial and effective public service—a 'catch-all' provision that did not differentiate between the types of information protected or the consequences of disclosure went too far.[124]

4.110 The Attorney-General's Department (Security and Intelligence Law Branch) conducts scrutiny of draft legislation and legislative instruments containing secrecy provisions and administers the secrecy offences in pts VI and VII of the *Crimes Act*. In relation to the breadth of secrecy provisions, the Department considers and gives advice on, among other things, whether prohibitions on disclosing official information may infringe the implied constitutional freedom of political communication.

4.111 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.

4.112 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.[125] Provisions in Commonwealth legislation that expressly impose criminal sanctions for breach of secrecy or confidentiality obligations include, for example:

- *Crimes Act* ss 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);

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123 *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334.

124 Ibid [98]–[99]. See also Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) [2.57]–[2.59].

125 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) Appendix 4.

- *Australian Border Force Act* 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)–(2), 35P(1)–(2), 81, 92(1) and (1A).

4.113 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*. 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.

4.114 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.[126] 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.[127]

4.115 The ALRC also 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.[128] These recommendations have not been implemented.

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126 Ibid recs 4–1, 5–1.
127 Ibid rec 5–1.
128 Ibid recs 8–1, 8–2.

4.116 A number of stakeholders expressly supported the ALRC's earlier recommendations.[129] The Law Council recommended that the Australian Government give further consideration to the implementation of the ALRC's 2009 secrecy report, which it stated would 'assist in ensuring that official secrecy is justified, proportionate and necessary to achieving legitimate objectives'.[130]

4.117 Stakeholders highlighted a number of specific secrecy provisions as being of particular concern for their impact on freedom of speech in Australia. These are discussed below.

Australian Border Force Act

4.118 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 ('protected information'),[131] punishable by imprisonment for 2 years.[132]

4.119 An 'entrusted person' is defined to include the Secretary of the Department of Immigration and Border Protection, the Australian Border Force Commissioner and any Immigration and Border Protection worker.[133] The latter category of person may, by written determination of the Secretary or Commissioner, include any consultant, contractor or service provider—such as a doctor or welfare worker in an offshore immigration detention centre.[134]

4.120 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'.[135] In addition, in some circumstances, an entrusted person who makes a disclosure may be protected by the *Public Interest Disclosure Act 2013* (Cth), as discussed below.

4.121 The Explanatory Memorandum to the Australian Border Force Bill 2015 (Cth) noted that the secrecy provisions

> are necessary to provide assurances to law enforcement and intelligence partners in Australia and internationally and to industry that information provided to the Department will be appropriately protected … The application of the secrecy provisions across the integrated department will ensure the disclosure of sensitive information is appropriately regulated.[136]

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129 Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 140*; Public Interest Advocacy Centre, *Submission 55*.
130 Law Council of Australia, *Submission 140*.
131 *Australian Border Force Act 2015* (Cth) s 4.
132 Ibid s 42.
133 Ibid s 5.
134 Ibid ss 4, 5. Secrecy may also, of course, also be preserved by contractual terms of employment.
135 Ibid s 48.
136 Explanatory Memorandum, Australian Border Force Bill 2015 (Cth) 14.

4.122 Stakeholders in this Inquiry submitted that the scope of the secrecy and disclosure offences in the *Australian Border Force Act* constitute an unjustified encroachment on freedom of speech.[137]

4.123 The Law Council stated that it was concerned that the *Australian Border Force Act* may unjustifiably encroach on freedom of speech because it did not include an adequate public interest disclosure exception to the secrecy provisions; and operated extraterritorially without the associated protections that apply in Australia.[138]

4.124 One concern is the breadth of the definition of an entrusted person, which can include external consultants, contractors or service providers 'such as doctors and welfare workers performing work by contract for the Department'[139] and any person employed by an entrusted person.

> The first people to find themselves silenced under this law will be those who work in Australia's regional processing centres in Nauru and Papua New Guinea (PNG). However, the law may reach far beyond this, to silence every person involved in the provision of legal, counselling and welfare services to refugees, if their non-government employer is in receipt of government funding.[140]

4.125 Councils for Civil Liberties observed that an organisation like the Victorian Foundation for the Victims of Torture 'may be caught by the legislation solely on the ground that the Foundation provides counselling services for refugee clients of the Immigration Department'.[141] The Law Council submitted that any review may wish, among other things, to consider whether the definition of 'entrusted person' should be more narrowly defined.[142]

4.126 Academics at the Sydney Centre for International Law submitted that pt 6 of the Act violated international law and the constitutional implied freedom of political communication. In relation to the first point, they argued that the secrecy provisions were not necessary for the protection of national security or public order, or for protecting rights and reputations, in terms of art 19.3 of the ICCPR.

> It is difficult to see how all 'protected information' as defined by the Act—that is, including any information at all, obtained by an [immigration and border protection] worker in the course of his or her work—has the potential to damage national security or public order, and thus why such a broad restriction is 'necessary'.[143]

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137 National Association of Community Legal Centres, *Submission 143*; Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 140*; E Moore, M Darwish and A Pert, *Submission 109*.

138 Law Council of Australia, *Submission 140*. These protections include Australian state and territory legislation requiring mandatory disclosure of suspected child abuse by relevant professionals.

139 Ibid.

140 Ibid.

141 Councils for Civil Liberties, *Submission 142*. The councils submitted that 'the contracted and non-governmental agencies to which the legislation applies should be specifically defined and properly limited'.

142 Law Council of Australia, *Submission 140*.

143 E Moore, M Darwish and A Pert, *Submission 109*.

4.127 Further, they suggested that even if it is accepted that the Act is protecting legitimate national security or public order interests, the imposition of criminal sanctions (up to two years' imprisonment) was arguably unnecessary and disproportionate to protecting any potential legitimate objective.[144]

4.128 The provisions were also said to breach the implied freedom of political communication because 'any entrusted persons who in their working capacity come across any objectionable conduct or content which could be the basis for legitimate criticism of government policy will be forced to risk imprisonment by disclosure of such information' and the necessary element of proportionality was lacking.[145]

ASIO Act secrecy provisions

4.129 Secrecy offences in the *ASIO Act* have been extended to apply to the unauthorised disclosure of information relating to a 'special intelligence operation'.[146] 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 operation'.[147] Recklessness is the fault element in relation to whether the information relates to a special intelligence operation.[148]

4.130 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.

4.131 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'.[149]

4.132 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.[150] The provisions were incompatible with the right to freedom of expression because they appeared to impose disproportionate limits on that right.[151]

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144 Ibid.

145 Ibid.

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

147 'Special intelligence operation' is defined in Ibid s 4.

148 Ibid s 35P(1)(b).

149 Explanatory Memorandum, National Security Legislation Amendment Bill (No 1) 2014 (Cth) [553].

150 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 16th Report of the 44th Parliament* (November 2014) [2.107].

151 Ibid [2.112].

4.133 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]'.[152]

> 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.[153]

4.134 The Scrutiny of Bills Committee 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.
>
> 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.[154]

4.135 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.[155]

4.136 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;

152 Ibid [2.107].
153 Ibid.
154 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *12th Report of 2014* (September 2014) 627–8.
155 Ibid 628.

- 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.[156]

4.137 Section 35P of the *ASIO Act* was enacted unchanged.[157] In December 2014, the Prime Minister announced that the INSLM would review any impact on journalists of the provisions.[158] The INSLM, the Hon Roger Gyles AO QC, announced on 30 March 2015 that his first priority was the review of s 35P. As at 1 November 2015, the report on the INSLM's review of s 35P was being prepared.[159]

4.138 Stakeholders in this ALRC Inquiry expressed concerns about these secrecy provisions of the *ASIO Act*, which ranged from points of drafting through to broader arguments about the possible impact on journalism generally, and suggested repeal or reform because of the impact on freedom of speech and of the press.[160] Some stakeholders suggested a new public interest disclosure exception should be incorporated.[161]

4.139 The adoption of recklessness as the fault element, in the lesser offence under s 35P(1), caused some concern.[162] However, unless otherwise specified, recklessness is the fault element provided for under the *Criminal Code* for a 'physical element that consists of a circumstance', such as that information relates to a 'special intelligence

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156 Ibid 628–34.

157 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].

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

159 See 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>.

160 Councils for Civil Liberties, *Submission 142*; Australian Lawyers for Human Rights, *Submission 106*; 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*: Department of the Prime Minister and Cabinet, above n 159.

161 National Association of Community Legal Centres, *Submission 143*; Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 140*.

162 Australian Lawyers for Human Rights, *Submission 106*; Free TV Australia, *Submission 48*; UNSW Law Society, *Submission 19*.

operation'.[163] It is applied to similar offences under the *Crimes Act* relating to the disclosure of information about controlled operations conducted by the AFP.[164]

4.140 The scope of the available defences was criticised. The UNSW Law Society, for example, stated that the lesser offence unnecessarily restricts freedom of speech because there is 'no public interest defence for unauthorised disclosure, which is likely to restrict legitimate scrutiny of security agencies',[165] and because there is no harm element. The Public Interest Advocacy Centre (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'.[166]

4.141 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.[167]

4.142 Free TV Australia expressed concern that the offences remained capable of capturing 'the activities of journalists reporting in the public interest'. Section 35P, it said, appeared 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.[168]

4.143 Councils for Civil Liberties were concerned that the impact of s 35P 'cannot be confined to journalists or whistle-blowers' and that academics, members of civil society and religious groups, community advocates and ordinary members of the community may be affected. The new offences 'could be used to prevent or deter publication or disclosure of important information regarding the use and misuse of official power that is essential to the proper functioning of a democratic state' and appear intended to have 'a major deterrent effect on legitimate whistle-blowers, on the freedom of the media to report on abuses of power by ASIO and on debate relating to

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163 *Criminal Code* s 5.6(2).

164 *Crimes Act 1914* (Cth) ss 15HK, 15HL.

165 UNSW Law Society, *Submission 19*. However, s 35P(3) does provide for disclosure to the Inspector-General of Intelligence and Security in certain circumstances.

166 Public Interest Advocacy Centre, *Submission 55*.

167 Joint Media Organisations, *Submission 70*.

168 Free TV Australia observed that the impact of s 35P may be 'amplified in the context that information relating to [special intelligence operations] 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*.

intelligence and counter terrorism issues—even when these pose no threat to national security'.[169]

Other secrecy provisions

4.144 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;[170]
- *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;[171]
- *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;[172] and
- *Crimes Act* ss 15HK, 15HL, which prohibit the disclosure of information relating to a 'controlled operation'.[173]

Public interest disclosure

4.145 The *Public Interest Disclosure Act* 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.

4.146 The Joint Media Organisations criticised this protection as inadequate, a problem that was 'further exacerbated when laws, such as the three tranches of 2014–2015 national security laws, not only provide no protection but criminalise information disclosure (external or otherwise)—and therefore unjustifiably interfere with freedom of speech'.[174]

4.147 Councils for Civil Liberties recommended that the INSLM conduct a review of counter-terrorism and national security legislative provisions that

> erode legitimate journalistic freedom and weaken protections for legitimate whistle-blowers with the intention of developing a comprehensive set of effective shield laws for journalists and comprehensive and effective whistle-blower legislation which protects all citizens.[175]

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169 Councils for Civil Liberties, *Submission 142*.
170 Australian Lawyers for Human Rights, *Submission 43*.
171 Joint Media Organisations, *Submission 70*; Free TV Australia, *Submission 48*.
172 Joint Media Organisations, *Submission 70*; Free TV Australia, *Submission 48*.
173 Joint Media Organisations, *Submission 70*.
174 Ibid.
175 Councils for Civil Liberties, *Submission 142*.

Court and tribunal orders

4.148 Courts have powers to suppress information relevant to court proceedings, or may be empowered to do so by legislation. These powers can be seen to be inherent to the scope of freedom of speech at common law.

4.149 The federal courts have such implied powers as are incidental and necessary to exercise their jurisdiction and express powers conferred on them by legislation.[176] 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.[177] Part VAA of the *Federal Court of Australia Act 1976* (Cth) sets out expressly when and how these powers can be exercised by providing for suppression and non-publication orders.

4.150 Commonwealth administrative tribunals also have power to make orders for private hearings, non-publication and non-disclosure in relation to administrative review proceedings.[178]

Privilege and contempt laws

Parliamentary privilege

4.151 Parliamentary privilege is derived from art 9 of the *Bill of Rights Act 1688* in which it was declared that the 'freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'. However, in protecting freedom of speech of parliamentarians and witnesses before Parliament and its committees, privilege can interfere with others' freedom of speech.

4.152 One of the effects of s 16 of the *Parliamentary Privileges Act 1987* (Cth), which declares and enacts art 9, is that it limits the freedom of members of the public to question directly or indirectly, in judicial proceedings, what is said in Parliament. Section 16(3) provides:

> (3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:
>
> (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
>
> (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
>
> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

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176 *DJL v The Central Authority* (2000) 201 CLR 226, 240–41.

177 *Central Equity Ltd v Chua* [1999] FCA 1067 (29 July 1999).

178 See, eg, *Administrative Appeals Tribunal Act 1975* (Cth) s 35.

4.153 The provision also limits the ability of citizens sued for defamation by a member or a witness before Parliament to defend themselves, by introducing evidence of what may have been said in parliamentary proceedings.

4.154 The question of whether s 16 violates the implied freedom of political communication has not been authoritatively determined by the High Court, but other courts have rejected constitutional challenges.[179]

Contempt of Parliament

4.155 The law of contempt of Parliament can be used to limit criticisms of the Parliament or of individual parliamentarians.

4.156 Section 4 of the *Parliamentary Privileges Act* defines contempt as *excluding* conduct (including the use of words) 'unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member'. Section 6 expressly abolishes defamatory words or acts as a punishable contempt.

Contempt of court

4.157 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.[180] Powers to punish for contempt of court are part of the inherent jurisdiction of superior courts, and are also provided for in legislation.[181]

4.158 Section 264E of the *Bankruptcy Act 1966* (Cth) makes it an offence to insult or disturb a court registrar or magistrate conducting an examination in bankruptcy.[182] Section 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.

Tribunals, commissions of inquiry and regulators

4.159 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 (Administrative Appeals Tribunal);

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179 *Amann Aviation v Commonwealth* (1988) 19 FCR 223; *Rann v Olsen* (2000) 172 ALR 395.

180 Thomson Reuters, *The Laws of Australia* (at 1 November 2015) 10 Criminal Offences, '10.11 Administration of Law and Justice', [10.11.140].

181 See, eg, *Family Law Act 1975* (Cth) ss 35, 69F, 112AP.

182 *Bankruptcy Act 1966* (Cth) s 264E.

- *Copyright Act 1968* (Cth) s 173 (Copyright Tribunal);
- *Defence Act 1903* (Cth) s 89 (service tribunals);
- *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 119 (Commissioners);
- *Fair Work Act 2009* (Cth) s 674 (Fair Work Commission);
- *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 61 (parliamentary commissions);
- *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 94 (Integrity Commissioner);
- *Royal Commissions Act 1902* (Cth) s 6O (royal commissions); and
- *Veterans' Entitlements Act 1986* (Cth) s 170 (Veterans' Review Board).

4.160 Some of these 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.[183]

4.161 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.[184]

4.162 An example of a contempt law that was found to be unconstitutional is the provision struck down by the High Court in *Nationwide News v Wills*.[185] This concerned s 299(1)(d)(ii) of the *Industrial Relations Act 1988* (Cth), which criminalised the publication of a writing calculated to bring the Commission into disrepute. The judges were unanimous in holding the provision to be an interference with the implied freedom of political communication.

4.163 In 2014, the Human Rights Committee requested further advice from the Minister for Veterans' Affairs as to the compatibility of the provision now appearing as

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183 Ibid; *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.

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

185 *Nationwide News v Wills* (1992) 177 CLR 1.

s 170 of the *Veterans' Entitlements Act* with the right to freedom of opinion and expression. Section 170 provides, among other things, that it is an offence to insult another person in the exercise of the other person's powers or functions under the part of the Act relating to the operations of the Veterans' Review Board. In particular, the Committee asked whether the measure was rationally connected to its stated objective; and proportionate to achieving that objective.[186]

4.164 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.[187]

4.165 In 2015, it was suggested in Parliament[188] that public criticism of the Royal Commissioner in charge of the Royal Commission into Trade Union Governance and Corruption might constitute an offence under the *Royal Commissions Act*.[189]

4.166 There seems reason to review the range of legislative provisions that protect the processes of tribunals, commissions of inquiry and regulators. Some of these laws may unjustifiably interfere with freedom of speech—and may be unconstitutional—in prohibiting criticism of public officers engaged in performing public functions.

Anti-discrimination laws

4.167 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.

4.168 Together, these Acts[190] prohibit discrimination on the basis of race, colour, descent, or national or ethnic origin, sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, breastfeeding or family responsibilities, disability, and age. The conduct prohibited may include speech or other forms of expression.

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186 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.

187 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.

188 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 August 2015, 8885 (Tony Abbott, Prime Minister).

189 *Royal Commissions Act 1902* (Cth) s 6O.

190 *Age Discrimination Act 2004* (Cth); *Disability Discrimination Act 1992* (Cth); *Sex Discrimination Act 1984* (Cth); *Racial Discrimination Act 1975* (Cth).

4.169 The *RDA* makes unlawful offensive behaviour because of race, colour or national or ethnic origin.[191] The *Sex Discrimination Act 1984* (Cth) makes sexual harassment unlawful in a range of employment and other contexts.[192] Various Commonwealth anti-discrimination laws make it an offence to advertise an intention to engage in unlawful discrimination.[193] Each of these Acts also makes it an offence to victimise a person because the person takes anti-discrimination action.[194]

4.170 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.[195]

Racial Discrimination Act

4.171 There has been much debate over the scope of s 18C and pt IIA 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.

4.172 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 alleging unlawful discrimination 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.[196]

4.173 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.[197]

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

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

193 *Age Discrimination Act 2004* (Cth) s 50; *Disability Discrimination Act 1992* (Cth) s 44; *Sex Discrimination Act 1984* (Cth) s 86. FamilyVoice submitted that these laws are unjustified restrictions on freedom of speech and should be repealed: FamilyVoice Australia, *Submission 122*.

194 *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.

195 *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.

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

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

4.174 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.[198] This announcement followed controversy about s 18C occasioned by the decision of *Eatock v Bolt.*[199]

4.175 On 6 August 2014, after consultation on an exposure draft Freedom of Speech (Repeal of s 18C) Bill, then Prime Minister, the Hon Tony Abbott MP, announced that the proposed changes to s 18C had been taken 'off the table'.[200] On 25 September 2014, a private members' Bill to amend s 18C was introduced in the Senate.[201]

4.176 In the ALRC's view, s 18C of the *RDA* would benefit from more thorough review in relation to implications for freedom of speech. In particular, there are arguments that s 18C lacks sufficient precision and clarity, and unjustifiably interferes with freedom of speech by extending to speech that is reasonably likely to 'offend'. In some respects, the provision is broader than is required under international law, broader than similar laws in other jurisdictions, and may be susceptible to constitutional challenge.

4.177 The ALRC received widely divergent views on whether s 18C unjustifiably interferes with freedom of speech. Some stakeholders considered that it strikes an appropriate balance between freedom of speech and other interests, including the right to be free from racial discrimination.[202] Others considered that it significantly overreaches, and should be amended or repealed.[203]

Scope of s 18C

4.178 Many of the arguments used to justify s 18C appear to relate primarily to vilification—rather than simply giving offence, or even causing insult or humiliation. Racial vilification, in this context, generally refers to public acts that encourage or incite others to hate people because of their race, nationality, country of origin, colour or ethnic origin.[204] Vilification carries with it a sense of extreme abuse or hatred of its

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198 See Attorney-General's Department, Exposure Draft, Freedom of Speech (Repeal of s 18C) Bill 2014 (Cth).

199 *Eatock v Bolt* (2011) 197 FCR 261.

200 Emma Griffiths, *Government Backtracks on Racial Discrimination Act 18C Changes; Pushes Ahead with Tough Security Laws* <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.

201 Racial Discrimination Amendment Bill 2014 (Cth).

202 National Association of Community Legal Centres, *Submission 143*; 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*.

203 FamilyVoice Australia, *Submission 122*; Wilberforce Foundation, *Submission 118*; FamilyVoice Australia, *Submission 73*; Wilberforce Foundation, *Submission 29*; Church and Nation Committee, Presbyterian Church of Victoria, *Submission 26*; P Parkinson, *Submission 9*.

204 See, eg, *Racial Vilification Act 1996* (SA) s 4.

object, and can provoke hostile and even violent responses. Arguably, the words of s 18C do not convey this meaning.[205]

4.179 Section 18C has long been criticised for extending to giving offence. In 2004, Dan Meagher of Deakin University highlighted that the meaning of the words 'offend' and 'insult' in s 18C of the *RDA* were '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'.[206]

4.180 Stakeholders in this Inquiry echoed concerns about the scope of the provision. The Church and Nation Committee, for example, submitted that the state 'cannot legislate against offence and insult without doing serious damage to wide-ranging freedom of speech'.[207]

4.181 The Wilberforce Foundation stated that s 18C was flawed because it 'essentially makes speech and acts unlawful as a result of a subjective response'. This flaw, it said, is compounded by s 18D, which does not make truth a defence.[208] FamilyVoice Australia (FamilyVoice) submitted that, since 'justifiable limitations on offensive speech are already available under state defamation laws, the provisions of section 18C are superfluous'.[209]

4.182 Other stakeholders considered that the scope of s 18C, together with the defence provision in s 18D, were appropriate. The Law Society of NSW Young Lawyers, for example, stated that the provision 'finely balances fair and accurate reporting and fair comment with discrimination protections'.[210] PIAC 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'.[211]

4.183 Australian Lawyers for Human Rights (ALHR) submitted that the right to be free from racist abuse and hate speech was an important right, which deserved protection even at the expense of some 'relatively minor and proportionate limits' upon free speech, (as provided by the *RDA*).[212] It stated that the 'evidence is that encouraging, accepting and tolerating racism causes it to increase and causes the forms that racism takes to become more harmful and more violent'.[213]

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205 Liberty Victoria, Submission to Attorney-General's Department, *Exposure Draft Freedom of Speech (Repeal of s 18C) Bill 2014 (Cth)*, 2014.

206 Dan Meagher, 'So Far So Good? A Critical Evaluation of Racial Vilification Laws in Australia' [2004] *Federal Law Review* 225, 231.

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

208 Wilberforce Foundation, *Submission 29*.

209 FamilyVoice Australia, *Submission 122*.

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

211 Public Interest Advocacy Centre, *Submission 55*. 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.

212 Australian Lawyers for Human Rights, *Submission 106*.

213 Ibid.

4.184 NSW Young Lawyers considered that, rather than going too far, s 18C limits freedom of speech only 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.[214]

4.185 The Australia/Israel and Jewish Affairs Council (AIJAC) observed that pt IIA of the *RDA* was 'drafted to best balance the twin goals of maintaining maximum freedom of expression consistent with maintaining freedom from racial vilification' and was the product of widespread public consultation and debate.[215]

The 'reasonably likely' standard

4.186 Section 18C provides that an act must be 'reasonably likely, in all the circumstances' to cause the listed harms. This element has been criticised because the reasonableness requirement may demand that the court make a 'political decision' about the boundaries of permissible speech. The objective test of reasonableness in s 18C may not 'cure the definitional indeterminacy of these words that a decision-maker must objectively apply'.[216]

4.187 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.[217]

4.188 In contrast, it has been submitted that the test does allow for an objective assessment to be made, and ensures that the threshold for racial vilification is appropriate, given that s 18D of the *RDA* provides safeguards to protect freedom of speech by imposing a list of exemptions for 'anything said or done reasonably and in good faith'.[218]

Section 18C in practice

4.189 Those with concerns about the potential scope of s 18C often place little emphasis on how the provision has been interpreted in practice by the courts. Broad meanings of 'offend' have been rejected by Australian courts. For example, in *Creek v Cairns Post Pty Ltd*, Kiefel J held that the section requires the harm to be 'profound and serious effects not to be likened to mere slights'.[219]

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214 Law Society of NSW Young Lawyers, *Submission 69*. See also Australian Lawyers for Human Rights, *Submission 106*.

215 Australia/Israel & Jewish Affairs Council, *Submission 100*.

216 Meagher, above n 206, 231.

217 Darryn Jensen, 'The Battlelines of Interpretation in Racial Vilification' (2011) 27 *Policy* 14, 19; *Anti-Discrimination Act 1998* (Tas) ss 19, 55.

218 Law Society of NSW Young Lawyers, *Submission 69*. 'The Australian Courts have historically interpreted sections 18C and 18D in a fair and reasonable manner, and with the public interest in mind': Ibid.

219 *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, [16].

4.190 In *Eatock v Bolt*, the defendant essentially failed in his defence because he was found not to be have acted reasonably and in good faith, in terms of s 18D. Bromberg J held that s 18C is 'concerned with consequences it regards as more serious than mere personal hurt, harm or fear'. Rather, it is

> concerned with mischief that extends to the public dimension. A mischief that is not merely injurious to the individual, but is injurious to the public interest and relevantly, the public's interest in a socially cohesive society.[220]

4.191 The words 'offend, insult, humiliate or intimidate' were 'not intended to extend to personal hurt unaccompanied by some public consequence' of the kind pt IIA of the *RDA* is directed to avoid.[221]

4.192 NSW Young Lawyers submitted that Australian courts have 'historically interpreted sections 18C and 18D in a fair and reasonable manner, and with the public interest in mind'.[222] The Refugee Council of Australia (RCOA) submitted that:

> currently existing sections 18B, 18C, 18D and 18E protect people from the harm of racial vilification and discrimination, as exemplified by almost 20 years of case law. We argue that there is a lack of a clear rationale for these changes, which have only been brought about after extensive media attention regarding one case. Indeed, research shows that these laws have been considered in less than 100 finalised court cases since 1995 and RCOA argues that the courts have applied these laws reasonably and appropriately.[223]

International law

4.193 One reason that s 18C might be considered an unjustified interference with freedom of speech is that it is broader in its terms than art 20 of the ICCPR. Article 20 provides that any 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.[224] Professor Patrick Parkinson stated that s 18C should be similarly confined and not extend to matters likely only to offend.[225]

4.194 FamilyVoice 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.[226]

4.195 In *Coleman v Power*, Kirby J observed that the widest possible meaning of the term 'insulting'—in Queensland legislation prohibiting 'threatening, abusive or

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220 *Eatock v Bolt* (2011) 197 FCR 261, [263].

221 Ibid [267]. However, the 'public consequence' can be slight. Bromberg J held that 'conduct which invades or harms the dignity of an individual or group, involves a public mischief in the context of an Act which seeks to promote social cohesion'.

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

223 Refugee Council of Australia, *Submission 109*.

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

225 P Parkinson, *Submission 9*.

226 FamilyVoice Australia, *Submission 122*.

insulting words' in a public place—would go beyond the permissible limitations on freedom of speech set out in art 19.3 of the ICCPR.[227]

4.196 On the other hand, the need to protect against harmful speech is clearly contemplated in international law.[228] Federal Court cases have found that s 18C is consistent with Australia's undertakings under international law and, in particular, with the *Convention on the Elimination of Racial Discrimination* (CERD) and the ICCPR.[229]

Other jurisdictions

4.197 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 bring into contempt any group of persons … on the ground of the colour, race, or ethnic or national origins of that group of persons'.[230]

4.198 In the UK, 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'.[231]

4.199 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.

4.200 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'.[232]

4.201 The repeal of this provision, introduced by a private member's Bill and subjected to a conscience vote,[233] was controversial.[234] Repeal was justified on a number of grounds, including that the provision conflicted with the 'freedom of

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227 *Coleman v Power* (2004) 220 CLR 1, [242].

228 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 inciting racial discrimination: Public Interest Advocacy Centre, *Submission 55*.

229 Law Council of Australia, *Submission 140*. Referring to *Toben v Jones* (2003) 129 FCR 515; *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105.

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

231 *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).

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

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

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

thought, belief, opinion and expression' protected by s 2(b) of the *Canadian Charter of Human Rights and Freedoms*;[235] and because provisions of criminal law were considered to be the 'best vehicle to prosecute these crimes'.[236]

Constitution

4.202 The constitutional validity of s 18C has not been tested before the High Court. The provision may be vulnerable to challenge on two fronts.[237]

4.203 The first is the question of whether s 18C is validly supported by the external affairs power under s 51(xxix) of the *Constitution*. This would arise if the provision extends beyond Australia's international obligations under the ICCPR and CERD, which may be said to 'focus on protecting against racial vilification and hatred rather than prohibiting offence or insult'.[238]

4.204 The second relates to the implied freedom of political communication. In this context, the High Court has observed that 'insult and invective' are a legitimate part of political discussion and debate.[239] The inclusion of the words 'offend' and 'insult' raises a possibility that the High Court, in an appropriate case, might read down the scope of s 18C, or find it invalid.[240]

Review of s 18C

4.205 Australian racial vilification laws have long been the subject of academic and other criticism. For example, in 2004, Dan Meagher suggested that Commonwealth, state and territory laws, including s 18C of the *RDA*, lacked 'sufficient precision and clarity in key respects'. 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.[241]

4.206 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.[242]

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

236 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'.

237 Lorraine Finlay, 'Freedom's Limits: Speech, Association, and Movement in the Australian Legal System' (Speech, ALRC Freedoms Symposium, Constitutional Centre of Western Australia, Perth, 29 September 2015).

238 Ibid.

239 *Coleman v Power* (2004) 220 CLR 1, [36], [102] (McHugh J), [197] (Gummow and Hayne JJ); *Monis v The Queen* (2013) 249 CLR 92, [85]–[86] (Hayne J).

240 Cf *Monis v The Queen* (2013) 249 CLR 92. As discussed above, the statute considered in *Monis* concerned using a postal service to 'cause offence'.

241 Meagher, above n 206, 227.

242 Ibid 228.

4.207 The ALRC has not established whether s 18C of the *RDA* has, in practice, caused unjustifiable interferences with freedom of speech.[243] However, it appears that pt IIA of the *RDA*, of which s 18C forms a part, would benefit from more thorough review in relation to freedom of speech.

4.208 In particular, there are arguments that s 18C lacks sufficient precision and clarity, and unjustifiably interferes with freedom of speech by extending to speech that is reasonably likely to 'offend'. The provision appears broader than is required under international law to prohibit the advocacy of racial hatred and broader than similar laws in other jurisdictions, and may be susceptible to constitutional challenge.

4.209 However, any such review should not take place in isolation. Stakeholders put forward arguments that people should also be protected from vilification on other grounds, including sex, sexual orientation and gender identity.[244]

4.210 While recognising that anti-vilification laws serve a number of purposes, including providing an 'educative and symbolic function and acting as a general deterrent',[245] there are also concerns that existing laws do not effectively prohibit more serious 'hate speech'.

4.211 For example, the AIJAC suggested that the Australian Government should consider amendments to ss 80.2A and 80.2B of the *Criminal Code* to improve their effectiveness against 'incitement to racially motivated violence and racial hatred including on online platforms'.[246]

4.212 A review of pt IIA might best be done in conjunction with a more general review of vilification laws that could consider not only existing encroachments on freedom of speech, but also whether existing Commonwealth laws effectively discourage the urging of violence towards targeted groups distinguished by race, religion, nationality, national or ethnic origin or political opinion.[247] In this context, the Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (Cth), introduced on 12 November 2015, would create a new offence of advocating genocide in div 80 of the *Criminal Code*.[248]

4.213 A related issue concerns Australia's compliance with CERD.[249] Article 4(a) of CERD states that signatory states should criminalise the dissemination of ideas based

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243 A summary of the instances in which it has been applied can be found in: Gillian Triggs, 'Freedom of Speech and Racial Vilification: One Man's Freedom Ends Where Another's Starts' (Speech, Sydney Institute, 26 November 2013).

244 JobWatch, *Submission 115*; A Lawrie, *Submission 112*; Australian Lawyers for Human Rights, *Submission 106*; NSW Gay and Lesbian Rights Lobby, *Submission 47*.

245 Standing Committee on Law and Justice, Legislative Council (NSW), *Racial Vilification Law in New South Wales* (2013) xi.

246 Australia/Israel & Jewish Affairs Council, *Submission 100*. See also Glen Falkenstein, *'Jihad against Jews'—How Our Race Hate Laws Have Failed Us* <www.abc.net.au/news>.

247 To adopt the language of *Criminal Code* s 80.2B.

248 The new offence is modelled on the advocating terrorism offence in s 80.2C, but has some important differences, including that it is limited to public acts of advocacy: Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (Cth) [56].

249 Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 140*; Public Interest Advocacy Centre, *Submission 55*.

on racial superiority or hatred and all other propaganda activities promoting and inciting racial discrimination. Article 4 is not fully implemented in Australian law, because s 18C does not create a criminal offence.[250]

4.214 In 2000, the UN Committee on the Elimination of Racial Discrimination acknowledged the 'civil law prohibition of offensive, insulting, humiliating or intimidating behaviour based on race' contained in s 18C, and recommended that Australia 'continue making efforts to adopt appropriate legislation' giving full effect to art 4(a) of CERD.[251]

4.215 Greater harmonisation between Commonwealth, state and territory laws in this area may also be desirable. While all Australian states and the ACT have racial discrimination legislation in many ways similar to the *RDA*, the approaches to racial vilification and other conduct based on race hate are not uniform.[252]

Media, broadcasting and communications laws

4.216 Obscenity laws have a long history in the common law,[253] and censorship of publications dates back to the invention of the printing press.[254]

4.217 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 Act* and complementary state and territory enforcement legislation.[255]

4.218 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 strongest 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.

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250 Australia has entered a reservation in relation to art 4(a) of CERD that states the Australian Government intends, when suitable, 'to seek from Parliament legislation specifically implementing the terms of article 4(a)': United Nations, United Nations Treaty Collection, Chapter IV Human Rights, *International Convention on the Elimination of All Forms of Racial Discrimination*, Reservation Made by Australia.

251 Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, 66th Sess, UN Doc CERD/C/AUS/CO/14 (14 April 2005).

252 Australian Human Rights Commission, *Racial Vilification Law in Australia* <www.humanrights.gov.au>.

253 See *Crowe v Graham* (1968) 121 CLR 375, 391; *Knuller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435, 471. Since 1727, it has been 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.

254 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.

255 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).

4.219 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'.[256] Civil Liberties Australia also expressed concern about the scope of the classification scheme.[257]

4.220 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.[258] 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'.[259]

4.221 Following the passage of the *Enhancing Online Safety for Children Act 2015* (Cth), a scheme addressed at cyber-bullying material is administered by the Children's e-Safety Commissioner.

4.222 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.

4.223 Other communications laws place restrictions on speech and expression. For example, the *Do Not Call Register Act*, *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.[260]

4.224 ALHR submitted that s 313 of the *Telecommunications Act* unjustifiably limits freedom of speech.[261] 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.

4.225 Commonwealth agencies have used s 313 to prevent the continuing operation of online services in breach of Australian law (for example, sites intended to facilitate 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

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256 Law Council of Australia, *Submission 75*.

257 Civil Liberties Australia, *Submission 94*.

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

259 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'.

260 See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 10th Report of 2013* (June 2013).

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

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.[262] The Committee recommended that the Australian Government adopt whole-of-government guidelines for the use of s 313, proposed by the Department of Communications.[263]

4.226 ALHR 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 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.[264]

Information laws

4.227 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.

4.228 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’.[265]

4.229 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.

4.230 The Office of the Australian Information Commissioner (OAIC) observed the functions of that office regularly require balancing the protection of personal information under the *Privacy Act* with the broader public interest in the free flow of information and with an individual’s right to access government information under the *FOI Act*. The role of the OAIC in examining legislative proposals includes assessing whether a law or practice ‘is reasonable, proportionate and necessary and the least privacy invasive option’.[266]

4.231 In the ALRC’s view, there is no reason to suggest that privacy regulation unjustifiably interferes with freedom of speech.

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262 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.

263 Ibid rec 1.

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

265 Free TV Australia, *Submission 48*.

266 Office of the Australian Information Commissioner, *Submission 114*. See also Australian Privacy Foundation, *Submission 116*.

4.232 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.[267] For example, the ICCPR defines the right to freedom of expression as including freedom to 'seek' and 'receive' information.[268]

4.233 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'.[269]

4.234 Freedom of information law is a recent development based on statute, and is concerned primarily with promoting government accountability and transparency by providing a legal framework for individuals to request access to government documents.[270] While freedom to seek and receive information is linked with freedom of speech, it is not a traditional common law right.

4.235 Finally, stakeholders expressed concern about the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth) including in relation to its implications for journalism and the protection of media sources.[271] This Act, which came into force in March 2015, included some safeguards applying to the release of metadata that might identify a journalist's source. While the effects of this law, and communications and data surveillance laws more generally, may include indirect 'chilling' effects on freedom of speech and expression, these concerns are beyond the scope of this Inquiry.[272]

Intellectual property laws

4.236 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.[273]

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267 P Timmins, *Submission 27*.

268 *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).

269 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*.

270 *Freedom of Information Act 1982* (Cth) s 3.

271 Law Council of Australia, *Submission 140*; Australian Privacy Foundation, *Submission 116*; Australian Lawyers for Human Rights, *Submission 106*; Civil Liberties Australia, *Submission 94*; 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*.

272 See Ch 2. See also, Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014).

273 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: *Copyright Act 1968* (Cth) s 115A.

4.237 While the history of intellectual property protection goes back to the 1710 *Statute of Anne*,[274] intellectual property rights can be seen as affecting others' freedom of speech and expression.

4.238 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[275]—as recommended by the ALRC in its 2014 report, *Copyright and the Digital Economy*.[276] The Copyright Council submitted that to the extent that Australian copyright law may interfere with freedom of speech, it is 'proportionate and appropriate'.[277]

4.239 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);
- *Protected Symbols Determination 2013* (Cth); and
- *Protection of the Word 'ANZAC' Regulations 1921* (Cth).[278]

4.240 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.[279]

4.241 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

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274 1710, 8 Anne c 19.

275 Australian Digital Alliance and Australian Libraries Copyright Committee, *Submission 61*. See also D Black, *Submission 6*.

276 Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2014) rec 1.

277 Australian Copyright Council, *Submission 101*. See also Copyright Agency, *Submission 104*.

278 In *Davis v Commonwealth*, the High Court ruled that the grant of a monopoly on '200' to the Australian Bicentennial Authority was beyond the 'corporations' power in s 51(xx) and constitutionally invalid: *Davis v Commonwealth* (1988) 166 CLR 79.

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

advertising content', art 19.3 of the ICCPR expressly permits restricting this right where necessary for protecting public health.[280]

4.242 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 the 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.[281]

4.243 The Human Rights Committee noted, in relation to the proportionality of the restriction, that exemptions were provided for the purposes of criticism, review or the provision of information.[282]

Other laws

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

4.245 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. Section 45DD provides some exemptions where the 'dominant purpose of conduct relates to environmental protection or consumer protection'.

4.246 There may be a question whether s 45D of the *Competition and Consumer Act* prohibits campaigns that urge the general public to boycott the products of a particular business, including on the basis of the domestic or foreign policies of the nation where the business originates. It has been suggested that it should be put beyond doubt that such campaigns are not prohibited.[283]

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280 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* (2012).

281 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].

282 Ibid [1.94].

283 Michael Sexton SC, 'Legislative Restrictions on Freedom of Speech' (Speech, ALRC Freedoms Symposium, Federal Court of Australia, Sydney, 8 October 2015).

4.247 The Australian Industry Group strongly supported the restrictions on engaging in secondary boycotts and stated that these ‘must not be watered down or removed in favour of uncompetitive behaviour justified by a perceived freedom of speech or expression of employees (or their representatives)’.[284]

4.248 The *Charities Act 2014* (Cth) provides that a charity cannot promote or oppose a political party or a candidate for political office.[285] 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.[286]

4.249 Other laws impose prohibitions on forms of false, deceptive or misleading statements, including the *Competition and Consumer Act* (Cth) (Australian Consumer Law)[287] and the *Corporations Act 2001* (Cth).[288]

4.250 Finally, a number of Commonwealth 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’).

Conclusion

4.251 The ALRC concludes that the following Commonwealth laws should be further reviewed to determine whether they unjustifiably limit freedom of speech:

- Pt IIA of the *RDA*, in conjunction with consideration of anti-vilification laws more generally.
- Legislative provisions that protect the processes of tribunals, commissions of inquiry and regulators, for example s 170 of the *Veterans’ Entitlements Act*.
- Secrecy offences, including the general secrecy offences in ss 70 and 79 of the *Crimes Act*.

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284 Australian Industry Group, *Submission 131*.
285 *Charities Act 2014* (Cth) ss 5, 11.
286 *Commonwealth Electoral Act 1918* (Cth) pt XXI. See also *Broadcasting Services Act 1992* (Cth) sch 2 cl 3, 3A.
287 *Competition and Consumer Act 2010* (Cth) sch 2 s 18.
288 *Corporations Act 2001* (Cth) ss 1309, 1041E.

- *Criminal Code* s 80.2C (advocating terrorism), ss 102.1, 102.3, 102.5, 102.7 (prescribed terrorist organisations) and s 105.41 (preventative detention orders). These provisions are subject to review by INSLM and the Intelligence Committee as part of their ongoing roles.
- Section s 35P of the *ASIO Act* (special intelligence operations). This provision is also subject to review by INSLM and the Intelligence Committee as part of their ongoing roles.

5. Freedom of Religion

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Summary

5.1 Religious freedom encompasses freedom of conscience and belief, the right to observe or exercise religious beliefs, and freedom from coercion or discrimination on the grounds of religious (or non-religious) belief.

5.2 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.

5.3 Australians enjoy the freedom to worship and observe religion, and the freedom not to be coerced into engaging in religious practices. There are very few, if any, provisions in Commonwealth laws that interfere with religious freedom in these ways. The main areas of tension arise where religious freedom intersects with anti-discrimination laws, which have the potential to limit the exercise of freedom of conscience outside liturgical and worship settings.

5.4 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. These laws, such as the *Sex Discrimination Act 1984* (Cth), are intended to give effect to Australia's international treaty obligations, and other relevant international instruments, and to eliminate various forms of discrimination that have negative social, health, and financial effects for individuals and society.

5.5 Some religious groups or individuals may wish to engage in conduct that may constitute unlawful discrimination against others, on the grounds of sex, sexual orientation, or the marital or relationship status of individuals.

5.6 Some stakeholders have argued for reforms to anti-discrimination laws to ensure that freedom of religion is protected more fully, including through the operation of exemptions from anti-discrimination laws for religious organisations, or 'conscientious objection' provisions. Other stakeholders, by contrast, suggested that the existing exemptions for religious organisations should be narrowed or removed, not widened.

5.7 A broader concern of stakeholders is that freedom of religion may be vulnerable to erosion by anti-discrimination law if religious practice or observance is respected only through exemptions to general prohibitions on discrimination. An alternative approach would involve the enactment of general limitations clauses, under which legislative definitions of discrimination would recognise religious practice or observance as lawful discrimination, where the conduct is a proportionate means of achieving legitimate religious objectives.

The common law

5.8 Arguably, 'the struggle for most of the principal civil liberties we have today originated in the struggle for various aspects of religious liberty'.[1] However, the common law itself has provided little protection for freedom of religion.[2]

5.9 Australian courts have stated that religious belief is a 'fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity';[3] and that freedom of religion is the 'paradigm freedom of conscience' and 'of the essence of a free society'.[4] In *Evans v New South Wales,* religious belief and expression was described as an 'important freedom generally accepted in society'.[5]

5.10 Freedom of religion has been characterised as a 'composite' freedom—as it derives from freedom of thought and conscience, and its exercise directly involves

1 Jay Newman, *On Religious Freedom* (University of Ottawa Press, 1991) 100.

2 The common law 'quite possibly does not protect religious freedom': Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (2012) 88. See, eg, *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.

3 Supreme Court of Victoria, Court of Appeal: *Christian Youth Camps Limited v Cobaw Community Health Services Limited* (2014) 308 ALR 615, [560] (Redlich JA).

4 *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130 (Mason CJ, Brennan J).

5 *Evans v New South Wales* (2008) 168 FCR 576, [79] (French, Branson and Stone JJ).

other freedoms such as freedom of speech and association.[6] Therefore, the common law may provide indirect protection to the limited extent that it protects against encroachments of other freedoms, without which freedom of religion is not possible.

Definition

5.11 The High Court has propounded various definitions of 'religion'. In the *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (the *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'.[7]

5.12 In *The Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (the *Scientology* case)—which concerned whether the Church of the New Faith qualified as a religion for the purposes of charitable tax exemptions—judges of the High Court expressed a range of views about how religion may be defined. Mason ACJ and Brennan J proposed the following criteria for the existence of a 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.[8]

5.13 Wilson and Deane JJ set out five indicia:

> 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 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.[9]

5.14 These definitions are wide enough to apply to most religions, but may raise questions about their application to, for example, Buddhism or indigenous religion or spirituality.[10]

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6 Newman, above n 1, 99–100.

7 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 123.

8 *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 136.

9 Ibid 173–4.

10 In the *Scientology case*, Mason ACJ and Brennan J stated that the 'search for religious indicia should not be confined to the Judaic group of religions—Judaism, Christianity, Islam—for the tenets of other acknowledged religions, including those which are not monotheistic or even theistic, are elements in the contemporary atmosphere of ideas': Ibid 133.

Characterising freedom of religion

5.15 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)'.[11]

5.16 Negative religious freedom, on the other hand, is freedom from coercion or discrimination on the grounds of religious or non-religious belief.[12] In the *Scientology* case, Mason ACJ and Brennan J commented that the 'chief function in the law of a definition of religion is to mark 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'.[13]

5.17 The positive exercise of religion—according to certain 'canons', 'standards' or 'codes' of conduct—is a source of potential conflict between freedom in the exercise of religious beliefs and the exercise by others of other rights and freedoms.

History

5.18 Any 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.[14] 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.[15]

5.19 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.[16]

5.20 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.[17]

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11 Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press) 128.

12 *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.

13 *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130.

14 The treatment of religious freedom in the common law of Australia developed in a different historical and legal context from that in England. This difference—which includes the fact that Australia never had 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).

15 *Act of Toleration 1689* (1 Will & Mary c 18).

16 *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.

17 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.

5.21 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'.[18]

5.22 Thomas Jefferson, 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.[19]

5.23 Indirect recognition of freedom of religion in the common law developed towards the end of the 19th century in England in the context of wills, for instance 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.[20] Generally speaking, the law will make void any condition which is in restraint of religion.[21]

5.24 The equitable doctrine of undue influence also developed to extend to religious influence. In the English case of *Allcard v Skinner*, the Court of Appeal of England and Wales avoided 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 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.[22]

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18 '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] (Nicholls LJ).

19 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.

20 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].

21 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.

22 *Allcard v Skinner* (1887) 36 Ch D 145 183–85. For more on the principle of undue influence, see Croucher and Vines, above n 21, 255; Roderick Pitt Meagher, Dyson Heydon and Mark Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002) ch 15; 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.

Protections from statutory encroachment

Australian Constitution

5.25 Religious freedom 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.

5.26 The provision includes four prohibitions on the making of Commonwealth laws,—the 'establishment', 'observance', 'free exercise' and 'religious test' clauses respectively. It 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.[23]

5.27 Australian courts have considered the interpretation of s 116 in only a small number of cases. Those cases have concerned the meaning of religion (as discussed above), and the operation of the 'free exercise' and 'establishment' clauses.[24] Generally, however, s 116 has been read narrowly by the High Court.[25]

Establishment clause

5.28 There is only one decision of the High Court that considers the scope of the establishment clause—the case of *Attorney-General (Vic) (ex rel Black) v Commonwealth* (the DOGS case)—in which an organisation called Defence of Government Schools, challenged federal funding of non-government schools operated by religious organisations.[26]

5.29 The High Court held that the funding did not contravene the establishment clause when the funding was for ordinary educational purposes. The reasoning in the DOGS case has been described as 'restrictive', strict' and as setting 'a very high threshold'.[27] A majority held that the establishment clause only prohibited the

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23 Arguably, the implied constitutional freedom of political communication may also provide some protection for the free exercise of religion, to the extent that public expression of religious perspectives is 'relevantly political and a factor in the formation of political opinions as a function of the democratic process': A Deagon, *Submission 84*.

24 The religious test clause was raised in the 'School Chaplains' case, but the High Court determined that a school chaplain did not hold an office under the Commonwealth: *Williams v Commonwealth (No 1)* (2012) 248 CLR 156.

25 *Attorney-General (Vic) (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* (Oxford University Press, 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.

26 *Attorney-General (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559.

27 See Luke Beck, 'The Establishment Clause of the Australian Constitution: Three Propositions and a Case Study' [2014] *Adelaide Law Review* 225, 225–6.

Commonwealth from passing legislation that purposely created a national church or religion.[28]

5.30 However, the continuing strength of the authority of the decision in the DOGS case has been questioned. One reason is that, since this case was decided in 1981, the High Court has adopted a more liberal approach to the interpretation of constitutional rights and safeguards.[29] More fundamentally, such a narrow interpretation would render the establishment clause meaningless, because it would 'only ban something about which the Federal Parliament appears to have no power to legislate—the creation of a national church'.[30]

5.31 Importantly, this leaves room to argue that s 116 may be capable of applying to laws that have the effect, and not just the purpose of establishing religion, imposing religious observance, prohibiting the free exercise of religion, or requiring religious tests.

Free exercise clause

5.32 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 the free exercise clause of 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.[31]

5.33 Griffith CJ also stated that while 'a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds … it does not come within the prohibition of s 116'.[32] These statements can be seen as suggesting that the free exercise clause is concerned only with laws which 'in terms' ban religious practices or otherwise forbid the free exercise of religion.[33]

5.34 The *Jehovah's Witnesses* case challenged a ban of the Jehovah's Witnesses under defence regulations.[34] The effect of the ban was that the group's doctrines were illegal and they could not lawfully print or publish their beliefs or hold meetings advocating those beliefs. While the regulations were found to be invalid as *ultra vires* the *National Security Act 1939* (Cth) and, in part, beyond the defence power in s 51(vi) of the *Constitution*,[35] the judgments provided interpretations of s 116.

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28 *Attorney-General (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559, 579, 583–4, 604, 615–6, 653; Reid Mortensen, 'The Unfinished Experiment: Report on Religious Freedom in Australia' *Emory Law Review* 167, 174.

29 Generally, Mortensen, above n 28; Beck, above n 27.

30 Mortensen, above n 28, 174.

31 *Krygger v Williams* (1915) 15 CLR 366, 369 (Griffith CJ).

32 Ibid.

33 *Kruger v Commonwealth* (1997) 190 CLR 1, 130–31.

34 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116.

35 Ibid 148, 150, 156, 157, 168; Mortensen, above n 28, 172.

5.35 Arguably, the judges in the *Jehovah's Witnesses* case took a broad view of the free exercise clause, and assumed that a 'facially-neutral regulation directed at the suppression of subversive organizations, burdening religion in its effect', could offend the clause.[36]

5.36 However, in *Kruger v Commonwealth,* the High Court confirmed the view that laws that have the effect of indirectly prohibiting the free exercise of religion are not invalidated by s 116.[37] That is, s 116 is interpreted as purposive in nature—being directed at laws that explicitly have the prohibited aim, rather than just the indirect effect.[38]

5.37 It remains possible, however, that the removal or lessening of exemptions for religious organisations contained in Commonwealth anti-discrimination laws or, for example, legislating for same-sex marriage without adequate recognition for freedom of religion, may have constitutional implications under s 116.

Principle of legality

5.38 The principle of legality provides some protection to freedom of religion. When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of religion, unless this intention was made unambiguously clear.[39] In *Canterbury Municipal Council v Moslem Alawy Society*, it was suggested that Australian courts should show restraint in upholding provisions which interfere with the exercise of religion:

> 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.[40]

5.39 However, under Australia's model of parliamentary supremacy, common law protection of freedom of religion has its limits, where a legislative intention is clearly expressed:

> 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.[41]

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36 Mortensen, above n 28, 173. Referring, in particular, to *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 132 (Latham CJ).

37 See, eg, *Kruger v Commonwealth* (1997) 190 CLR 1, 40 (Brennan CJ), 86 (Toohey J).

38 Gaudron J disagreed with this narrow interpretation and stated that s 116 was 'intended to extend to laws which operate to prevent the free exercise of religion, not merely those which, in terms, ban it': Ibid 130–31.

39 *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130 (Mason ACJ, Brennan J).

40 *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) 228–9.

41 Denise Meyerson, 'The Protection of Religious Rights under Australian Law' (2009) 3 *Brigham Young University Law Review* 529, 542.

International law

5.40 Article 18 of the *Universal Declaration of Human Rights* enshrines freedom of religion, in providing that everyone 'has the right to freedom of thought, conscience and religion'.[42]

5.41 Article 18.1 of the International Covenant on Civil and Political Rights, (ICCPR) provides:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.[43]

5.42 The UN Human Rights Committee has explained that the right to freedom of thought, conscience and religion is 'far-reaching and profound' and 'encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others'.[44]

5.43 Under art 18.4, the parties to the ICCPR also 'undertake to have respect for 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'.

5.44 The UN Human Rights Committee has noted that public education that includes instruction in a particular religion or belief is inconsistent with art 18.4, unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.[45]

5.45 The UN Human Rights Committee also observed that the fundamental character of freedom of thought, conscience and religion is reflected in the fact that this provision cannot be derogated from, even in time of public emergency.[46]

5.46 Infringement of a person's rights under art 18 may engage a number of other rights and freedoms protected in the ICCPR, including the right to privacy,[47] the rights to hold opinions and freedom of expression,[48] the right of peaceful assembly,[49] and liberty of movement.[50]

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42 *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.

43 *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.

44 United Nations Human Rights Committee, *General Comment 22 on Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, CCPR/C/21/Rev.1 (30 July 1993) [1].

45 Ibid [6].

46 Ibid [1]. See *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 4.2. Derogations allow states parties to adjust their obligations temporarily under the treaty in exceptional circumstances, for example, in times of public emergency threatening the life of the nation.

47 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17.

48 Ibid art 19.

49 Ibid art 21.

50 Ibid art 12.

5.47 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]

Bills of rights

5.48 In some countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms, for example in the United States,[53] the United Kingdom,[54] Canada[55] and New Zealand.[56] An example is s 15 of the New Zealand *Bill of Rights Act 1990* (NZ), 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.

5.49 The *Charter of Human Rights and Responsibilities 2006* (Vic) and the *Human Rights Act 2004* (ACT) also include protection for religious freedom.[57]

Justifications for limits on freedom of religion

Legitimate objectives

5.50 The threshold question in a proportionality test is whether the objective of the law is legitimate. Freedom of religion is 'subject to powers and restrictions of government essential to the preservation of the community'.[58] For example, in the *Jehovah's Witnesses* case, Williams J stated that the scope of s 116 of the *Australian Constitution* may be limited in the interests of national security.[59]

5.51 Outside constitutional contexts, some guidance on what should be considered legitimate objectives of a law that interferes with freedom of religion may be derived from international human rights law. International law distinguishes the freedom to manifest religion or belief from freedom of thought and conscience itself. Article 18 of the ICCPR does not permit any limitations on the 'freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice'.[60]

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51 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J).
52 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). See Ch 2.
53 *United States Constitution* amend I.
54 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 9(1).
55 *Canada Act 1982* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 2.
56 *New Zealand Bill of Rights Act 1990* (NZ) s 15.
57 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14; *Human Rights Act 2004* (ACT) s 14.
58 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 149 (Rich J).
59 Ibid 161.
60 United Nations Human Rights Committee, *General Comment 22 on Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, CCPR/C/21/Rev.1 (30 July 1993) [3].

5.52 However, under art 18.3, restrictions on the freedom to manifest religion or belief are permitted if limitations are 'prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others'.[61]

5.53 The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts.[62] The Australian Human Rights Commission has observed that 'practice' appears to be the broadest category, but that art 18 does not provide any further guidance about the level of connection required between an act and a belief for it to constitute a manifestation through 'practice'. [63]

5.54 Clearly, the right to manifest religion or belief 'does not always guarantee the right to behave in public in a manner governed by that belief'. That is, once a belief is 'manifested (that is, implemented) in action, it leaves the sphere of absolute protection, because the manifestation of a religious belief may have an impact on others'.[64]

5.55 The UN Human Rights Committee has stated that art 18.3 should be strictly interpreted, and that limitations based on other grounds, such as national security, are not permitted.[65]

5.56 The Siracusa Principles provide some guidance on permissible limitations on human rights.[66] While the scope of the 'rights and freedoms of others' that may act as a limitation extend beyond those recognised in the ICCPR, the principles state that when a conflict exists between a right protected in the ICCPR and one which is not, recognition and consideration should be given to the fact that the ICCPR 'seeks to protect the most fundamental rights and freedoms'.[67]

5.57 There is a wide range of justifications advanced 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

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61 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18.3.

62 The practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications: United Nations Human Rights Committee, *General Comment 22 on Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, CCPR/C/21/Rev.1 (30 July 1993) [4].

63 Australian Human Rights Commission, *Freedom to Believe and the Freedom to Manifest That Belief* <www.humanrights.gov.au>.

64 Ibid. Referring to decisions of the European Court of Human Rights.

65 United Nations Human Rights Committee, *General Comment 22 on Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, CCPR/C/21/Rev.1 (30 July 1993) [8].

66 United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984). See Ch 2.

67 Ibid [35]–[36]. The only ICCPR rights recognised as absolute rights, which cannot be limited, are freedom from torture (art 7); freedom from slavery (art 8); freedom from imprisonment for inability to fulfil a contractual obligation (art 11); the prohibition against the retrospective operation of criminal laws (art 15); and the right to recognition as a person before the law (art 16).

guardians have refused on religious grounds.[68] In contrast, courts have not insisted on life-saving treatment where an adult has made the same decision to refuse life-saving treatment.

Balancing rights and interests

5.58 In practice, legislatures and the courts often have to strike a balance between 'equality' rights like anti-discrimination, and freedom to manifest religious belief. Campbell and Whitmore stated:

> 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 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.[69]

5.59 An example of the need for such balancing was given in an amicus brief to the US Supreme Court case of *Obergefell v Hodges,*[70] in which a majority of the Court upheld the constitutional validity of state-based same-sex marriage legislation:

> 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.[71]

5.60 A number of stakeholders submitted that freedom of religion, as a fundamental right, should be given priority in balancing with 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'.[72] The Australian Christian Lobby (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.[73]

5.61 In particular, the ACL stated that 'it is not immediately clear that the right to non-discrimination is a permissible burden on freedom of religion'. Rights and

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68 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, and his parents, could not refuse life-saving therapeutic treatment on the basis of religious belief, despite the minor having 'Gillick' competency.

69 Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 204.

70 *Obergefell v Hodges* 576 US (June 26, 2015).

71 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)' (Public Law and Legal Research Paper Series 1–2, 2015) 1–2.

72 Freedom 4 Faith, *Submission 23*. Also Australia/Israel & Jewish Affairs Council, *Submission 100*.

73 Australian Christian Lobby, *Submission 33*. The ACL submitted that, instead, an 'overly expansive understanding of unjust discrimination has had the related effect of locating fundamental rights below the right to non-discrimination': Australian Christian Lobby, *Submission 135*.

interests should be 'carefully balanced without swiftly subjecting fundamental freedoms to non-discrimination'.[74]

5.62 The ACL submitted that rights to non-discrimination reach their limits where 'differentiations of treatment occur in the reasonable and objective pursuit of other fundamental rights, including freedom of thought, conscience and religion or belief'. This fact, the ACL said, is not currently reflected in Australian law. Rather, 'anti-discrimination law has become the dominant lens through which rights are viewed'.[75]

5.63 The Church and Nation Committee, Presbyterian Church of Victoria submitted that balancing freedom of religion with principles such as non-discrimination is 'misguided', because while religious freedom 'is a fundamental underpinning of our society, freedom from discrimination is not'.[76]

5.64 Other stakeholders also 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.[77] The Wilberforce Foundation submitted that the 'focus of human rights discourse on anti-discrimination' has caused

> both a misunderstanding of the effect of the ICCPR and a skewing and imbalance of legislation in favour of anti-discrimination, to the devaluation of the other fundamental rights and (as in the case of the right of freedom of religion) higher order rights than the right to non-discrimination.

5.65 Other stakeholders argued that considerations of religious freedom should always involve a balance with other, competing rights and interests and, in particular, the right to be free from unlawful discrimination.[78] In particular, some stakeholders highlighted the way in which legislative provisions that protect religious freedom may undermine the rights or freedoms of lesbian, gay, bisexual, transgender and intersex Australians—primarily the right to be free from discrimination.[79]

Laws that interfere with freedom of religion

5.66 Freedom of religion is infringed when a law prevents individuals from exercising their religion or requires them to engage in conduct which is prohibited by their religion.[80] Alternatively, the freedom will also be infringed when a law mandates

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74 Australian Christian Lobby, *Submission 135*.

75 Ibid.

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

77 Ibid.

78 Law Society of NSW Young Lawyers, *Submission 69*; Maronite Catholic Society Youth *Submission 51*; NSW Gay and Lesbian Rights Lobby, *Submission 47*; Kingsford Legal Centre, *Submission 21*. For example, in arguing that existing exemptions for religious organisations undermine the Australian Government's commitment to international law protecting vulnerable groups, such as women, from discrimination: Public Interest Advocacy Centre, *Submission 55*; Kingsford Legal Centre, *Submission 21*.

79 National Association of Community Legal Centres, *Submission 66*; NSW Gay and Lesbian Rights Lobby, *Submission 47*.

80 Radan, Meyerson and Croucher, above n 25, 4.

a particular religious practice. There are few, if any, Commonwealth laws that can be said to interfere with freedom of religion in these ways.[81]

5.67 Such challenges to freedom of religion as do exist in Australia can been seen as falling outside liturgical and worship settings and involving 'questions of freedom of conscience in a commercial or service provision setting, the integrity of religious education, and the manifestation of belief in other ways'.[82]

5.68 Encroachments arise in 'balancing religious freedom with other protected freedoms, such as freedom of speech'.[83] Issues remain about 'the balance to be 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'.[84]

5.69 This chapter identifies provisions in Commonwealth laws that may be characterised as interfering with freedom of religion in the areas of:

- anti-discrimination law;
- workplace relations laws;
- solemnisation laws under the *Marriage Act 1961* (Cth); and
- counter-terrorism legislation.

Anti-discrimination law

5.70 The following section discusses the potential for anti-discrimination laws to limit freedom of religion, the operation of exemptions for religious organisations, and whether exemptions should be replaced with a general limitations clause.

5.71 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.

5.72 For example, 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.[85]

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81 Law Council of Australia, *Submission 75*; Public Interest Advocacy Centre, *Submission 55*; Freedom 4 Faith, *Submission 23*; P Parkinson, *Submission 9*.

82 Australian Christian Lobby, *Submission 135*.

83 Law Council of Australia, *Submission 75*.

84 P Parkinson, *Submission 9*.

85 *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.

5.73 Some religious organisations discriminate on these and other grounds, for example by only appointing male priests and ministers, by excommunicating people who have sexual relationships outside marriage, or employing only teachers who are religiously observant in their schools. In some cases, such conduct will be covered by exemptions to anti-discrimination laws, as discussed below.

5.74 In other cases, conduct considered as giving effect to religious beliefs may constitute unlawful discrimination. FamilyVoice Australia observed that some of the grounds on which discrimination is prohibited in the *SDA*, for example, 'directly contradict moral values of the Christian faith and other faiths'. From this perspective:

> Many parts of antidiscrimination laws represent a direct assault on religious freedom by prohibiting some conduct that may be required to give effect to religious beliefs. Religious beliefs generally make moral distinctions between right and wrong, between good and bad, whereas antidiscrimination laws may declare conduct giving effect to such moral distinctions to be unlawful.[86]

5.75 Arguments have been raised that the practices of religious organisations—including in some areas of employment—lie outside the 'commons' or public sphere, and should generally be excluded from government interference, including in relation to eliminating discrimination.[87] Essentially, this appears a political argument for lower anti-discrimination requirements in some areas of activity.

5.76 Dr Joel Harrison and Professor Patrick Parkinson have 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'. The commons is not simply whatever is 'public' rather than 'private', but is more focused on 'particular spheres of official authority and potentially most commercial enterprises, where non-discrimination should be expected given the norms of the institution or affiliation involved'.[88]

5.77 However, beyond these commons, there lies a range of associations—'natural, educational, charitable, voluntary, or commercial'. These are said to be 'voluntary associations of the like-minded, those who share opinions, interests, or a shared identity and are not engaged in profit-making'.[89] They include religious institutions, but also everything from a book club to a political party.[90] Beyond the commons, it is argued that there is less need for imposing anti-discrimination requirements.

5.78 In contrast, the Human Rights Law Centre maintained that a line dividing public and private remains relevant because 'it marks the point at which the religious beliefs of one person or group impact upon other people and society generally'. That is, when

86 FamilyVoice Australia, *Submission 122*.
87 See, eg, Freedom 4 Faith, *Submission 23*.
88 Patrick Parkinson and Joel Harrison, 'Freedom beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society' (2014) 40 *Monash University Law Review* 411, 442–3.
89 Ibid 443.
90 Ibid 444.

'religious practice affects those who do not subscribe to the religion, the Government's regulatory capacity and responsibilities are increased'.[91]

Exemptions for religious organisations

5.79 The accommodation or 'special treatment' in anti-discrimination law of those who observe religious beliefs is a point of tension.[92] In Australia, debate in this area has crystallised around the exemptions for religious organisations in anti-discrimination legislation. Where exemptions do not apply, or are not broad enough, anti-discrimination law may be considered to encroach on freedom of religion.

5.80 Commonwealth anti-discrimination laws contain exemptions for religious organisations and religious educational institutions. These exemptions apply 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. For example, in the *SDA*, the exemptions include the following:

- s 23(3)(b), which allows discrimination in the provision of accommodation by religious bodies;
- s 37, which allows discrimination in the ordination or appointment of priests, ministers of religion or members of any religious order, the training or education of persons seeking ordination or appointment, the appointment of persons to perform religious duties or functions, and any other act or practice of a body established for religious purposes that 'conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion'; and
- s 38, which allows discrimination by educational institutions established for religious purposes 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'.

5.81 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 (unless it would breach state or territory law).

Previous inquiries

5.82 There have been a number of parliamentary and other inquiries into the exemptions in the *SDA*.

5.83 In 2008, the Senate Standing Committee on Legal and Constitutional Affairs (Legal and Constitutional Affairs Committee) inquired into the effectiveness of the

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91 Human Rights Law Centre, *Submission 148*.

92 Radan, Meyerson and Croucher, above n 25, 5. It may also be said that rights to freedom of religion and non-discrimination 'exist concurrently and within prescribed limits or accommodations'. The characterisation of 'special treatment' may arise, in the Australian context, because 'the single right of non-discrimination has been over-legislated': Australian Christian Lobby, *Submission 135*.

SDA in eliminating discrimination and gender inequality and recommended reform of the exemptions.[93]

5.84 In 2011, the Australian Human Rights Commission's report, *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination,* noted a divergence in opinions about the appropriateness of exemptions for religious organisations, and that most stakeholders who commented on the issue opposed the existing exemptions.[94]

5.85 In 2013, the Legal and Constitutional Affairs Committee conducted an inquiry into the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013. This inquiry also noted the range of opinions on the existence and operation of the exemptions in the *SDA*.[95]

5.86 The Legal and Constitutional Affairs 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.[96]

5.87 This recommendation was reflected in the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth), and was justified 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'.[97]

5.88 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—including a general limitations clause—without settling on a preferred model.[98] The consolidation process resulted in an exposure draft Human Rights and Anti-Discrimination Bill 2012, which was the subject of an inquiry by the Legal and Constitutional Affairs Committee.

5.89 Despite being primarily a consolidation exercise, the draft Bill contained several proposed changes to existing Commonwealth anti-discrimination law. These included a 'streamlined approach' to exemptions, incorporating a new general exception for justifiable conduct, and the preservation of religious exemptions with some limitations applying to Commonwealth-funded aged care services provided by religious organisations.[99]

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93 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.

94 Australian Human Rights Commission, *Addressing Sexual Orientation and Sex And/or Gender Identity Discrimination: Consultation Report* 2011 33.

95 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill* (2013) [3.9].

96 Ibid rec 1.

97 Ibid [2.31].

98 'Consolidation of Commonwealth Anti-Discrimination Laws' (Discussion Paper, Attorney-General's Department, 2011) 37–41.

99 Senate Legal and Constitutional Affairs Legislation Committee, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013) [1.13].

5.90 The Legal and Constitutional Affairs Committee recommended additional changes to exemptions including the removal of exemptions allowing religious organisations to discriminate against individuals in the provision of services, where that discrimination would otherwise be unlawful.[100]

Views on the exemptions

5.91 As in these previous inquiries, submissions in this Inquiry reflected divergent views about the existence and form of the religious organisation exemptions in the *SDA*, and about exemptions to anti-discrimination laws generally. These included:

- arguments that the existing exemptions are too narrow, and that anti-discrimination laws therefore unjustifiably limit freedom of religion; and
- arguments that the existing exemptions are too broad, and undermine the effectiveness of anti-discrimination legislation; and
- objections, in principle, to the use of exemptions to generally applicable anti-discrimination laws as a way of defining freedom of religion.

5.92 Concerns were raised about the limited scope of the exemption in s 38 of the *SDA*.[101] The Presbyterian Church of Queensland observed that the exemption 'requires courts to weigh the nature of religious truth', whereas the courts should instead 'adopt an approach that permits the religious institution and religiously convicted individual the maximum scope to define their own doctrine'.[102] FamilyVoice 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.[103]

5.93 The ACL expressed concern about the interpretation given to the phrase 'injury to the religious susceptibilities' of adherents of a religion. In *Griffin v The Catholic Education Office*,[104] 'injury to the religious susceptibilities' was found not to protect the Catholic Education Office from a negative finding where a 'lesbian activist' had applied to the Catholic Education Office to be classified as a teacher. The woman was suitably qualified, but her application was declined and she claimed discrimination on the grounds of sexual preference.

5.94 The Human Rights and Equal Opportunity Commission found that the exception from the definition of discrimination in s 3(1) of the (now repealed) *Human Rights and Equal Opportunity Commission Act 1986* (Cth) did not apply, stating that:

> If the employment of Ms Griffin would injure the religious susceptibilities of these students and their parents, the injury would be founded on a misconception. Indeed it would be not an injury to their religious susceptibilities but an injury to their

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100 Ibid rec 11. The Committee considered that the Australian Government should develop specific amendments to implement this recommendation, using the approach taken in the *Anti-Discrimination Act 1998* (Tas) as a model. Coalition Senators presented a dissenting report.

101 Presbyterian Church of Queensland, *Submission 136*; Australian Christian Lobby, *Submission 135*.

102 Presbyterian Church of Queensland, *Submission 136*.

103 FamilyVoice Australia, *Submission 73*.

104 *Griffin v The Catholic Education Office* [1998] EOC 92-928.

> prejudices. These injuries do not come within the terms of exception and are not a permissible reason for discriminating on the ground of sexual preference.[105]

5.95 Given this interpretation, and the similar wording of the exemption in s 38 of the *SDA*[106] and s 153(2)(b)(ii) of the *Fair Work Act 2009* (Cth), the ACL stated that the existing exemptions for religious organisations 'do not provide a high level of confidence for religious bodies that desire to ensure the integrity and ethos of their organisations can be maintained without legal disputes'.[107]

5.96 In relation to exemptions for educational institutions, stakeholders noted that religious observance occurs in all facets of a student's school experience and is not restricted to specific religious ceremonies, necessitating broader exemptions.[108] Christian Schools Australia Ltd explained that religion is 'not simply taught as a stand-alone subject' but 'permeates all that takes place and is lived out in the daily lives of the community of the school'. Religion is concerned with 'all manner of conduct—the use of appropriate language, the conduct of relationships, attitudes, values and expression of matters of sexuality'.[109]

5.97 In contrast, the Law Council of Australia submitted that ss 37 and 38 of the *SDA* reflect a reasonable balance between religious freedom and measures promoting non-discrimination.[110] Other stakeholders opposed the exemptions for religious organisations entirely, or argue that they should be wound back[111]—considering that the general application of anti-discrimination law is considered to be a justifiable interference with religious freedom.

5.98 Some stakeholders were concerned that exemptions undermine the effectiveness of anti-discrimination legislation.[112] For example, it was suggested that the employment practices of some religious educational institutions 'have a significant impact on the ability of people, including women, gay and lesbian persons, to find and remain in work and it is unacceptable that they not be subject to the same laws as other significant employers'.[113]

5.99 There are also arguments that exemptions for religious schools give the message to children that 'discrimination is relatively minor in comparison to other forms of

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105 Ibid 22.

106 Also *Fair Work Act 2009* (Cth) s 153(2)(b)(ii).

107 Australian Christian Lobby, *Submission 135*.

108 Australian Christian Schools Ltd, *Submission 45*.

109 Ibid.

110 Law Council of Australia, *Submission 140*.

111 See, eg, 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*.

112 See, eg, Human Rights Law Centre, *Submission 148*; National Association of Community Legal Centres, *Submission 143*; Kingsford Legal Centre, *Submission 110*; Law Society of NSW Young Lawyers, *Submission 69*; National Association of Community Legal Centres, *Submission 66*.

113 Kingsford Legal Centre, *Submission 110*.

harm against which the law protects and from which most religious schools have no exemptions' and that 'equality is a goal of limited value'.[114]

5.100 The possible negative effects on lesbian, gay, bisexual and transgender (LGBT) Australians were highlighted by a number of stakeholders.[115] The Victorian Gay and Lesbian Rights Lobby and NSW Gay and Lesbian Rights Lobby (Vic/NSW Gay and Lesbian Rights Lobby) submitted that blanket exemptions for religious exemptions fail to balance the human right of freedom of religion with freedom from discrimination.

> Indeed, such wide-ranging exemptions give priority to religious freedom at the expense of the freedoms of LGBT Australians and allow LGBT people to be discriminated against as they seek to obtain an education and access healthcare, themselves fundamental human rights.[116]

5.101 The Public Interest Advocacy Centre (PIAC) accepted that a religious group may need to discriminate 'on occasions to ensure ongoing manifestation of the core tenets of its faith', but recommended that current religious exemptions be amended to require that religious organisations justify discrimination in the specific circumstances of each proposed act.[117]

Exemptions and public funding

5.102 Some stakeholders questioned exemptions from anti-discrimination legislation for religious organisations that receive public funding or perform public services,[118] which may include, for example, aged care, education, adoption, employment assistance and child welfare.

5.103 On the other hand, regardless of public funding, there is an argument that, for example, the existence of religious schools that have some degree of autonomy from state control, is an important part of a diverse and plural society.[119]

5.104 Religious bodies raised a number of arguments against using public funding as a reason to remove exemptions. The Presbyterian Church of Queensland submitted that the 'mere receipt of funding does not alter or limit the legitimacy of the rationale for the separate treatment of the organisation'—that is, the protection of religious freedom. Further:

> There is also a danger in limiting religious freedom to only those religious entities that do not engage in the commercial sphere. The right to religious freedom (both as classically understood and under contemporary international instruments) is not limited to religious institutions, it applies to all.[120]

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114 NSW Gay and Lesbian Rights Lobby, *Submission 47*. The submission quoted Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30 *Adelaide Law Review* 31, 42.

115 Victorian Gay and Lesbian Rights Lobby and NSW Gay and Lesbian Rights Lobby, *Submission 120*; A Lawrie, *Submission 112*.

116 Victorian Gay and Lesbian Rights Lobby and NSW Gay and Lesbian Rights Lobby, *Submission 120*.

117 Public Interest Advocacy Centre, *Submission 55*.

118 Kingsford Legal Centre, *Submission 110*; Public Interest Advocacy Centre, *Submission 55*.

119 Evans and Ujvari, above n 114, 31.

120 Presbyterian Church of Queensland, *Submission 136*.

5.105 The ACL suggested that placing restrictions on religious organisations that receive public funding 'would itself be a form of discrimination against those organisations, as [would be] a refusal to grant funds to certain bodies on the basis of their religious beliefs'.[121] It submitted:

> Religious organisations receiving taxpayer funds should be able to determine their own identity without government interference. It is not the role of government to interfere in a religious organisation's mission or vision.[122]

5.106 These stakeholders also observed that funding restrictions could lead to the withdrawal of religious organisations from the provision of services, with detrimental effects on the autonomy and choice of the recipients of services.[123] Religious service providers were seen as contributing to 'the common good of society', and public support, rather than endorsing a particular religious 'worldview', is instead an acknowledgment that a 'pluralistic society sees charitable and social engagements operating in diverse ways for the collective good'.[124]

5.107 A particular concern was that 'forcing religious charities and bodies to adhere to laws that prevent them from eliminating job applicants who don't share in their worldview is likely to change the ethos and vision of the organisation', and make it less likely that people who are motivated by religious values and principles would make themselves available for such work.[125] Parkinson submitted that religious 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 LGBT organisations do' and that to select on the basis of 'mission fit' is not discrimination.[126]

A general limitations clause?

5.108 Some stakeholders favoured the introduction of a 'general limitations clause' as an alternative to the current religious organisation exemptions.[127] Such a clause would clarify that conduct which is necessary to achieve a legitimate objective, including freedom of religion, and is a proportionate means of achieving that objective, is not discrimination.[128]

5.109 Some stakeholders objected to the model of the current exemptions, arguing against the practice of defining religious freedom by way of exemptions from generally applicable laws.[129] Parkinson and Aroney have observed that anti-discrimination laws

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121 Australian Christian Lobby, *Submission 135*.
122 Ibid.
123 Presbyterian Church of Queensland, *Submission 136*; Australian Christian Lobby, *Submission 135*.
124 Australian Christian Lobby, *Submission 135*.
125 Ibid. Also P Parkinson, *Submission 9*.
126 P Parkinson, *Submission 9*.
127 Australian Christian Lobby, *Submission 135*; Victorian Gay and Lesbian Rights Lobby and NSW Gay and Lesbian Rights Lobby, *Submission 120*.
128 The benefits and disadvantages in adopting a general limitations clause to replace some or all of the current specific exemptions are summarised in: 'Consolidation of Commonwealth Anti-Discrimination Laws', above n 98, 37.
129 Australian Christian Lobby, *Submission 135*; Maronite Catholic Society Youth *Submission 51*; Australian Christian Lobby, *Submission 33*; Wilberforce Foundation, *Submission 29*; Freedom 4 Faith, *Submission 23*; P Parkinson, *Submission 9*.

may diminish freedom of religion 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'.[130]

5.110 The ACL argued that 'religious freedom should not be considered as a concession to more fundamental freedoms from non-discrimination'.[131] It summarised objections to the current exemptions model as follows:

> The language of exemptions sends a message of 'special pleading' or preferential treatment towards religious bodies. Rather than being the rule, or the assumption, freedom of religion is relegated to being the exception, or the special accommodation. This is a reversal of the place of fundamental freedoms in a free society such as Australia. If the narrative promoted by the relevant legislation clearly articulated the limits of discrimination law and the assumption of freedom, such resentment or confusion could be ameliorated.[132]

5.111 Parkinson and Aroney have proposed a general limitations clause that redefines discrimination to include limitations on freedom of religion where 'necessary'.[133] The proposed definition is comprehensive and combines direct and indirect discrimination. The definition includes a proportionality test and 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).[134]

5.112 In 2008, the Legal and Constitutional Affairs 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.[135] In making this

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130 P Parkinson and N Aroney, Submission to Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws,* 2011.

131 Australian Christian Lobby, *Submission 33*.

132 Australian Christian Lobby, *Submission 135*.

133 This approach was supported by Freedom 4 Faith, *Submission 23*.

134 P Parkinson and N Aroney, Submission to Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws,* 2011.

135 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.

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.[136]

5.113 The Vic/NSW Gay and Lesbian Rights Lobby submitted that broad permanent exemptions for educational institutions and religious bodies should be removed and replaced with a general justification defence or general limitations clause. Such a clause, it said, should set out criteria for evaluating circumstances in which religious rights and interests should take precedence over the right to freedom from discrimination, and how these competing rights should be balanced.[137]

5.114 In this context, PIAC observed that the 2011–13 process directed towards consolidation of Commonwealth anti-discrimination laws may have represented 'a missed opportunity to recast the current broad exemptions'—including the exemptions for religious organisations under the *SDA*—so as to comply better with 'orthodox principles of international human rights law'.[138]

Conscience clauses

5.115 Others argued for more explicit carve-outs from anti-discrimination law for religious organisations or individuals. 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 obtainable elsewhere.[139]

5.116 FamilyVoice submitted that ss 37 and 38 of the *SDA* should be replaced with 'a simple provision for exemption from the Act for persons, natural or corporate, whose conscientious beliefs do not allow them to comply with the Act, or with particular provisions of the Act'.[140]

5.117 Suggestions have been made that, if legislation is enacted to provide for same-sex marriage, wedding service providers should be able to conscientiously object to providing associated services. This issue is discussed further below, in relation to the *Marriage Act*.

Workplace relations laws

5.118 Workplace relations laws contain provisions that prohibit employers from discriminating against an employee on the basis of a protected characteristic. This may be considered as interfering with freedom of religion as it may affect the employment

136 Ibid [11.64].
137 Victorian Gay and Lesbian Rights Lobby and NSW Gay and Lesbian Rights Lobby, *Submission 120*.
138 Public Interest Advocacy Centre, *Submission 133*.
139 Wilberforce Foundation, *Submission 29*.
140 FamilyVoice Australia, *Submission 122*. FamilyVoice suggested similar amendment of the *Age Discrimination Act 2004* (Cth) and *Disability Discrimination Act 2004* (Cth).

practices of religious organisations that may wish to select staff who conform to the beliefs of that organisation.[141]

5.119 For instance, in some circumstances, a religious organisation or body may seek to exclude a potential employee where the person does not adhere to the teachings of that religious organisation.

5.120 The *Fair Work Act 2009* (Cth) provisions include the following:

- s 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;
- s 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
- s 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).

5.121 Freedom 4 Faith proposed several changes to the *Fair Work Act* including imposing a duty on employers to make reasonable adjustment for an employee who has a conscientious objection to performing a particular duty.[142] FamilyVoice also considered that the Act should include an exemption for persons whose conscientious beliefs do not allow them to comply with it.[143]

5.122 In general, the *Fair Work Act* provisions did not attract much adverse comment. The anti-discrimination provisions of s 351 contain broad exceptions, including where the adverse action is taken by a religious institution 'to avoid injury to the religious susceptibilities of adherents of that religion or creed'.[144] Further, these provisions do not apply to action that is not unlawful under the relevant state and territory anti-discrimination law.[145]

Conclusion–anti-discrimination laws

5.123 While there is no obvious evidence that Commonwealth anti-discrimination laws significantly encroach on freedom of religion in Australia, there is nevertheless a degree of community concern, as evidenced by the 2015 religious freedom roundtables convened by the Australian Human Rights Commission (AHRC).[146]

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141 Ibid.
142 Freedom 4 Faith, *Submission 23*.
143 FamilyVoice Australia, *Submission 122*.
144 *Fair Work Act 2009* (Cth) s 351(2)(c).
145 Ibid s 351(2)(a). See JobWatch, *Submission 115*.
146 Australian Human Rights Commission, *Summary: Religious Freedom Roundtable, Sydney, 5 November 2015* (2015).

5.124 Any concerns about freedom of religion should be considered in future initiatives directed towards the consolidation of Commonwealth anti-discrimination laws. In particular, further consideration should be given to whether freedom of religion should be protected through a general limitations clause rather than exemptions.

5.125 Other opportunities to review concerns about freedom of religion and anti-discrimination law may arise in future initiatives directed towards the harmonisation of Commonwealth, state and territory anti-discrimination laws. At present all states, except New South Wales and South Australia, and both territories, have legislation making it unlawful to discriminate on the grounds of religious belief. The definitions of religious discrimination and the scope of exemptions differ.[147] Commonwealth law does not make discrimination on the basis of religion unlawful, although the President of the AHRC has the power to endeavour, by conciliation, to effect a settlement of a complaint.[148]

Marriage Act

5.126 The policy justifications for government regulation of marriage (and other relationships) include ensuring that people who enter into marriage do so with full consent, preventing polygamy and incest, and maintaining government records for taxation and other regulatory purposes.

5.127 Marriage, under the *Marriage Act*, has some important legal consequences, including in relation to taxation, entitlement to health and welfare benefits and the succession to property on death. Other forms of marital or marriage-like relationship, including those recognised by religions, may or may not have similar legal consequences.[149]

5.128 The *Marriage Act* gives direct legal effect to marriages solemnised by authorised religious celebrants. In other jurisdictions, as in some European countries, the civil ceremony creates the legal marriage, while the religious ceremony has no legal effect.[150]

5.129 The Act establishes three categories of celebrants authorised to solemnise marriages:

- ministers of religion of a recognised denomination, proclaimed under s 26 of the Act, who are nominated by their denomination and registered and regulated by state and territory registries of births, deaths and marriages;

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147 See Westlaw AU, *The Laws of Australia* Vol 21.9 Discrimination (at 19 October 2015) [21.9.780]–[21.9.800]; Evans, above n 2, 140–44. However, NSW anti-discrimination law does cover discrimination on the ground of ‘ethno-religious origin’: *Anti-Discrimination Act 1977* (NSW) ss 4, 7. South Australian law covers discrimination on the basis of religious appearance or dress in employment or education: *Equal Opportunity Act 1984* (SA) ss 85T(1)(f), (7).

148 *Australian Human Rights Commission Act 1986* (Cth) ss 3, 8(6), 11, 31.

149 While marriages and de facto relationships are increasingly treated the same for most legal purposes, marriage may be relevant in determining whether two individuals have the status of a ‘couple’.

150 See, eg, Direction de l’information légale et administrative (Premier ministre), Ministère en charge de la justice, *Mariage En France* <//www.service-public.fr/particuliers/vosdroits>.

- state and territory officers who are authorised to perform marriages as part of their duties and are regulated by state and territory registries of births, deaths and marriages; and
- Commonwealth-registered marriage celebrants who are authorised under pt IV, div 1, subdiv C of the Act to perform marriages, and regulated through the Marriage Celebrants Program operated by the Attorney-General's Department.[151]

5.130 The solemnisation provisions in the *Marriage Act* may have some implications for freedom of religion and, in particular, s 101, which states:

> 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.[152]

5.131 Section 113 deals with second marriage ceremonies and, among other things, provides that 'a person who is not an authorised celebrant does not commit an offence against section 101 by reason only of his or her having performed a religious ceremony of marriage' between parties who have complied with s 113(5).[153] Section 113(5) allows a second marriage ceremony between two persons who are already legally married to each other under Australian law, provided certain formalities are followed ensuring that all parties involved in the religious ceremony are aware that it has no legal standing under the *Marriage Act*.

5.132 In *Nelson v Fish*, the Federal Court held that the statutory scheme for regulating the class of persons who may solemnise marriages 'does not disclose any basis upon which it could be argued that it interferes with religious freedom in a way that conflicts with s 116' of the *Constitution*.[154] The Court also observed that the provisions of s 113(5) 'preserve in a way that is consistent with the free exercise of religious observance the right of persons married in the eyes of the law to undergo a religious form of marriage even where the religion concerned is not a recognised denomination and its minister not a registered minister'.[155]

5.133 Parkinson and Krayem argued 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

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151 This group includes civil celebrants and celebrants who are ministers of religion whose denomination is not proclaimed under s 26 of the *Marriage Act*: 'Such proclamations are purely for the purpose of the Marriage Act. A declaration under section 26 does not in any way amount to government endorsement of the organisation concerned or an acknowledgment that it has any particular standing in the community': Attorney-General's Department (Cth), *Information Sheet - Recognised Denominations* <www.ag.gov.au>.

152 P Parkinson and G Krayem, *Submission 1*.

153 *Marriage Act 1961* (Cth) s 113(7).

154 *Nelson v Fish* (1990) 21 FCR 430, [14] (French J).

155 Ibid.

doing so a criminal offence'.[156] They suggested that s 101, read along with s 113 make it unlawful to conduct a religious wedding unless it occurs after a civil marriage, and is conducted by an authorised celebrant.

5.134 Criminal sanctions for conducting marriages other than in compliance with these provisions of the *Marriage Act* may be seen as an unjustifiable burden on an important form of religious expression, particularly as there may be some religious leaders who are unaware of the offences. Parkinson and Krayem submitted that the criminal sanctions have the potential to produce more major issues if the *Marriage Act* were to be amended to permit same-sex marriages, because some faith organisations, or individual ministers, may choose to conduct weddings as a purely religious ceremony or sacrament.[157]

5.135 On the other hand, the *Marriage Act* may be interpreted as regulating legal marriages, and not purely religious ceremonies. On this view, the criminal sanctions in s 101 only cover situations where an unauthorised person solemnises or purports to solemnise a 'legal' marriage under the *Marriage Act.*[158] Section 101 would not preclude an unauthorised minister of religion from conducting a purely religious ceremony of marriage, where it is not intended or purported to have legal effect, or preclude an authorised minister from conducting a purely religious ceremony of marriage. The *Marriage Act* would not make it unlawful to conduct a religious wedding unless it occurs after a civil marriage, nor require that a purely religious wedding be conducted by an authorised celebrant.

5.136 Parkinson and Krayem propose that to avoid interference with freedom of religion, the law should be amended to allow couples to 'choose the religious celebrant of their choice and be able to register their own marriages if they choose to go through a religious ceremony with someone who is not an authorised celebrant' (provided that it is made clear that the religious ceremony has no legal effect).[159]

5.137 This outcome may already be possible under the *Marriage Act*—in that, following a religious ceremony, a couple may undergo a civil ceremony. However, reforms to clarify the position, or to more clearly separate the civil act from the religious act of solemnising the marriage may be desirable. Religious celebrants could cease to be, in this sense, agents of the state, and able to dedicate themselves to religious rites unburdened by state imposed administrative duties—fully separating church and state.

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156 P Parkinson and G Krayem, *Submission 1*. The Law Council considered that the *Marriage Act* solemnisation provisions 'do not disproportionately impinge on religious freedoms in a way that is disproportionate': Law Council of Australia, *Submission 140*.

157 For example, the NSW arm of the Presbyterian Church has decided to ask its national branch to take the steps necessary to withdraw from the *Marriage Act* entirely if same-sex unions are no longer banned by law: Amy Corderoy, 'Presbyterian Church Considers Withdrawing from Marriage Act If Gay Marriage Allowed', *Sydney Morning Herald* (online), 6 July 2015 <www.smh.com.au/nsw>.

158 Or, for example, marriage under Aboriginal laws and customs. See discussion: Commonwealth, *Parliamentary Debates*, Senate, 11 April 1961, 415–6.

159 P Parkinson and G Krayem, *Submission 1*.

Same-sex marriage

5.138 A number of stakeholders raised concerns about possible implications for freedom of religion, if the Commonwealth were to legislate to permit same-sex marriage.[160] These include that celebrants may face legal consequences under anti-discrimination law for refusing to solemnise or register marriages; and, more broadly, that wedding service providers should be able to conscientiously object to providing associated services.

5.139 Section 47 of the *Marriage Act* provides that nothing in the solemnisation provisions imposes an obligation on an authorised celebrant, being a minister of religion, to solemnise any marriage. However, this provision does not protect other celebrants, including religious celebrants who are not part of a recognised denomination.

5.140 It has been suggested that, in the event that the *Marriage Act* is amended to provide for same-sex marriage, consideration should be given to whether celebrants who have a genuine religious or conscientious objection to solemnising a marriage of persons of the same sex should be able to refuse to solemnise a marriage of persons of the same sex.

5.141 Provision could be made, for example, for authorised celebrants to register a genuine religious or conscientious objection with registrars of marriage celebrants. Such provisions, protecting a right to 'conscientiously object', have been advocated by the Australian Human Rights Commissioner, Tim Wilson.[161]

5.142 In the United Kingdom, the *Marriage (Same Sex Couples) Act 2013* (UK) includes a 'religious protection' clause, which provides that a person 'may not be compelled by any means (including by the enforcement of a contract or a statutory or other legal requirement)' to conduct or otherwise participate in a same-sex marriage.[162]

5.143 The Vic/NSW Gay and Lesbian Rights Lobby agreed that provisions to make it clear that religious celebrants cannot be compelled to marry same-sex couples would 'strike an appropriate balance'. However, in their view, permitting civil celebrants, as distinct from religious celebrants, to discriminate on the basis of sexual orientation would be unjustifiable.[163] Another stakeholder stated that allowing civil celebrants to refuse to solemnise same-sex marriages 'set a concerning precedent whereby individuals would be able to discriminate in service delivery on the basis of their personal religious beliefs'.[164]

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160 See, eg, FamilyVoice Australia, *Submission 122*; Wilberforce Foundation, *Submission 118*; Australian Christian Lobby, *Submission 33*; Freedom 4 Faith, *Submission 23*.

161 Tim Wilson, *Same-Sex Marriage: A Law That Protects the Rights of All Parties* <www.humanrights.gov.au>.

162 *Marriage (Same Sex Couples) Act 2013* (UK) s 2(2).

163 Victorian Gay and Lesbian Rights Lobby and NSW Gay and Lesbian Rights Lobby, *Submission 120*.

164 A Lawrie, *Submission 112*.

5.144 The Parliamentary Joint Committee on Human Rights (Human Rights Committee) considered the obligations of civil celebrants in its review of the private members' *Marriage Legislation Amendment Bill 2015* (Cth).[165] The effect of the Bill would be that civil celebrants (who are not ministers of religion) would be prohibited from refusing to solemnise same-sex marriages on the ground that the couple are of the same sex. This would apply even if the civil celebrant had a religious objection to the marriage of same-sex couples.[166] The majority of the Human Rights Committee concluded that any limitation on the right to freedom of religion was proportionate to the objective of promoting equality and non-discrimination. However, a number of Committee members considered that 'this limitation is not justified as the bill does not provide civil celebrants with the option to refuse to solemnise marriages that are contrary to their religious beliefs'.[167]

5.145 There have also been suggestions that the law should also permit individuals to conscientiously object to providing goods, services and facilities in relation to the solemnisation of a same-sex marriage.[168]

5.146 Parliament has made it unlawful to discriminate in the provision of goods, services and facilities on the grounds of sexual orientation (with some limited exemptions for religious organisations, but not otherwise for individuals). As Lady Hale, the Deputy President of the Supreme Court of the United Kingdom has observed:

> Denying some people a service which you are prepared to offer others is deeply harmful to them. It is reminiscent of the days when women were not allowed to order their own drinks at the bar in certain establishments and landlords were allowed to say 'no blacks here'. It is a denial of their equal dignity as human beings.[169]

5.147 It is not clear that freedom to manifest religion or belief should extend to refusing to provide, for example, a wedding cake for a same-sex couple.[170] Protecting individuals from discrimination in ordinary trade and commerce seems a proportionate limitation on freedom of religion.

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165 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report—30th Report of the 44th Parliament* (2015) 112–19.

166 Ibid 116.

167 Ibid 118–19.

168 See, eg, Archbishop Anthony Fisher, *Should Bakers Be Required to Bake Gay Wedding Cakes? Democracy and Religious Liberty in Australia* <www.abc.net.au>; Australian Broadcasting Corporation, *Anglican Church Concerned Gay Marriage Would Force Christian Wedding Suppliers to Cater for Same-Sex Couples* <www.abc.net.au>.

169 Lady Hale, 'Are We a Christian Country? Religious Freedom and the Law' (Oxfordshire High Sheriff's Lecture 2014, 14 October 2014).

170 See, eg, 'The more expansive view of the concept of freedom of religion—that it should permit a person with religious beliefs to run businesses including aged care facilities, schools, etc consistent with religious doctrines—is not, in CLA's view, the traditional view, at least in developed, secular countries. It is more commonly found in theocratic (and generally repressive) states and it would be regrettable if it gained currency in Australia': Civil Liberties Australia, *Submission 94*.

Counter-terrorism legislation

5.148 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:

- Section 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.
- Section 102.1(2), which provides that an organisation may be specified 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.[171]
- Section 102.8, which makes it an offence to associate with a 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.

Advocating terrorism offence

5.149 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.[172] Section 80.2C was introduced into the *Criminal Code* by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).

5.150 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.[173]

5.151 The Human Rights Committee 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:

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171 Gilbert and Tobin Centre of Public Law, *Submission 22*.
172 Ibid.
173 Ibid.

> such incitement offences may capture a range of speech acts, including 'urging', 'stimulating', 'commanding', 'advising' or 'encouraging' a person to commit an unlawful act.[174]

5.152 The Human Rights Committee concluded that the provision was 'likely to be incompatible with the human right of opinion and expression'.[175] The Committee's comments were primarily related to restrictions on free speech and are discussed in Chapter 4.

5.153 It is difficult to regard the advocacy of terrorist acts, as defined in div 101 of the *Criminal Code* as being an exercise of religious freedom, unless the advocacy of terrorism is part of a religious creed. If it were, exercise of the freedom would be likely to directly harm the adherents of other religions (or of none), and limitations would be justified.

Conclusion

5.154 There is no obvious evidence that Commonwealth anti-discrimination laws significantly encroach on freedom of religion in Australia, especially given the existing exemptions for religious organisations. Nevertheless, concerns about freedom of religion should be considered in future initiatives directed towards the consolidation of Commonwealth anti-discrimination laws, or harmonisation of Commonwealth, state and territory anti-discrimination laws. In particular, further consideration should be given to whether freedom of religion should be protected through a general limitations clause rather than exemptions.

5.155 Some concerns have been raised in relation to the solemnisation provisions for marriage celebrants in the *Marriage Act* and, in particular, provisions which make the solemnisation of marriage by an unauthorised celebrant a criminal offence. These provisions have been argued to act as a fetter on religious freedoms. On the other hand, the *Marriage Act* may be interpreted as regulating legal marriages, and not purely religious ceremonies. Reforms to clarify the position, or to more clearly separate the civil act from the religious act of solemnising the marriage may be desirable.

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174 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].

175 Ibid [1.258].

6. Freedom of Association and Assembly

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Summary

6.1 Freedom of association concerns the right of all persons to group together voluntarily for a common goal or to form and join an association, such as a political party, a professional or sporting club, a non-government organisation or a trade union.

6.2 This chapter discusses the source and rationale of the common law rights of freedom of association and freedom of assembly; how these rights are protected from statutory encroachment; and when laws that interfere with them may be considered justified, including by reference to the concept of proportionality.

6.3 Freedom of association is closely related to other fundamental freedoms recognised by the common law, including 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'.[1] Freedom of association is different from, but also closely related to, freedom of assembly.

1 Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 272.

6.4 Freedom of association serves as a vehicle for the exercise of many other civil, cultural, economic, political and social rights. For example, freedom of association is vital to modern commerce and economic wellbeing because partnerships and corporations, which are associations of shareholders, account for much business activity. In practice, many business activities cannot be undertaken by individuals alone.

6.5 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.

6.6 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, a wide range of Commonwealth laws may be seen as interfering with freedom of association or freedom of assembly, in the contexts of criminal law and counter-terrorism; public assembly; workplace relations; migration; and anti-discrimination. Many of these provisions relate to limitations of these freedoms 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.

6.7 Some areas of particular concern, as evidenced by parliamentary committee materials, submissions and other commentary, involve:

- various counter-terrorism offences provided under sch 1 of the *Criminal Code Act 1995* (Cth) (*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 1958* (Cth), which provides a ministerial discretion to refuse a visa to a person whom 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.

6.8 Counter-terrorism and national security laws, including those mentioned above, should be subject to further review to ensure that the laws do not interfere unjustifiably with freedom of association and freedom of assembly, or other rights and freedoms. Further review on this basis could be conducted by the Independent National Security Legislation Monitor (INSLM) and the Parliamentary Joint Committee on Intelligence and Security (Intelligence Committee).

6.9 Workplace relations laws in Australia have been subject to extensive local and overseas criticism on the basis of lack of compliance with International Labour Organization (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.

6.10 For example, the legal power to take industrial action is not a common law entitlement but a statutory grant. Therefore, the exercise of the power and the benefit of legal protection may be subject to statutory conditions. While conditions on industrial action may offend certain ILO norms, they do not necessarily encroach on freedom of association.

6.11 The character test in s 501 of the *Migration Act* may not be a proportionate limitation on the right to freedom of association. The provision might be amended to provide narrower meanings of 'association' and 'membership'. The issue could be dealt with in any future review of Australia's migration laws aimed at ensuring that these laws do not interfere unjustifiably with freedom of association, or other rights and freedoms.

6.12 Anti-discrimination laws have been criticised for potentially interfering with freedom of association by making unlawful certain forms of discrimination—including the use of rules or criteria excluding people from membership of associations, such as sporting clubs. These concerns overlap with discussion of freedom of religion and are considered in Chapter 5.

The common law

6.13 There has been some recognition by Australian courts that freedom of association should be considered a common law right.[2] In *Tajjour v New South Wales* (*Tajjour*), Keane J cited High Court authority for the proposition that, at common law, freedom of association is a 'fundamental aspect of our legal system'.[3]

6.14 The approach of the common law to freedom of assembly has been described as 'hesitant and negative, permitting that which was not prohibited'.[4] In *Duncan v Jones*, Lord Hewart CJ said that 'English law does not recognize any special right of public meeting for political or other purposes'.[5]

6.15 Common law freedom of assembly is only for peaceful purposes. Freedom of assembly does not always involve freedom of association. People assemble, for example, for entertainment in a cinema, theatre or a sports stadium without necessarily associating with one another.

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2 *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*.

3 *Tajjour v New South Wales* (2014) 313 ALR 221, [224]. Citing *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 200 (Dixon J).

4 *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, 126–7. This is generally the way in which the common law protects rights: see Ch 2.

5 *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.

Protections from statutory encroachment

Australian Constitution

6.16 Freedom of association is not expressly protected in the *Australian Constitution* and there is also no freestanding right to association implied in the *Constitution*.[6] Generally, Australian Parliaments may make laws that encroach on freedom of association.

6.17 However, there are some constitutional limits on Parliament's power to restrict freedom of association. Section 116 places some limits on the Parliament's power to interfere with freedom of association with respect to religion. Section 92 may prevent the prohibition of interstate trade between corporations. The High Court has also said that the Parliament cannot prohibit trading, financial or foreign corporations under the s 51(xx) corporations power, though it may regulate their activities.[7]

6.18 The power to make laws encroaching on freedom of association is also subject to general constitutional constraints on the legislative powers of the Commonwealth. In 1951, the High Court ruled that the *Communist Party Dissolution Act 1950* (Cth) was not a valid exercise of express legislative power,[8] 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.[9] The High Court has upheld legislation that deregistered a trade union, validly made under the s 51(xxxv) labour power.[10]

6.19 Most importantly, just as there is an implied constitutional right to 'political communication', there may also be an implied right to 'political association'. As in the case of political communication, any implied right to 'political association' would not protect a personal right, but act as a restraint on the exercise of legislative power by the Commonwealth.

6.20 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*'.[11] For example, people should be free, generally speaking, to join groups like political parties to lobby for and effect change. Gaudron J in

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6 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [148] (Gummow and Hayne JJ). 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.

7 *Commonwealth v Bank of New South Wales* (1948) 76 CLR 1, 202–03.

8 Under *Australian Constitution* s 51(xxxix) read with s 61 (incidental and executive powers), s 51(vi) (defence power). However, the majority thought that the law could have been supported by the defence power in times of war: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, see eg, 255–6 (Fullagar J).

9 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

10 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88.

11 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [148] (Gummow and Hayne JJ). This position has been supported in subsequent judgments: *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 and Hayne JJ); *Wainohu v New South Wales* (2011) 243 CLR 181, [112] (Gummow, Hayne, Crennan and Bell JJ).

Australian Capital Television Pty Ltd v Commonwealth said that the 'notion of a free society governed in accordance with the principles of representative democracy may entail freedom of movement [and] freedom of association'.[12]

6.21 Recognition of this corollary acknowledges the importance of freedom of association to a vibrant democracy. In many circumstances, freedom of political communication is unrealisable without freedom of association, as when individuals join together to form political parties or other groups to promote or publicise political viewpoints.

6.22 Freedom of assembly may also be a component of the implied freedom of political communication as, 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'.[13]

6.23 Nevertheless, in the Australian constitutional context, it seems any implied right to freedom of association, or assembly, 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]

6.24 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

6.25 The principle of legality provides some protection to freedom of association. 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.

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12 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 212 (Gaudron J).

13 Barendt, above n 1, 269.

14 *Wainohu v New South Wales* (2011) 243 CLR 181, [112]. See also *Tajjour v New South Wales* (2014) 313 ALR 221, [95], [136], [244]–[245]. The case concerned the 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*.

15 George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 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.

6.26 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.[16]

6.27 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[17] 'merely on the basis of an innocent association with persons whom the Minister reasonably suspects have been or are involved in criminal conduct'.[18] 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*.[19]

International law

6.28 International law recognises rights to peaceful assembly and to freedom of association. The *International Covenant on Civil and Political Rights* (ICCPR) provides for 'the right of peaceful assembly'[20] and the 'right to freedom of association including the right to form and join trade unions'.[21]

6.29 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.[22]

6.30 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'.[23]

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16 *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206.
17 Under *Migration Act 1958* (Cth) s 501(6)(b).
18 *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, [114].
19 Australian Council of Trade Unions, *Submission 44*.
20 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 21.
21 Ibid, art 22.1.
22 United Nations 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).
23 *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.

6.31 Australia is bound to respect freedom of association under international labour standards, and through its membership of the ILO.[24] International labour standards seek to guarantee the right of both workers and employers to form and join organisations of their choice.[25]

6.32 World Trade Organization rules and the provisions of free trade agreements to which Australia is a signatory also create obligations which, by implication, protect freedom of association for the purposes of commerce, industry and investment.[26]

6.33 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]

Bills of rights

6.34 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]

6.35 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] Freedom of association in the US is derived primarily from First Amendment freedom of speech.

6.36 Freedom of association is also provided for in the Victorian *Charter of Human Rights and Responsibilities* and the *Human Rights Act 2004* (ACT).[34]

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24 See Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) [3.21]–[3.23].

25 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.

26 Department of Foreign Affairs and Trade, *The World Trade Organization (WTO) & Free Trade Agreements* <www.dfat.gov.au/international-relations/international-organisations/wto/pages/the-world-trade-organization-wto-free-trade-agreements>.

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 2.

29 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 11(1).

30 *Canada Act 1982* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 2(d).

31 *New Zealand Bill of Rights Act 1990* (NZ) s 17.

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).

Justifications for limits on freedom of association and assembly

6.37 It has long been recognised that laws may be justified in interfering with freedom of association, including to restrict the association of certain classes, groups or organisations of persons who are involved, or likely to be involved, in crime.

6.38 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'.[35] Similarly, the ICCPR recognises permissible limitations on freedom of association.

6.39 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 association is justified, including those under international law.

Legitimate objectives

6.40 The threshold question in a proportionality test is whether the objective of a law is legitimate. Some guidance on what should be considered legitimate objectives of a law that interferes with freedom of association or freedom of assembly may be derived from the common law and international human rights law.

6.41 The common law and international human rights law recognise that freedom of association and freedom of assembly can be restricted in order to pursue legitimate objectives such as the protection of public safety and public order. Some existing restrictions on these freedoms are a corollary of pursuing other important public or social needs, such as the need to counter crime and control traffic.

6.42 Preventing people from 'getting together to hatch crimes' has long been considered one justification for restrictions on freedom of association.[36] The High Court has recognised a 'public interest' in restricting the activities, or potential activities, of criminal associations and criminal organisations.[37]

6.43 In *South Australia v Totani*,[38] 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)

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35 *Canadian Charter of Rights and Freedoms* 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.

36 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).

37 *South Australia v Totani* (2010) 242 CLR 1, [92] (Gummow J).

38 In that case, the *Serious and Organised Crime (Control) Act* 2008 (SA) 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.

> 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.[39]

6.44 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 involvement in criminal activity'. The object of the section is to prevent or impede criminal conduct.[40]

6.45 Limits on freedom of assembly are sometimes said to be necessary for other people to enjoy freedom of association. 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 need to inhibit the freedom of assembly of others, for example by giving police certain powers to control or regulate public protests.

6.46 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. 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.[41]

6.47 Freedom of assembly is sometimes limited by laws that regulate protests aimed, for example, at ensuring protests are peaceful and do not disproportionately affect others. Protest organisers may 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, such as the 2007 APEC meeting in Sydney and the 2013 G20 summit in Brisbane.[42]

6.48 In considering how restrictions may be appropriately justified, one starting point is international human rights law, and the restrictions permitted by the ICCPR. The ICCPR provides that no restrictions may be placed on the rights to freedom of peaceful assembly and of association other than those which are prescribed by law and 'which

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39 *South Australia v Totani* (2010) 242 CLR 1, 36 [44].

40 *Tajjour v New South Wales* (2014) 313 ALR 221, [160] (Gageler J). References omitted. 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'. 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': Ibid [41], [45].

41 *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 (the Trafalgar Square case).

42 See, eg, *G20 (Safety and Security) Act 2013* (Qld); *APEC Meeting (Police Powers) Act 2007* (NSW).

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'.[43]

6.49 Many of the laws discussed below pursue these objectives. For example, criminal laws, including counter-terrorism and consorting laws, 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 and public order.

6.50 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.

6.51 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*.[44]

6.52 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, similar to the ICCPR, 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'.[45]

6.53 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*.

Balancing rights and interests

6.54 Whether all of the laws identified below as potentially interfering with freedom of association or freedom of assembly, in fact pursue legitimate objectives of sufficient importance to warrant restricting the freedom may be contested. However, even if a

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43 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 21, 22.2; United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984). See Ch 2.

44 International Labour Organization, *Freedom of Association and Protection of the Right to Organise Convention*, C87 (entered into force 4 July 1950).

45 *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.

law does pursue such an objective, it will also be important to consider whether the law strikes an appropriate balance between these freedoms and other rights and interests.

6.55 A recognised starting point for determining whether an interference with freedom of association or freedom of assembly is justified is the international law concept of proportionality. In arts 21 and 22 of the ICCPR, the phrase ‘necessary in a democratic society’ is seen to incorporate the notion of proportionality.[46]

6.56 In *McCloy v New South Wales*, the High Court expressly adopted a proportionality test to be applied where the purpose of a law and the means adopted to achieve that purpose are legitimate, but the law burdens the implied right of political communication.[47] This test may also be applied to laws that interfere with freedom of association or freedom of assembly, if they are seen as a ‘corollary’ of the constitutional implied right.

6.57 In relation to one element of proportionality—suitability—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’.[48]

Laws that interfere with freedom of association and assembly

6.58 A wide range of Commonwealth laws may be seen as interfering with freedom of association and freedom of assembly, broadly conceived. Some of these laws impose limits 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.

6.59 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;

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46 See, eg, Attorney-General’s Department (Cth), *Right to Freedom of Assembly and Association* <http://www.ag.gov.au>; United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984).

47 *McCloy v New South Wales* [2015] HCA 34 (7 October 2015) [3] (French CJ, Kiefel, Bell, Keane JJ). See Ch 2.

48 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’.

- migration law; and
- anti-discrimination law.

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

Criminal law

6.61 A number of offences in the *Criminal Code* directly criminalise certain forms of association. Notably, these include counter-terrorism and foreign incursion offences, and consorting laws which criminalise associating in support of criminal activity or criminal organisations.

Terrorism offences

6.62 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. A terrorist organisation is defined as an organisation that is 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act'[49] or is specified by regulations made under s 102.1 of the *Criminal Code*.[50] The Attorney-General's Department has issued a protocol that provides guidance on the process for listing organisations for this purpose.[51]

6.63 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.

6.64 In addition, the terms of counter-terrorism control orders issued under the *Criminal Code* may contain a prohibition or restriction on a person 'communicating or associating with specified individuals'.[52]

6.65 The Law Council of Australia (Law Council) 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'.[53] It added that assessing justification for the offence is difficult, 'given the broad executive

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49 *Criminal Code* s 102.1(1).

50 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.

51 Attorney-General's Department (Cth) *Protocol—Listing Terrorist Organisations under the Criminal Code*.

52 *Criminal Code* s 104.5(3)(e).

53 Law Council of Australia, *Submission 75*.

discretion to proscribe a particular organisation and the absence of publicly available binding criteria to be applied’.[54]

6.66 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’.[55] Further, an organisation can be listed as a terrorist organisation simply on the basis that it ‘advocates’ the doing of a terrorist act. The Law Council stated:

> 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.[56]

6.67 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’.[57]

6.68 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’.[58]

6.69 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.[59]

Consorting offences

6.70 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

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54 Ibid.
55 Ibid.
56 Ibid.
57 UNSW Law Society, *Submission 19*.
58 Law Council of Australia, *Submission 75*. See also Human Rights Law Centre, *Submission 39*.
59 Law Council of Australia, *Submission 75*.

Thomas v Mowbray, Gleeson CJ referred to counter-terrorism control orders as having similar characteristics to bail and apprehended violence orders.[60]

6.71 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.[61]

6.72 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"'.[62]

6.73 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.[63]

6.74 In Australia, these laws are creatures of statute that first emerged early last century, also 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.[64]

6.75 In relation to modern NSW 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'*.[65]

6.76 Concerns about the impact on freedom of association of state and territory consorting laws[66] were repeatedly mentioned during the Australian Human Rights Commission's 2014 rights and responsibilities consultation.[67]

6.77 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

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60 *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) vol IV, Bk IV, Ch 18, 248.

61 See, eg, *Wainohu v New South Wales* (2011) 243 CLR 181.

62 Ibid [8] (French CJ and Kiefel J).

63 *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.

64 McLeod, above n 63, 104.

65 *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].

66 For example, *Crimes Act 1900* (NSW) s 93X; *Vicious Lawless Association Disestablishment Act 2013* (Qld); *Criminal Organisations Control Act 2012* (WA).

67 Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015) 32.

any) that it would infringe any constitutional doctrine of implied freedom of political communication'.[68]

6.78 Some stakeholders in this ALRC Inquiry questioned the justification for the Commonwealth 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.[69]

6.79 The Public Interest Advocacy Centre (PIAC) submitted that Commonwealth 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'.[70] Because any consorting law, 'by its very nature, impinges on a person's right to freedom of association', PIAC stated that it would be 'difficult to draft such legislation so as to comply with international human rights law'.[71]

6.80 However, the Commonwealth offences may constitute a proportionate interference with freedom of association. Legislating for specific criminal offences that target the conduct of members of criminal groups is a common approach internationally to combating serious and organised crime.[72] The Explanatory Memorandum for these offences provided the following example of the type of offence targeted by the provisions:

> Person A meets with person B on two or more occasions. Person B is proposing to engage in an illegal operation with four other people involving the import into Australia of commercial quantities of border controlled drugs … Person A works at the airport through which person B proposes to import the drugs, and knows that Person B proposes to engage in the illegal importation. The purpose of person A's meetings with person B is to provide advice on how person B may circumvent the airport security system as part of the operation. In doing so, person A is reckless as to whether his advice will help person B to engage in the illegal importation.[73]

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68 *Criminal Code* s 390.3(8). Arguably, following the decision of the High Court in *Tajjour*, upholding the constitutional validity of s 93X of the *Crimes Act 1900* (NSW), this qualification is no longer necessary: *Tajjour v New South Wales* (2014) 313 ALR 221.

69 Law Council of Australia, *Submission 75*.

70 Public Interest Advocacy Centre, *Submission 55*.

71 Ibid.

72 Definitions used in the criminal organisation offences draw on the *United Nations Convention Against Transnational Organized Crime*: See *United Nations Convention Against Transnational Organized Crime*, opened for signature 12 December 2000, resolution adopted by the General Assembly, 8 January 2001, A/RES/55/25 (entered into force 29 September 2003) art 2(a).

73 Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009 (Cth).

Public assembly

6.81 Most legislative interferences with the right of public assembly are contained in state and territory laws including, for example, unlawful assembly[74] and public order offences where there is some form of 'public disturbance', such as riot, affray or violent disorder.[75] Sometimes, state laws limiting freedom of assembly are enacted for the purposes of specific events, such as those related to APEC and the G20.[76]

6.82 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 respect of Commonwealth premises and certain other places, such as the premises of federal courts and tribunals and diplomatic and special missions.

6.83 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'.[77] 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.[78]

6.84 It may be hard to conceive of an alternative method of prevention in circumstances of imminent danger to public order. In this regard, the Act seems to adopt the standard model in democratic states with respect to when assembly will be unlawful.[79]

Workplace relations laws

6.85 The *Fair Work Act 2009* (Cth) is intended, in part, 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.[80] Part 3-1 of the Act contains protections for freedom of association and involvement in lawful industrial activities, including protection under

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74 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.

75 For example, in NSW, *Crimes Act 1900* (NSW) s 93B (riot), s 93C (affray); *Summary Offences Act 1988* (NSW) s 11A (violent disorder).

76 *APEC Meeting (Police Powers) Act 2007* (NSW); *G20 (Safety and Security) Act 2013* (Qld).

77 *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.

78 *Public Order (Protection of Persons and Property) Act 1971* (Cth) s 8(1).

79 See, eg,*International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 21.

80 *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].

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'.[81]

6.86 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'.[82] 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 dismiss an employee (partly) because of an 'offensive and abusive' protest sign was upheld as lawful.[83]

6.87 BHP Billiton observed that regulation of workplace relations involves balancing rights, where 'exercise of one person's right will commonly encroach upon the rights of another'. For example, union rights of entry 'encroach upon the co-existent rights of an occupier to have the quiet enjoyment of property free from trespass and the co-existent rights of an employer to have the benefit of an employment contract without interference'. Similarly, the rights of employees include a 'right not to be pressed into membership of a union where that is the employee's preference'.[84]

6.88 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'. This principle, it said, 'has been a long-standing and beneficial feature of Australian labour law' and, without such protections, the ability of employees to bargain with their employer in their collective interest is greatly reduced.[85]

6.89 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'—in particular, by provisions of the *Fair Work Act*.[86]

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81 *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 24, [20.06].

82 *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, [14].

83 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': *CFMEU v BHP Coal Pty Ltd* (2014) 314 ALR 1, [92].

84 BHP Billiton, *Submission 129*.

85 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': Kingsford Legal Centre, *Submission 21*.

86 Australian Institute of Employment Rights, *Submission 15*.

6.90 The Australian Council of Trade Unions (ACTU) stated that existing provisions of the *Fair Work Act* 'unjustifiably interfere with the right to freedom of association and should be reconsidered'. These included restrictions on the right to strike, the duration of industrial action and union access to workplaces.[87]

6.91 Arguably, however, while some of these provisions may be seen as inconsistent with international labour law norms[88]—as reflected in ILO conventions—they do not necessarily infringe on the scope of freedom of association, as understood by the common law.

Protected industrial action

6.92 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.[89]

6.93 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*.[90] Each of the criteria for protected action[91] can be interpreted as interfering with freedom to associate for the purposes of taking industrial action.

6.94 The AIER noted criticism of these provisions by the ILO Committee on Freedom of Association,[92] including in relation to: prohibitions on sympathy strikes and general secondary boycotts;[93] removal of protection for industrial action in support of multiple business agreements;[94] and prohibitions in relation to pattern bargaining.[95]

6.95 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 Application of Conventions and Recommendations on the basis that industrial action is only protected during the process of bargaining for an agreement.[96] The emphasis within the *Fair Work Act* on enterprise level bargaining can also be seen as an unnecessary

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87 Australian Council of Trade Unions, *Submission 44*.

88 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.

89 *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 16.

90 Ibid ss 408–414.

91 These include the following provisions of the *Fair Work Act*: the definitions of an employee claim action, employee response action and employer response action (ss 409–411); the prohibition on 'pattern bargaining' (ss 409–412); the requirement to be genuinely trying to reach an agreement (ss 409–411, 413); the notice requirements in relation to industrial action (ss 409–411, 413, 414); and the requirements for protected action ballots (s 409(2), pt 3–3, div 8).

92 Australian Institute of Employment Rights, *Submission 15*.

93 *Fair Work Act 2009* (Cth) ss 408–411.

94 Ibid s 413(2).

95 Ibid ss 409(4), 412.

96 Australian Council of Trade Unions, *Submission 44*. The ILO Committee of Experts on the Application of Conventions and Recommendations examines government reports on ratified ILO conventions.

encroachment on the right to collectively bargain.[97] For example, industrial action in support of pattern bargaining by employees is restricted.[98]

6.96 The ACTU also criticised provisions of the *Fair Work Act* concerning the circumstances in which industrial action is authorised by protected action ballots. The Act provides that at least 50% of the employees on the roll of voters must actually vote; and more that than 50% of the valid votes must be in favour of taking action.[99] The ILO Committee of Experts has commented that such requirements are ‘excessive and could excessively hinder the possibility of carrying out a strike, particularly in large enterprises’.[100] The ACTU submitted that these ‘restrictions on the right to strike unjustifiably interfere with the right to freedom of association’.[101]

6.97 Finally, the ACTU and the AIER considered that the powers of the Fair Work Commission to suspend or terminate industrial action on various grounds, including economic harm, health and safety, third party damage and cooling off,[102] are cast too broadly and unjustifiably interfere with the right to freedom of association.[103]

6.98 In contrast, BHP Billiton submitted that there is no legitimate criticism of the current legislation regulating industrial action on the basis of freedom of association concerns. It observed that industrial action involves a ‘substantial encroachment on the legal, economic and societal rights of others’ and should not be facilitated by legislation except as reasonable and proportionate. In Australia, the legislative framework is based on a system of regulated enterprise bargaining, and it would not be ‘in any way proportionate or reasonable, to expand industrial action rights beyond what is reasonable and appropriate within an accepted enterprise bargaining framework’.[104]

Right of entry

6.99 The *Fair Work Act* provides a framework for rights of entry to workplaces for union officials to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions of workplace laws.[105]

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97 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).

98 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*: International Labour Organization, *Right to Organise and Collective Bargaining Convention*, C98 (entered into force 18 July 1951).

99 *Fair Work Act 2009* (Cth) s 459(1)(b)–(c). However, the roll of voters may not represent the entire workforce or even every employee that will be covered by the enterprise agreement the subject of bargaining: Australian Industry Group, *Submission 131*.

100 Australian Council of Trade Unions, *Submission 44*.

101 Ibid.

102 *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*.

103 Australian Council of Trade Unions, *Submission 44*; Australian Institute of Employment Rights, *Submission 15*. The AIG stated that these provisions have been exercised infrequently under the *Fair Work Act*, and predecessor legislation: Australian Industry Group, *Submission 131*.

104 BHP Billiton, *Submission 129*.

105 *Fair Work Act 2009* (Cth) pt 3–4.

6.100 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'.[106] The 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.[107]

6.101 Some limitations on rights of entry may be characterised as interfering with union members' freedom of association.[108] The relevant legislative limitations include the requirement to hold a valid entry permit, which may only be issued to a 'fit and proper person';[109] the required period of notice before entry;[110] and limitations on the circumstances in which an official can gain entry.[111]

6.102 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.[112] 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.[113]

6.103 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 that these requirements 'are extraordinary in the sense that they authorise what would otherwise be the tort of trespass' and should be repealed.[114]

6.104 The Australian Industry Group (AIG) rejected the idea that limitations on rights of entry interfere with an employee's right to freely associate with a union. It submitted

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106 Ibid s 480.

107 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, 2907–08 (Bill Shorten).

108 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.

109 *Fair Work Act 2009* (Cth) ss 512–513. 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': Australian Council of Trade Unions, *Submission 44*.

110 *Fair Work Act 2009* (Cth) s 487(3).

111 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.

112 See Australian Council of Trade Unions, *Submission 44*.

113 Ibid.

114 National Farmers' Federation, *Submission 54*.

that 'reasonable restrictions on the right of an employee representative to enter a workplace are necessary to prevent misuse of entry rights by unions'.[115]

6.105 BHP Billiton stated that it is important to understand rights of entry as substantive rights of the employees, rather than of the union or the union officer. It submitted that 'there is no legal or other proper principle under which statutory rights of entry for union officials should be expanded or restrictions protecting the encroached rights of others should be lessened'.[116]

6.106 The Productivity Commission, in its 2015 draft report on the workplace relations framework, stated that the provisions of the *Fair Work Act* providing rights of entry by union officials to worksites 'are broadly sound, though at times both sides play games with each other'.[117]

Registration of organisations

6.107 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*.[118]

6.108 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.[119]

6.109 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—because the obligations promote association.

6.110 The ILO Committee of Experts has stated, with regard to the ability of governments to intervene in employee or employer organisations, that 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'.[120]

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115 Australian Industry Group, *Submission 131*.

116 BHP Billiton, *Submission 129*.

117 Productivity Commission, *Workplace Relations Framework—Productivity Commission Draft Report* (2015) 42.

118 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: *Fair Work (Registered Organisations) Act 2009* (Cth) s 5(3).

119 See, eg, Explanatory Memorandum, Fair Work (Registered Organisations) Amendment Bill 2012 (Cth).

120 Committee of Experts on the Application of Conventions and Recommendations, '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, International Labour Conference, 2012) [108].

6.111 The Explanatory Memorandum to the Fair Work (Registered Organisations) Amendment Bill 2012 (Cth) stated that the limitations which the Bill placed on the 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'.[121]

Other issues

6.112 A number of other workplace relations issues were raised by stakeholders. One stakeholder submitted that restrictions on trade union membership and collective bargaining by members of the Australian Defence Force constitute an unjustified interference with freedom of association.[122]

6.113 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.[123] Similarly, AIG expressed concern that the introduction of compulsory enterprise bargaining and the removal of the right to bargain at the individual level 'interferes with freedom of association to the extent that an employer and employee may not wish to negotiate collectively when negotiating the terms and conditions of employment'.[124]

Conclusion

6.114 A number of stakeholders expressed the view that the *Fair Work Act* may not comply with international obligations in relation to freedom of association in the workplace, and the right to strike.[125]

6.115 The ACTU observed that the ILO Committee of Experts has 'repeatedly found that Australian law breaches international labour law'.[126] Similarly, the United Services Union stated that it is 'apparent that there is some divergence between Australia's obligations at international law and the system in place domestically when it comes to the right to strike'. It submitted that while there is scope for the Australian domestic legislative regime to diverge from the international law position where it is 'necessary', the restrictions currently placed upon employees are 'excessive and unnecessarily restrictive'.[127]

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121 Explanatory Memorandum, Fair Work (Registered Organisations) Amendment Bill 2012 (Cth).

122 D Black, *Submission 6*. The *Defence Act 1903* (Cth) regulates ADF remuneration.

123 National Farmers' Federation, *Submission 54*. 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.

124 Australian Industry Group, *Submission 131*.

125 United Services Union, *Submission 117*; Kingsford Legal Centre, *Submission 110*; Australian Council of Trade Unions, *Submission 44*; Australian Lawyers for Human Rights, *Submission 43*; Australian Institute of Employment Rights, *Submission 15*. A group of legal academics submitted that, while the protections set out in 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': See B Creighton and Others, *Submission 24*.

126 Australian Council of Trade Unions, *Submission 44*.

127 United Services Union, *Submission 117*.

6.116 The AIER observed that the Australian Government has been 'put on notice'[128] that a number of provisions of the *Fair Work Act* infringe on freedom of association[129] as understood under the ILO *Freedom of Association and Protection of the Right to Organise Convention*.[130]

6.117 The Australian Government has provided a number of detailed reports to the ILO setting out the reasons why it considers that the *Fair Work Act* does comply with relevant ILO conventions.[131]

6.118 For example, in 2011, the ILO Expert Committee recorded that the Australian Government had not amended various provisions of the *Fair Work Act*,[132] despite the Committee's expressed concerns. The Australian Government explained that, overall, 'the industrial action provisions of the *Fair Work Act* strike the right balance between an employee's right to strike and the need to protect life and economic stability in a manner that is appropriate to Australia's national conditions and that [Fair Work Australia] has set a high threshold for allowing for suspension or termination of protected industrial action in specific circumstances'.[133]

6.119 While workplace relations laws in Australia have been subject to extensive local and overseas criticism on the basis of lack of compliance with ILO Conventions, the extent to which obligations under ILO conventions engage the scope of common law or traditional understandings of freedom of association may be contested.

6.120 At common law, employers and employees, whether individually or collectively, may bargain for the purpose of concluding employment contracts. However, the common law does not compel either party to engage in bargaining. Under the *Fair Work Act*, the Fair Work Commission may compel an employer to bargain with a group of employees if a majority of those employees wish to negotiate an enterprise agreement.[134] The Act creates many rights and duties in relation to enterprise bargaining agreements, the right to strike, the duration of industrial action and union access to workplaces. While some of these provisions may offend ILO norms, they do not necessarily infringe common law freedom of association.

6.121 Limits concerning the entry of union officials to workplaces, for example, do not seem to infringe common law freedom of association. Entry is a power granted by statute, not common law, and to unions but not to other persons.

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128 Australian Institute of Employment Rights, *Submission 15*.

129 See 'Reports of the Committee on Freedom of Association' (357th Report, International Labour Office, 2010) Case No. 2698 (Australia), [213]–[229].

130 International Labour Organization, *Freedom of Association and Protection of the Right to Organise Convention*, C87 (entered into force 4 July 1950).

131 Australian Industry Group, *Submission 131*.

132 Including *Fair Work Act 2009* (Cth) ss 413(2); 409(4), 412, 422, 437(2); 408–411; 172, 194, 353, 409(1),(3), 470–475; 423, 424, 426, 431.

133 International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, *Observation (CEACR)—Freedom of Association and Protection of the Right to Organize Convention–Australia* Adopted 2011, 101st ILC Session (2012).

134 *Fair Work Act 2009* (Cth) ss 236–7.

6.122 Laws that interfere with the constitution and internal arrangements of an association are more likely to interfere with common law freedom of association. In this context, a distinction needs to be drawn between laws that control the internal arrangements of an association and laws that deal with the activities of an association as they affect others. What is unlawful does not generally become lawful when done by an association of individuals.

6.123 Trade unions have special legal status, which carries rights and powers under the law that other associations do not enjoy. These are concerned with legal power and associated rights to take industrial action in pursuit of collective demands. The legal power to take industrial action is not a common law entitlement but a statutory grant. Therefore, the exercise of the power and the benefit of legal protection may be subject to statutory conditions.

6.124 However, some statutory provisions may infringe common law freedom of association if they unreasonably regulate the internal governance of an association. It is possible that some aspects of the *Fair Work (Registered Organisations) Act 2009* (Cth) may fall into this category.

Migration law character test

6.125 Freedom of association may be engaged by provisions of the *Migration Act* concerning the circumstances in which a visa may be refused or cancelled on character grounds.

6.126 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.[135]

6.127 Section 501(6)(b) was broadened in 2014.[136] The Explanatory Memorandum to the amending legislation made it clear that membership of, or association with, a group or organisation that has or is involved in criminal conduct would be, by itself, grounds for cancellation on character grounds:

> 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 requirement that there be a demonstration of special knowledge of, or participation in, the suspected criminal conduct by the visa applicant or visa holder.[137]

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135 *Migration Act 1958* (Cth) s 501(6)(b).

136 *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) sch 1.

137 Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth).

6.128 In *Haneef*, Spender J, in the Federal Court, read down the previous version of s 501(6)(b) as meaning that there had to be an 'alliance or link or combination' between the person subject to the character test and the group, organisation or person engaged in criminal activity.[138]

6.129 On appeal, the Full Federal Court also considered the scope of the word 'association'. In a unanimous judgment, the Full Court agreed with Justice Spender that a narrower interpretation of 'association' than that applied by the Minister should be taken to reflect the intention of the Parliament:

> Having regard to its ordinary meaning, the context in which it appears and the legislative purpose, we conclude that the association to which s 501(6)(b) refers is an association involving some sympathy with, or support for, or involvement in, the criminal conduct of the person, group or organisation. The association must be such as to have *some* bearing upon the person's character.[139]

6.130 A number of stakeholders expressed concern about the present scope of s 501(6)(b).[140] 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,[141] the test in effect 'authorises the detention of a person based on a suspicion in relation to that person's lawful association with others'.[142]

6.131 The Australian National University (ANU) Migration Law Program submitted that the provision 'is neither a reasonable or proportionate curtailment of the right to freedom of association' as it is 'now so broad that it would cover a range of circumstances where there is no appreciable risk to Australian society'.[143] The Law Council and the ANU Migration Law Program suggested that the legislation should be amended.[144]

6.132 In the ALRC's view, the character test in s 501 of the *Migration Act* may not be a proportionate limitation on the right to freedom of association. The provision might be amended to provide meanings of 'association' and 'membership' consistent with the Federal Court judgments in *Haneef*.[145] This issue could be dealt with in any future

138 *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40, [230].

139 *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, [130] (emphasis in original).

140 Law Council of Australia, *Submission 140*; ANU Migration Law Program, *Submission 59*; Refugee Advice and Casework Service, *Submission 30*; UNSW Law Society, *Submission 19*.

141 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*.

142 Ibid.

143 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' and 'members of an organisation that committed criminal conduct many years ago, but is no longer involved in any criminal activity': ANU Migration Law Program, *Submission 59*.

144 Law Council of Australia, *Submission 140*; ANU Migration Law Program, *Submission 59*.

145 That is, something beyond mere membership and innocent association should be 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': ANU Migration Law Program, *Submission 59*.

review of Australia's migration laws aimed at ensuring that these laws do not interfere unjustifiably with freedom of association, or other rights and freedoms.

Other laws

6.133 Commonwealth anti-discrimination laws potentially interfere with freedom of association by making unlawful certain forms of discrimination that can be manifested by excluding people, on prohibited grounds, from participating in an association (of a kind covered by the laws).[146]

6.134 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.[147] 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'.[148]

6.135 Professor Patrick Parkinson observed that having an association 'inevitably means creating either explicit or implicit rules of membership', which 'both include and exclude'.[149] He stated that one area of major tension 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'. In particular, he submitted that faith-based organisations should have a right to select staff on the basis of 'mission fit', which is seen as essential to the right of freedom of association.[150]

6.136 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'.[151] It 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'.[152]

6.137 Other stakeholders contested these views.[153] The Kingsford Legal Centre, for example, considered that freedom of association should protect 'the right of individuals to associate in political and religious organisations, and trade unions', but does not

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146 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).

147 *Disability Discrimination Act 1992* (Cth) s 27(1).

148 Ibid s 4.

149 P Parkinson, *Submission 9*.

150 Ibid.

151 FamilyVoice Australia, *Submission 73*.

152 Ibid.

153 A Lawrie, *Submission 112*; Kingsford Legal Centre, *Submission 110*.

'apply to organisations in their recruitment practices in order to permit them to discriminate unfairly'.[154] Another stakeholder observed:

> Any argument that might be raised that these schools, hospitals or aged care facilities should have the freedom to include or exclude 'whoever they want, on whatever basis they want' is outweighed by the public interest in having education, health and community services provided on a non-discriminatory basis, and specifically by the harm caused to LGBT people by allowing such discrimination to occur.[155]

6.138 Anti-discrimination legislation already contains exemptions that permit certain forms of association that would otherwise be discriminatory. For example, the *Sex Discrimination Act 1984* (Cth) (*SDA*) 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.[156]

6.139 The Attorney-General, Senator the Hon George Brandis QC, has 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.[157]

6.140 There are some inconsistencies in the scope of exemptions that can be seen as protecting freedom of association. FamilyVoice questioned, for example, why the *Racial Discrimination Act 1975* (Cth) allows an exception only for charities—and not for clubs, educational institutions, religious organisations, sporting bodies or voluntary associations, as does the *SDA*.[158]

6.141 Some concerns were also expressed about the operation of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (*ACNC Act*). The *ACNC Act* was established to 'provide a national regulatory system that promotes good governance, accountability and transparency for not-for-profit entities be introduced to maintain, protect and enhance public trust and confidence in the not-for-profit sector'.[159] The not-for-profit sector receives a range of funding, including donations from members of the public and tax concessions, grants and other support from Australian governments.

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154 Kingsford Legal Centre, *Submission 110*.

155 A Lawrie, *Submission 112*.

156 *Sex Discrimination Act 1984* (Cth) s 39.

157 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). The comments were made in connection with the Committee's consideration of the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth).

158 FamilyVoice Australia, *Submission 122*. FamilyVoice submitted that anti-discrimination laws should be 'amended to affirm the priority of freedom of association over constraints on discrimination'.

159 *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) preamble.

6.142 Elizabeth Shalders submitted that while religious organisations and other charitable voluntary associations 'are required to be accountable to the broader public for their tax concessions' through the *ACNC Act* and the ACNC Commissioner, the 'considerable enforcement powers associated with that accountability can be said to impinge on freedom of association and freedom of religion'.[160]

6.143 The Law Council expressed some concern about a specific provision of the *ACNC Act*. Section 100–25 of the Act 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.[161]

Conclusion

6.144 The ALRC concludes that the following Commonwealth laws should be further reviewed to determine whether they unjustifiably limit freedom of association:

- *Criminal Code* ss 102.8, divs 104–105 (control orders and preventative detention orders), s 119 (declared area offences). These provisions are subject to review by INSLM and the Intelligence Committee as part of their ongoing roles.
- The character test in s 501 of the *Migration Act*.

160 Elizabeth Shalders, *Submission 139*.
161 Law Council of Australia, *Submission 75*.

7. Freedom of Movement

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Summary

7.1 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] The freedom is fundamental to the conduct of commerce, employment and cultural exchange, and is central to international law relating to asylum.

7.2 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 be considered justified,

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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.

including by reference to the concept of proportionality. While freedom of movement overlaps with concerns about personal liberty and the right to be free from arbitrary detention, these latter rights are not a focus of the chapter.

7.3 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 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.

7.4 Freedom of movement has commonly—both in theory and practice—been subject to exceptions and limitations. For example, the freedom does not extend to people trying to evade punishment for a crime and, in practice, a person's freedom to leave one country is limited by the willingness of other countries to allow that person to enter.

7.5 A range of Commonwealth laws may be seen as interfering with freedom of movement. 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 passport controls, and quarantine.

7.6 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.

7.7 The areas of particular concern include various counter-terrorism measures. In particular, the justification for aspects of the control and preventative detention order provisions and declared area offences in sch 1 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*) have been questioned.

7.8 Counter-terrorism and national security laws, including those mentioned above, should be subject to further review to ensure that the laws do not interfere unjustifiably with freedom of movement, or other rights and freedoms. Further review on this basis could be conducted by the Independent National Security Legislation Monitor (INSLM) and the Parliamentary Joint Committee on Intelligence and Security (Intelligence Committee).

7.9 There is also good 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 their passport to the trustee. This requirement may not be a proportionate response to concerns about bankrupt individuals absconding. Restrictions on freedom of movement should be imposed subject to precise criteria, and judicial oversight, rather than through automatic forfeiture of a bankrupt's passport.

The common law

7.10 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'.[2] 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'.[3]

7.11 Influenced by Blackstone, 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'.[4]

7.12 In Australia, O'Connor J said, in *Potter v Minahan*, that a citizen of Australia is entitled 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'.[5]

7.13 The common law freedom of movement is not absolute. Common law liability and property rules determine the basic boundaries of the freedom. A person who enters land without the owner's consent commits trespass. A person who moves in disregard of the safety of others commits other torts. A motorist has a duty of care not to drive in a way that causes harm to others. Non-citizens have no common law freedom to enter a country except as allowed by the law of the country.[6]

7.14 Different considerations apply to public property (*res communes*) and state-owned property. *Res communes* include the sea, foreshore, rivers, the atmosphere, commons and dedicated public areas. Members of the public have common law freedom to the use of these things, including the freedom to navigate. However, this freedom is often regulated by legislation enacted for reasons such as conservation and safety. In contrast, there is no general common law freedom to enter state-owned property. The state may grant public access to lands such as national parks and forests subject to conditions.

Protections from statutory encroachment

Australian Constitution

7.15 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]

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2 *Magna Carta 1297* (UK) 25 Edw 1 c 42.

3 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) vol I, bk I, ch 7, s II, 256.

4 See McAdam, above n 1, 13.

5 *Potter v Minahan* (1908) 7 CLR 277, 305.

6 *Ruddock v Vadarlis* (2001) 110 FCR 491.

7 *Australian Constitution* s 92.

7.16 In *Gratwick v Johnson*, Starke J said that the 'people of Australia are thus free to pass to and fro 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]

7.17 In *Cunliffe v 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]

7.18 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]

7.19 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

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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* (Oxford University Press, 2nd ed, 2013) 120. In *Williams v Child Support 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.

> implicit view that the Constitution's federalism is not intended to protect individuals.[14]

7.20 In any event, a right to freedom of movement implicit in federalism would only extend to movement within Australia.

7.21 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. Therefore, any such impost 'could not be regarded as a charge for the privilege of entry', encroaching on freedom of movement.[15]

7.22 Section 117 of the *Constitution*, which provides protection against discrimination on the basis of state of residence, may also protect freedom of movement within Australia. For example, in *Street v Queensland Bar Association*,[16] the High Court held that a state cannot impose limits on professional practice qualifications on grounds that a person is not permanently residing in that state. The decision can be seen as removing an important impediment to cross-border movement for occupational purposes.

Principle of legality

7.23 The principle of legality provides some protection to freedom of movement, because freedom of movement is an essential part of personal liberty.[17] 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.

7.24 For example, in *Potter v Minahan*, O'Connor J said that in the interpretation of migration laws, it must 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'.[18]

7.25 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.[19] Bell J stated that 'the application of the principle of legality

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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 *Street v Queensland Bar Association* (1989) 168 CLR 461.

17 See Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 256.

18 *Potter v Minahan* (1908) 7 CLR 277, 305.

19 *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1, [116]. See also, in relation to indefinite detention, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *Al-Kateb v Godwin* (2004) 219 CLR 562; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219.

requires that the legislature make plain that it has addressed that consequence and that it is the intended consequence'.[20]

International law

7.26 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.

7.27 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.[21]

7.28 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]

Bills of rights

7.29 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*,[24] and in the human rights statutes in Canada[25] and New Zealand.[26]

7.30 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).[27] Section 12 of the Victorian Act, for example, 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.

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20 *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1, [529].

21 In addition, art 9 of the ICCPR provides that no one shall be subjected to arbitrary arrest or detention.

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).

24 *United States Constitution* amend IV.

25 *Canada Act 1982* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 6(1)–(2).

26 *New Zealand Bill of Rights Act 1990* (NZ) s 18.

27 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 12; *Human Rights Act 2004* (ACT) s 13.

Justifications for limits on freedom of movement

7.31 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.

7.32 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'.[28]

7.33 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.

Legitimate objectives

7.34 The threshold question in a proportionality test is whether the objective of a law is legitimate. Some guidance on what should be considered legitimate objectives of a law that interferes with freedom of movement may be derived from the common law and international human rights law.

7.35 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 protect ecologically sensitive areas, or ensure safety at sea.

7.36 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. 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.

7.37 Many of the laws discussed below 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 concerned with the protection of national security or public order.

7.38 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.

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28 *Canadian Charter of Rights and Freedoms* 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.

7.39 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.

7.40 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.

Balancing rights and interests

7.41 Whether all of the laws identified below as potentially interfering with freedom of movement in fact pursue legitimate objectives of sufficient importance to warrant restricting the freedom, may be contested.

7.42 However, even if a law does pursue such an objective, it will be important also to consider whether the law strikes an appropriate balance between freedom of movement and other rights and interests. A recognised starting point for determining whether an interference with freedom of movement is justified is the concept of proportionality.[29] Applying the Siracusa Principles, for example, a state must use 'no more restrictive means than are required' to achieve the purpose of the limitation.[30]

7.43 The UN 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'.[31] The UN Human Rights 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 … [I]t 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.[32]

Laws that interfere with freedom of movement

7.44 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

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29 See Ch 2.

30 United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984) [11].

31 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].

32 Ibid [13]–[14]. Legal and bureaucratic barriers were, for the Committee, a 'major source of concern': Ibid [17]. See also United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984).

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.

7.45 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.

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

Criminal laws

7.47 Part 5.3 of the *Criminal Code* contains a range of provisions with implications for freedom of movement.[33] 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;[34] 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.[35]

7.48 The *Criminal Code* also criminalises entering or remaining in 'declared areas' in foreign countries.[36]

7.49 The declared areas offences were introduced into the *Criminal Code* by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) (*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 the control orders and preventative detention regimes and the Australian Security Intelligence Organisation's questioning and detention warrant powers.

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33 The control orders and preventative detention orders regimes also have implications for freedom of speech and freedom of association: see Chs 4, 6. For example, under *Criminal Code* (Cth) s 104.5(3)(e), a prohibition or restriction on the person communicating or associating with specified individuals may be imposed.

34 *Criminal Code* s 104.5(3)(a)–(c).

35 Ibid s 105.4.

36 Ibid s 119.2.

7.50 All of these provisions have been subject to critical scrutiny in parliamentary committee and other inquiries.[37] These previous inquiries include that conducted in 2011–12 by the INSLM.[38] The Law Council of Australia supported further review of these provisions by the INSLM, 'with a particular focus on determining any undue encroachment on freedom of movement'.[39]

Criminal Code—control orders

7.51 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.[40]

7.52 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.[41] An individual may be required to wear a tracking device.[42]

7.53 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.[43]

7.54 The control order regime, along with preventative detention, was first introduced by the *Anti-Terrorism Act (No. 2) 2005* (Cth).

7.55 In 2012, then INSLM, Bret Walker SC recommended that the control order regime should be repealed.[44] The control order regime was also reviewed as part of the 2012–13 Council of Australian Governments (COAG) review of counter-terrorism legislation. The COAG report recommended that the control order regime should be retained with additional safeguards and protections.[45]

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37 See eg, Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) 68; Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) 44, 67, 106. See Gilbert and Tobin Centre of Public Law, *Submission 22*.

38 Independent National Security Legislation Monitor, *Declassified Annual Report* (2012).

39 Law Council of Australia, *Submission 140*.

40 *Criminal Code* s 104.1.

41 Ibid s 104.5(a)–(c).

42 Ibid s 104.5(3)(d).

43 Ibid s 104.4(1)(d). See *Jabbour v Hicks* [2008] FMCA 178.

44 Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) 44.

45 Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) x–xvi (Recommendations).

7.56 Following the expiration of a ten-year sunset period, the regime was extended for a further ten years by the *Foreign Fighters Act*. 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.[46] It stated that these requirements ensure the 'gravity of consequences likely to be occasioned by a terrorist act justifies a reasonable and proportionate limitation of free movement'.[47]

7.57 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. It 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.[48]

7.58 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.[49]

7.59 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'.[50]

7.60 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

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46 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [156].

47 Ibid.

48 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 14th Report of the 44th Parliament* (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, 16th Report of the 44th Parliament* (November 2014) [1.28]–[1.29].

49 See Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth) [30].

50 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 16th Report of the 44th Parliament* (November 2014) [1.35].

that the amendments to control orders impose limits on human rights, including freedom of movement, that are neither necessary nor reasonable.[51]

7.61 Further, under the amendments, when requesting the court 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 restrictions—as a whole rather than individually—should not be imposed.[52] 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':

> 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.[53]

7.62 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.[54]

7.63 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.[55] 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.[56]

7.64 The control order regime was continued by the *Foreign Fighters Act*, without significant amendment, on 12 December 2014.

7.65 In 2015, the INSLM sought public submissions, by 18 September 2015, for an inquiry concerning the adequacy of the safeguards relating to the control order regime. The INSLM Inquiry will examine whether additional safeguards recommended by the COAG review of counter-terrorism legislation[57] are desirable, with particular

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51 Ibid [1.36].
52 Ibid [1.37].
53 Ibid [1.38].
54 Ibid [1.39].
55 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (2014) 797.
56 Ibid 799.
57 Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013).

consideration of the advisability of introducing a system of 'special advocates' into the regime.[58]

7.66 A number of stakeholders to this ALRC Inquiry submitted that the control order regime constituted an unjustified interference with freedom of movement.[59] The Law Council referred to its concerns, expressed previously in submissions to parliamentary, UN and other bodies, that control orders and preventative detention orders 'allow restriction of freedom of movement based on suspicion rather than charge'.[60]

7.67 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 submitted that the Australian Government should repeal the control order regime or substantially amend it to ensure it does not disproportionately limit rights.[61]

7.68 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'.[62]

7.69 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.[63]

Criminal Code—preventative detention orders

7.70 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.[64]

7.71 The preventative detention orders regime was also extended by the *Foreign Fighters Act*.

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58 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>.

59 Human Rights Law Centre, *Submission 39*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

60 Law Council of Australia, *Submission 75*.

61 Human Rights Law Centre, *Submission 39*.

62 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'.

63 UNSW Law Society, *Submission 19*.

64 *Criminal Code* s 105.1.

7.72 The Explanatory Memorandum addressed issues of proportionality, and 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.[65]

7.73 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.[66]

7.74 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.[67]

7.75 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.[68]

7.76 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.[69] In response, the Attorney-General similarly observed 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.[70]

7.77 The preventative detention order regime was continued by the *Foreign Fighters Act* without significant amendment.

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65 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [194].

66 Ibid.

67 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 14th Report of the 44th Parliament* (2014) [1.100].

68 Ibid [1.104].

69 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (2014) 776.

70 Ibid 777.

Offence of entering or remaining in a 'declared area'

7.78 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.[71] As at 1 November 2015, these declared areas were Al-Raqqa Province, Syria and Mosul District, Ninewa Province, Iraq.[72] The Attorney-General's Department has issued a protocol that provides guidance on the process for the declaration of areas for the purposes of s 119.2 of the *Criminal Code*.[73]

7.79 The declared areas restriction was justified in the Explanatory Memorandum 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 enhance their ability to spread extremist messages to the Australian community which thereby increases the likelihood of terrorist acts being undertaken on Australian soil.[74]

7.80 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'.[75]

7.81 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'.[76]

7.82 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

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71 *Criminal Code* s 119.2.

72 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).

73 Attorney-General's Department (Cth), 'Protocol for Declaring an Area in a Foreign Country Where a Listed Terrorist Organisation Is Engaging in a Hostile Activity under the Criminal Code Act 1995'.

74 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [234].

75 Ibid.

76 Ibid [237].

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.[77]

7.83 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'.[78] The Human Rights Committee expressed concern that the 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'. The Committee considered that the offence 'unnecessarily restricts freedom of movement, and is therefore likely to be impermissible as a matter of international human rights'.[79]

7.84 The Scrutiny of Bills Committee also examined the declared area offence. The Committee expressed concern about its scope and observed that, 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 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 …[80]

7.85 The Scrutiny of Bills Committee observed that, notwithstanding the power to prescribe further legitimate purposes,[81] 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.[82]

7.86 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'.[83]

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77 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 14th Report of the 44th Parliament* (2014) [1.197].

78 Ibid [1.199].

79 Ibid [1.203].

80 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.

81 *Criminal Code* s 119.3(h).

82 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.

83 Ibid.

7.87 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.

7.88 Stakeholders in this ALRC Inquiry identified the declared area offence as unjustifiably interfering with freedom of movement.[84]

7.89 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 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.[85]

7.90 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).[86]

7.91 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'.[87] 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.[88]

Other criminal laws

7.92 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.

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84 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*.
85 Australian Lawyers for Human Rights, *Submission 43*.
86 Gilbert and Tobin Centre of Public Law, *Submission 22*.
87 Human Rights Law Centre, *Submission 39*.
88 Ibid.

7.93 Some Commonwealth laws concerning police powers have been criticised, including police search and seizure powers in relation to terrorist acts and terrorism offences contained in the *Crimes Act 1914* (Cth).[89]

7.94 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.[90]

7.95 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.[91] 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.[92]

ASIO questioning and detention warrants

7.96 The *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*) allows for the issuing of a questioning and detention 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.[93]

7.97 In 2012, the INSLM recommended that these provisions of the *ASIO Act* should be repealed as an unjustifiable 'intrusion on personal liberty'.[94] He stated that agencies and departments had been asked to give evidence demonstrating why questioning and detention warrants were necessary and that

> [n]o scenario, hypothetical or real, was shown that would require the use of a [questioning and detention warrant] where no other alternatives existed to achieve the same purpose. The power to arrest and question without charge for a broad range of preparatory and inchoate offences, the power to order the surrender of passports and prohibit a person from leaving Australia and the existing powers of detention or

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89 *Crimes Act 1914* (Cth) pt 1AA, div 3A.
90 Law Council of Australia, *Submission 75*.
91 *Crimes Act 1914* (Cth) ss 23DB–23DF.
92 Law Council of Australia, *Submission 75*.
93 *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34F–34H.
94 Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) 106.

> forcibly compelled immediate attendance under [questioning warrants] all provide less restrictive alternatives to [questioning and detention warrants].[95]

7.98 The *Foreign Fighters Act* ensured the continuation of div 3 of the *ASIO Act*, which contains ASIO's special powers relating to terrorism offences and, in particular, the issuing of ASIO questioning and detention warrants.

7.99 An ASIO 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).

7.100 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'.[96]

7.101 The Human Rights Committee examined these provisions and other special powers of ASIO covered by the Foreign Fighters Bill. The Human Rights 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.[97]

7.102 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'.[98]

Customs and border protection

7.103 Under the *Customs Act 1901* (Cth), Australian Border Force (ABF) officers have extensive powers of detention.[99] For example, under s 219ZJB, an ABF officer has power to detain persons suspected of committing a serious Commonwealth offence or a prescribed state or territory offence. These powers generally only apply to persons in a

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95 Ibid 105–6.

96 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [78].

97 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 14th Report of the 44th Parliament* (2014) [1.49].

98 Gilbert and Tobin Centre of Public Law, *Submission 22*. See Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) 105. See also Human Rights Law Centre, *Submission 39*.

99 *Customs Act 1901* (Cth) pt XII div 1.

'designated place'—for example, certain ports, airports and wharves[100] and where there are reasonable grounds to suspect the commission of an offence.

7.104 The *Migration Act* also contains powers of detention. For example, under s 189, an officer must detain a person that an officer knows or reasonably suspects is an unlawful non-citizen.[101]

Customs Act detention powers

7.105 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.[102]

7.106 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.[103]

7.107 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.[104]

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100 Ibid ss 4, 15.

101 An 'officer' includes ABF officers, protective services officers, members of the AFP or other police force, and others authorised by the Minister: *Migration Act 1958* (Cth) s 5. See also, in relation to persons on detained vessels or aircraft: *Maritime Powers Act 2013* (Cth) s 72.

102 *Customs Act 1901* (Cth) s 219ZJCA.

103 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [288].

104 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 14th Report of the 44th Parliament* (2014) [1.316]–[1.317].

7.108 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.[105]

7.109 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 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.[106]

Quarantine

7.110 Quarantine has ancient origins, in times when the only means of containing epidemics such as the plague was by confinement of infected persons, and quarantining is considered to be part of the traditional police power of the state.

7.111 The Commonwealth has extensive powers to detain Australian citizens and non-citizens under the *Quarantine Act 1908* (Cth).[107] 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'.[108]

Environmental regulation

7.112 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.

7.113 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.[109]

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105 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (2014) 816–17.
106 Ibid 817.
107 See *Quarantine Act 1908* (Cth) pt IV. See the quarantine power in the *Australian Constitution* s 51(ix).
108 *Quarantine Act 1908* (Cth) s 4.
109 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 390E.

7.114 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.[110] 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.[111]

7.115 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.[112] Breach of such directions is an offence.[113]

7.116 Where a national park is state property, regulation of public access will not interfere with common law freedom of movement. If the area is *res communes* (property to which all persons have access), regulation may amount to a restriction of common law freedom of movement.

Citizenship and passport laws

7.117 A citizen's freedom of movement may be interfered with following revocation of citizenship under the *Australian Citizenship Act 2007* (Cth), if the person does not retain permanent residency status.

7.118 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.[114]

7.119 However, revocation of citizenship by conferral, on the basis of a criminal conviction, may not occur if the person would be rendered stateless.[115] An Australian citizen by birth cannot have their Australian citizenship revoked under these provisions.

7.120 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.[116]

7.121 Following passage of the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) (*Allegiance to Australia Act*), the *Australian Citizenship Act* allows Australian citizenship to cease for dual nationals engaged in or supporting terrorist activities.

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110 *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 12.23.

111 Uluru-Kata Tjuta National Park Board of Management, *Uluru-Kata Tjuta National Park Management Plan 2010-2020* (2010) 85.

112 *Great Barrier Reef Marine Park Act 1975* (Cth) s 61AEA. This applies where the person has been convicted of repeated offences against the Act, or repeatedly subject to penalties under the Act.

113 Ibid s 61AEB.

114 *Australian Citizenship Act 2007* (Cth) s 34(1), (2).

115 Ibid s 34(3).

116 Ibid s 35.

7.122 The amending Act introduced three new ways in which a person, who is a national or citizen of a country other than Australia, can cease to be an Australian citizen. These are as follows:

- The person, aged 14 years or older, renounces their Australian citizenship if the person acts inconsistently with their allegiance to Australia by engaging in specified terrorist-related conduct, where the conduct was engaged in outside Australia or the person left Australia before being charged and brought to trial for the conduct.
- The person, aged 14 years or older, ceases to be an Australian citizen if the person fights for, or is in the service of, a declared terrorist organisation. The Minister may, by legislative instrument, declare a terrorist organisation. This legislative instrument is subject to strict oversight.
- The Minister may determine in writing that a person ceases to be an Australian citizen because the person has been convicted of a specified terrorist-related offence with at least six years of imprisonment (or to periods of imprisonment that total at least six years).[117]

7.123 A number of stakeholders expressed concerns about the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth), as first introduced.[118] The ANU Migration Law Program observed that removing citizenship from a person, by definition, 'removes their freedom to leave and return to their own country' and is a form of 'banishment' that may be unjustified.[119]

7.124 The Bill was the subject of inquiry by the Intelligence Committee, which recommended 27 changes.[120] The recommended changes were all implemented[121] including, for example, to provide that the Minister may consider exemptions in each case where conduct has led to automatic loss of citizenship; and the loss of citizenship following conviction occurs by discretionary decision of the Minister, rather than automatically. The legislation is subject to review by the INSLM and the Intelligence Committee.[122]

117 Supplementary Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth). See *Australian Citizenship Act 2007* (Cth) ss 33AA, 35, 35AA, 35A, 35B.

118 Law Council of Australia, *Submission 140*; Legal Aid NSW, *Submission 137*; ANU Migration Law Program, *Submission 107*; Australian Lawyers for Human Rights, *Submission 106*.

119 ANU Migration Law Program, *Submission 107*. The Program noted that the measure also has an impact on individuals' freedom of association and, in particular, on their right to remain united with family. See also Law Council of Australia, *Submission 140*.

120 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015).

121 Supplementary Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth).

122 *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) sch 2.

Passports

7.125 Under the *Australian Passports Act 2005* (Cth) an Australian passport may be refused, suspended or cancelled, interfering with a citizen's ability to leave or re-enter Australia, or other countries.

7.126 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, 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.[123]

7.127 A passport or other travel document may also be cancelled by the Minister for a range of prescribed reasons.[124] 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.

7.128 '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.[125]

7.129 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.[126] For example, passports may be cancelled as a result of recommendations made by ASIO following adverse security assessments under pt IV of the *ASIO Act*.[127]

7.130 The Law Council observed that some grounds to refuse, suspend or cancel a passport are 'straightforward', for example, 'where there is an order of the Family Court or a tax debt or other obligation, and the underlying facts are usually reviewable'. However, matters arising in decisions on national security grounds were said to be more problematic because, in practice, 'such decisions are unchallengeable due to non-disclosure directions given by the Executive, which prevent the affected party from knowing of or addressing the information relied on'.[128]

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123 *Australian Passports Act 2005* (Cth) ss 11–14.

124 Ibid s 22.

125 Ibid ss 12–14, 16; *Australian Passports Determination 2005* (Cth) pt 3.

126 *Australian Passports Act 2005* (Cth) ss 12–14, 16; *Australian Passports Determination 2005* (Cth) pt 3.

127 *Australian Passports Act 2005* (Cth) ss 14(1), 48A.

128 Law Council of Australia, *Submission 140*. The Law Council referred to *Hussain v Minister for Foreign Affairs*, as an example. *Hussain* involved an appeal from a decision of the Administrative Appeals Tribunal (AAT) affirming decisions to cancel an Australian passport and issue an adverse security assessment under the *ASIO Act*. The applicants were unsuccessful in arguing that the AAT erred in law in preventing their legal representatives from having access to all of the evidence and submissions made by the respondents: *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241.

7.131 The Law Council submitted that, in such cases, the Minister's power 'can be exercised on the basis of undisclosed material and in the knowledge that judicial review is hampered', resulting in a 'very significant restriction on the right of movement, with very limited scope to test its proportionality to the purported threat'.[129]

7.132 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.[130]

7.133 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.[131]

7.134 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 art 12.3 of the ICCPR, the restriction will be provided by law and is necessary for the protection of Australia's national security.[132]

7.135 The introduction of the new suspension mechanism was considered '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'.[133]

7.136 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 INSLM—was not supported by empirical evidence.[134] The Human Rights Committee also noted, in relation to proportionality, 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.[135]

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129 Law Council of Australia, *Submission 140*.

130 *Australian Passports Act 2005* (Cth) 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.

131 *Australian Passports Act 2005* (Cth) s 22A.

132 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [49].

133 Ibid [50].

134 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 14th Report of the 44th Parliament* (2014) [1.244].

135 Ibid [1.245].

7.137 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.[136]

7.138 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.[137]

7.139 The Attorney-General asserted, in response, 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'.[138] The Scrutiny of Bills Committee resolved to leave the question of whether the proposed approach is appropriate to the Senate as a whole.[139]

7.140 The Law Council, in a submission to this ALRC Inquiry, queried whether s 22A contains 'sufficient safeguards to ensure proportionality'. The Law Council noted that there is no legislative safeguard preventing multiple suspensions of a travel document. 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'.[140] Finally, 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.[141]

7.141 The Law Council submitted:

> In an age where a passport is indispensable to international movement, such a 'discretionary power' is at odds with that part of freedom of movement which seeks to guarantee that 'everyone shall be free to leave any country, including his own'.[142]

Passports and bankruptcy

7.142 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.[143] This provision

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136 Ibid [1.246]–[1.247].

137 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (2014) 749.

138 Ibid 750.

139 Ibid.

140 Law Council of Australia, *Submission 75*.

141 Ibid. Referring to *Criminal Code* s 48A. See also UNSW Law Society, *Submission 19*.

142 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12.2.

143 *Bankruptcy Act 1966* (Cth) s 77. In practice, not every trustee collects passports: Christopher Symes, 'Bankrupts and Passports: A Call to Repeal Sections 77(1)(a)(ii) and 272(1)(c) of the Bankruptcy Act' (2014) 14 *QUT Law Review* 98, 99.

appeared in the Act as originally enacted—pre-dating modern parliamentary committee scrutiny processes.

7.143 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.[144]

7.144 The primary purpose of the *Bankruptcy Act* is to provide a mechanism whereby a debtor's property can be taken and used to pay creditors, and to allow the debtor to be freed from the burden of accumulated debts. However, the scheme is 'not intended to be punitive', although there 'must necessarily be punitive aspects to the legislation in order to provide appropriate incentives for bankrupts to comply with their obligations under the Act'.[145]

7.145 For some bankrupts, the forfeiture of a passport and the requirement to seek a trustee's consent for international travel is a significant restriction on freedom of movement. The provision may not be proportionate, if it is not the least intrusive means of achieving the efficient administration of the bankruptcy.[146] Repeal of these provisions has been suggested because:

- where a bankrupt does not return from overseas, the bankrupt is liable to face extradition proceedings—and Australian courts and trustees may use existing cross-border laws to return the bankrupt to Australia;
- forfeiture of passports is unusual in other similar jurisdictions—the UK, US, Canada, New Zealand, South Africa, Malaysia, Singapore and India do not possess a legislative equivalent; and
- under the *Corporations Act 2001* (Cth), liquidators have the power to apply for court orders to prevent officers from absconding from Australia,[147] rather than legislative forfeiture of passports.[148]

7.146 There is good reason to review s 77 of the *Bankruptcy Act*. This requirement may not be a proportionate response to concerns about bankrupt individuals absconding. Arguably, restrictions on freedom of movement should be imposed subject to precise criteria, and judicial oversight, rather than through automatic forfeiture of a bankrupt's passport. A possible mechanism would be to provide trustees with a power to apply for court orders similar to those available to liquidators.

Child support

7.147 Under the *Child Support (Registration and Collection) Act 1988* (Cth) (*Child Support Act*) the Child Support Registrar may make a 'departure prohibition order'

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144 C Symes, *Submission 40*. See Symes, above n 143.
145 *Nguyen v Pattison* [2004] FMCA 517 (20 August 2004) [22].
146 Symes, above n 143, 108–9.
147 *Corporations Act 2001* (Cth) ss 486A, 486B.
148 Symes, above n 143, 109–10.

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.[149]

7.148 The justifications for the making of 'departure prohibition orders' under the *Child Support Act*[150] were discussed in the Federal Magistrates Court of Australia in *Williams v Child Support Registrar*.[151]

7.149 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. 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.[152]

7.150 Professor Patrick Parkinson highlighted problems with the application of this provision to parents who are visiting Australia, but live permanently overseas. These problems were said to arise particularly in situations where the alleged child support debt is seriously contested, or is associated with a conflict of laws.[153] Parkinson recommended legislative amendments to ensure that orders can only be issued against a person 'who is domiciled in, or habitually resident in, or a taxpayer of Australia'.

7.151 This issue was considered by the House of Representatives Standing Committee on Social Policy and Legal Affairs. In its July 2015 report, the Committee recommended that the legislation be amended to ensure that departure prohibition orders are 'only issued by a tribunal or court on the application of the Registrar and after providing an opportunity for the subject of the [departure prohibition order] to be heard' and that whenever an order is being considered in relation to a person who resides outside of Australia, the tribunal, court or Registrar 'must give special consideration to those circumstances'.[154]

Laws restricting entry to specific areas

7.152 Many Commonwealth laws interfere with freedom of movement, broadly conceived, by providing that it is unlawful to 'enter or remain' in certain prescribed areas.

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149 *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.

150 Ibid.

151 *Williams v Child Support Registrar* (2009) 109 ALD 343.

152 Ibid [35] (Lucev FM).

153 P Parkinson, *Submission 9*.

154 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *From Conflict to Cooperation: Inquiry into the Child Support Program* (2015) 138–9, rec 21.

7.153 Of course, common law freedom of movement does not extend to unfettered access to all public property. For example, in the case of the parliamentary precincts, the Parliament has power to regulate the conduct of its business and, therefore, control access. Defence areas may be state-owned property (as distinguished from public property) and, if so, the public would have no common law freedom to enter them without licence.

7.154 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.[155] 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

7.155 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'.[156] 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.[157]

7.156 Clearly, the *Migration Act* constrains the movement of people into Australia and, in some cases, their detention on, or prior, to arrival in 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 understood by the common law. In *Ruddock v Vadarlis*, Beaumont J held that asylum seekers aboard the MV *Tampa* had not, and could not, assert a common law right to enter Australia; and it is unlikely they had other Australian common law rights which could be enforced.[158]

7.157 At common law, freedom of movement concerns the freedom of citizens to leave and return to their own country. Therefore, laws which infringe a non-citizen's

155 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 70, 69.
156 *Migration Act 1958* (Cth) s 4(1).
157 Ibid s 4(2)–(4).
158 *Ruddock v Vadarlis* (2001) 110 FCR 491, [97]. Beaumont J stated that the absence of a common law claim was fatal to the case for relief in the form of the common law prerogative writ of *habeas corpus*. In the High Court, Keane J stated that it is 'well-settled that the power of the Executive government under the common law to deny entry into Australia of a non-citizen … including by compulsion, is an incident of Australia's sovereign power as a nation': *CPCF v Minister for Immigration and Border Protection* (2015) 316 ALR 1, [479]. However, this assertion may be contested: see Ibid [142]–[143] (Hayne and Bell JJ).

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 common law freedom of movement.

Conclusion

7.158 The ALRC concludes that the following Commonwealth laws should be further reviewed to determine whether they unjustifiably limit freedom of movement:

- *Bankruptcy Act* s 77, which provides that a bankrupt person must automatically give their passport to the trustee in bankruptcy.
- *Criminal Code* divs 104–105 (control orders and preventative detention orders) and s 119 (declared area offences). These provisions are subject to review by INSLM and the Intelligence Committee as part of their ongoing roles.

8. Fair Trial

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Summary

8.1 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]

8.2 A fair trial is designed to prevent innocent people from being convicted of crimes. It protects life, liberty, property, reputation and other fundamental rights and interests. Being wrongly convicted of a crime has been called a 'deep injustice and a substantial moral harm'.[4] Fairness also gives a trial integrity and moral legitimacy or authority,[5] and maintains public confidence in the judicial system.

8.3 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 some statutory limits, for example:

- a trial should be held in public;
- a defendant has a right to a lawyer; and
- a defendant has the right to confront the prosecution's witnesses and test their evidence, and to obtain and adduce their own evidence.

8.4 Other components of a fair trial are discussed elsewhere in this Report.[6]

8.5 The common law and statute both feature some limits on fair trial rights, for example to protect vulnerable witnesses and to protect national security interests. This chapter provides a survey of some of the Commonwealth laws that may be said to affect fair trial rights. Some of these laws are uncontentious, but others may need to be reviewed to ensure they are justified.

8.6 Commonwealth laws that alter fair trial procedures for national security reasons were criticised in a number of submissions to this Inquiry. Some of these laws may be justified, provided that overall the trial remains fair, but they nevertheless warrant ongoing and careful scrutiny.

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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 The burden of proof and the right to be presumed innocent are discussed in Ch 9. The right not to incriminate oneself is discussed in Ch 11. Legal professional privilege, which among other things helps protect a person's right to communicate in confidence with a lawyer, is discussed in Ch 12. Other chapters that relate to the fairness of the justice system more broadly include Ch 13 (Retrospective Laws), Ch 14 (Procedural Fairness), and Ch 15 (Judicial Review).

8.7 A range of other laws that affect fair trial rights are also identified, but relatively few attracted wide criticism. Client legal privilege and the privilege for religious confessions were singled out in one submission. These privileges in the Uniform Evidence Acts protect communications between lawyer and client and between priest (or other religious confessor) and penitent. Evidence of these communications may sometimes assist a defendant in a criminal trial. Although these privileges are themselves important rights, arguably there should be additional or clearer exceptions to give defendants greater scope to adduce third-party privileged evidence in criminal proceedings.

8.8 Courts have an inherent power to ensure that the overall process of a criminal trial remains fair. This provides considerable protection to fair trial rights in Australia.

8.9 The right to a fair trial 'extends to the whole course of the criminal process'.[7] 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.[8] Rather, this chapter highlights examples of laws that interfere with accepted principles of a fair trial and some of the concerns that have been raised about them.

8.10 Further, because some state and territory courts exercise federal jurisdiction and apply their own state procedures,[9] a comprehensive review of fair trial laws would need to consider all these state laws.

8.11 This chapter and the burden of proof chapter focus on criminal laws, although many of the principles will also be relevant to civil trials. Civil trials must of course also be fair, particularly considering the very serious consequences—including substantial legal costs and penalties—that may follow.[10]

A common law right

8.12 The right to a fair trial is 'manifested in rules of law and of practice designed to regulate the course of the trial'.[11] 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'.[12]

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7 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [38] (French CJ and Crennan J) (citations omitted).

8 The laws of evidence, for example, affect the fairness of trials, and were the subject of substantial ALRC inquiries in 1985–87 and 2006: See Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985); Australian Law Reform Commission, *Evidence*, Report No 38 (1987); Australian Law Reform Commission; New South Wales Law Reform Commission; Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102 (2006).

9 *Judiciary Act 1903* (Cth) s 68.

10 The Terms of Reference refer to laws that 'alter *criminal* law practices based on the principle of a fair trial' (emphasis added). The principle of a fair trial 'receives its most complete exposition' in the context of the criminal law, but is 'equally applicable to civil proceedings': James Spigelman, 'The Truth Can Cost Too Much: The Principle of a Fair Trial' (2004) 78 *Australian Law Journal* 29, 3.

11 *Dietrich v The Queen* (1992) 177 CLR 292, 299–300.

12 *Jago v The District Court of NSW* (1989) 168 CLR 23, 56–7 (Deane J).

8.13 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.

8.14 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.[13]

8.15 Even 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 John Baker wrote that, for some time, the accused remained 'at a considerable disadvantage compared with the prosecution'. The defendant's right to call witnesses was doubted, they had no right to compel witnesses to attend court, and they rarely had the assistance of counsel.[14]

8.16 There was also 'little of the care and deliberation of a modern trial' before the 19th 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.[15]

8.17 Baker describes the 'unseemly hurry of Old Bailey trials' in the early 19th century and calls it 'disgraceful'. The average length of a trial was a few minutes, and many prisoners would return from their trials not even knowing that they had been tried. He states that 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.'[16]

8.18 Many of the most important reforms were made in the 19th century. Those on trial for a felony were given the right to have a lawyer represent them in court in 1836; to call their own witnesses in 1867; and to give their own sworn evidence in 1898.[17]

8.19 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

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13 Cosmas Moisidis, *Criminal Discovery. From Truth to Proof and Back Again* (Institute of Criminology Press, 2008) 5.

14 JH Baker, *An Introduction to English Legal History* (Butterworths, 1971) 417.

15 Ibid.

16 Ibid.

17 Ibid 418. These reforms were made by Acts of Parliament.

history of the development of criminal law and procedure'.[18] Even some fundamental features of the criminal trial process 'are of relatively recent origin'.[19] For example, now 'axiomatic principles about the burden and standard of proof in criminal trials' were not fully established until 1935, and it was 'not until the last years of the nineteenth century that an accused person became a competent witness at his or her trial'.[20]

Attributes of a fair trial

8.20 Widely accepted general attributes of a fair trial—some traceable to the common law, others to parliamentary reforms—may now be found set out in international treaties, conventions, human rights statutes and bills of rights. 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;[21]
- **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 they understand;
- **time and facilities to prepare**: the defendant must have adequate time and facilities to prepare a defence and to communicate with counsel of their own choosing;
- **trial without undue delay**: the defendant must be tried without undue delay;[22]
- **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';

18 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [100].
19 Ibid.
20 Ibid.
21 See Ch 9.
22 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. See *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';[23]
- **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]

8.21 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

8.22 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 essentially intuitive judgment. The best that one can do is to formulate relevant general propositions and examples derived from past experience.[27]

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23 See Ch 11.

24 This list and the quotes are 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).

26 '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': *Dietrich v The Queen* (1992) 177 CLR 292, 300 (Mason CJ and McHugh J). 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.

27 *Jago v The District Court of NSW* (1989) 168 CLR 23, [5].

8.23 In *Dietrich v The Queen*, 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'.[28] Except 'where clear categories have emerged, the inquiry as to what is fair must be particular and individual'.[29]

8.24 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]

8.25 In *Assistant Commissioner Michael James Condon v Pompano*, the court said that the 'rules of procedural fairness do not have immutably fixed content'.[31] Gageler J said that exceptions to procedural fairness in the common practices of Australian courts were 'more apparent than real'.[32]

> All are examples of modifications or adjustments to ordinary procedures, invariably within an overall process that, viewed in its entirety, entails procedural fairness.[33]

8.26 Evidently, considerable care must be taken in identifying laws that interfere with the right to a fair trial and, as discussed in Chapter 14, with procedural fairness in administrative decision making. Such laws must be understood in their broader context, 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.

8.27 Much might 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':

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28 *Dietrich v The Queen* (1992) 177 CLR 292, 364.

29 Ibid. In *Wainohu,* French CJ and Kiefel J said: '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': *Wainohu v New South Wales* (2011) 243 CLR 181, [44] (citations omitted).

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).

33 Ibid.

> 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.[34]

8.28 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.[35]

8.29 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—may not, in practice, cause unfairness.

Protections from statutory encroachment

Australian Constitution

8.30 The *Australian Constitution* does not expressly provide that criminal trials must be 'fair', nor does it set out the elements of a fair trial, but it does protect many attributes of a fair trial and may by implication be found to protect other attributes.

8.31 Chapter III of the *Constitution* and its judicial interpretations provide a range of assurances that a person charged with a criminal offence under federal law is tried by a competent, independent and impartial tribunal. Section 71 vests the judicial power of the Commonwealth exclusively in the High Court, other federal courts created by Parliament and state courts in which Parliament invests federal jurisdiction. Section 72 protects judicial tenure, including the remuneration of federal judges during their tenure.

8.32 The High Court has determined that courts exercising federal judicial power must be courts in the strict sense of the term.[36] Judicial power in Ch III of the *Constitution* is not power to resolve a controversy in any manner, but rather to determine it by the curial mode of decision making. In *Polyukhovich v Commonwealth*, Deane J said that the provisions of Ch III were based 'on the assumption of traditional judicial procedures, remedies and methodology' and that the *Constitution*'s 'intent and meaning were that judicial power would be exercised by those courts acting as courts with all that notion essentially requires'.[37]

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34 *Dietrich v The Queen* (1992) 177 CLR 292, 363–4 (Gaudron J).

35 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [38] (French CJ and Crennan J) (citations omitted).

36 Eg, *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434.

37 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607.

8.33 Moreover, under the *Kable* doctrine, state courts cannot be vested with powers that are incompatible with their role as courts exercising federal judicial power.[38] Trials of people charged for crimes under federal law falls within federal judicial power by the classic definition of that power.[39] According to the rule in the *Boilermakers' Case*, Parliament cannot vest this federal judicial power in non-judicial bodies. The independence of the federal judicature is further assured by prohibiting non-judicial powers from being vested in federal courts.

8.34 The text and structure of Ch III of the *Constitution* has been found to imply 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*'.[40] In *Nicholas v The Queen,* Gaudron J quoted this passage and then 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.[41]

8.35 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.[42]

8.36 The High Court may have moved towards—but stopped short of—entrenching procedural fairness as a constitutional right.[43] If procedural fairness were considered an

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38 *Kable v DPP (NSW)* (1996) 189 CLR 51.

39 'There has never been any doubt that "convictions for offences and the imposition of penalties and punishments are matters appertaining exclusively to [judicial power]". There has equally never been any doubt that the separation of the judicial power of the Commonwealth by Ch III of the *Constitution* renders those matters capable of resolution only by a court': *Magaming v The Queen* (2013) 252 CLR 381, [61] (Gageler J).

40 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ) (emphasis added).

41 *Nicholas v The Queen* (1998) 193 CLR 173, 208–9.

42 *Nicholas v The Queen* (1998) 193 CLR 173. For example, in *Hogan v Hinch*, French CJ stated that an 'essential characteristic of courts is that they sit in public', but nevertheless 'it lies within the power of parliaments, by statute, to authorise courts to exclude the public from some part of a hearing or to make orders preventing or restricting publication of parts of the proceeding or of the evidence adduced': *Hogan v Hinch* (2011) 243 CLR 506, [20], [27]. See also Suri Ratnapala and Jonathan Crowe, 'Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power' (2012) 36 *Melbourne University Law Review* 175.

43 George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 375.

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.[44]

8.37 In *Pompano,* Gageler 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.[45]

8.38 It remains to be seen whether this will become settled doctrine in the Court.

8.39 Trial by jury is commonly considered a feature of a fair trial,[46] and s 80 of the *Constitution* provides a limited guarantee: '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 determine whether a trial is to be on indictment, and thus, whether the requirement for a trial by jury applies.[47] This has been said to mean that s 80 provides 'no meaningful guarantee or restriction on Commonwealth power'.[48]

8.40 The right to appeal against a conviction is also a recognised fair trial right, and is protected by s 73 of the *Constitution*, which gives the High Court extensive jurisdiction to hear and determine appeals. Parties aggrieved by judgments or sentences have, by implication, a right of appeal to the High Court.[49]

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44 Ibid 376.

45 *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [177].

46 Although this is the subject of some debate. Some scholars argue that the jury system can in fact be harmful to fair trial. See Australian Law Reform Commission; New South Wales Law Reform Commission; Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102 (2006) ch 18.

47 *R v Archdall and Roskruge; Ex parte 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.

48 Williams and Hume, above n 43, 355. See also *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 58 CLR 556, 581–2 (Dixon and Evatt JJ).

49 This was affirmed by the High Court in *Cockle v Isaksen* (1957) 99 CLR 155.

Principle of legality

8.41 The principle of legality may provide some protection to fair trials.[50] When interpreting a statute, courts will presume that Parliament did not intend to interfere with fundamental principles of a fair trial, unless this intention was made unambiguously clear.

8.42 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',[51] 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.[52]

8.43 The right to a fair trial is 'perhaps the best established example of a presumption that is appropriately characterised as part of a common law bill of rights'.[53]

> Australian law is virtually indistinguishable from the case law with respect to a right of fair trial in those jurisdictions which have adopted a human rights instrument all of which contain a provision to that effect.[54]

International law

8.44 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.

8.45 International instruments, such as the ICCPR, 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]

Bills of rights

8.46 In other jurisdictions, bills of rights or human rights statutes provide some protection to fair trial rights. Principles of a fair trial are set out in the *Charter of*

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50 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 2. The application of the principle of legality to particular fair trial rights is discussed further below and in other chapters of this report dealing with fair trial rights.

51 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.

52 *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').

53 Spigelman, above n 26, 25.

54 Ibid.

55 *Minister for Immigration v B* (2004) 219 CLR 365, [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 2.

Human Rights and Responsibilities Act 2006 (Vic) and the *Human Rights Act 2004* (ACT).[57]

8.47 Bills of rights and human rights statutes also protect the right to a fair trial in the United States,[58] the United Kingdom,[59] Canada[60] and New Zealand.[61] 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.

Justifications for limits on fair trial rights

8.48 Although it will never be justified to hold an unfair trial, particularly an unfair criminal trial, as this chapter shows, many of the general principles that characterise a fair trial are not absolute.[62]

8.49 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 Jeremy Gans stressed the importance of the inherent jurisdiction of any superior court to stay a proceeding on the ground of abuse of process: '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'.[63] Another general question that might be asked is: does this law increase the risk of a wrongful conviction?[64]

8.50 The structured proportionality test discussed in Chapter 2 may also be a useful tool. The Parliamentary Joint Committee on Human Rights has suggested that proportionality reasoning can be used to evaluate limits of fair trial rights.[65]

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57 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 24–25; *Human Rights Act 2004* (ACT) ss 21–22.

58 *United States Constitution* amend VI.

59 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 6.

60 *Canada Act 1982* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 11, 14.

61 *New Zealand Bill of Rights Act 1990* (NZ) ss 24, 25.

62 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* [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 a 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.

63 J Gans, *Submission 2*.

64 Ibid 2.

65 '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, Parliament of Australia, *Guide to Human*

Proportionality is also used in the fair trial context in international law. In *Brown v Stott,* Lord Bingham said that limited qualification of the fair trial rights in art 6 of the *European Convention on Human Rights* 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.[66]

8.51 This reflects a proportionality analysis.[67] 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'.[68] Dennis cites examples of proportionality reasoning in English courts in relation to the privilege against self-incrimination,[69] the presumption of innocence,[70] and legal professional privilege.[71]

8.52 Proportionality reasoning is referred to in discussions of these features of a fair trial in this and other chapters of this Report. It is a useful method of testing whether laws that limit fair trial rights are justified.

Open justice

8.53 Open justice is one of the fundamental attributes of a fair trial.[72] That the administration of justice must take place in open court is a 'fundamental rule of the common law'.[73] 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'.[74]

Rights (2014) 26. As noted in Ch 2, many stakeholders 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.

66 *Brown v Stott* [2003] 1 AC 681, 704 (Lord Bingham).

67 As discussed in Ch 2, the proportionality principle is reflected in the Siracusa Principles: United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984) [10], [11].

68 Dennis, above n 62, 346.

69 *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 11.

70 *R v Lambert* [2002] 2 AC 545; *Sheldrake v DPP* [2005] 1 AC 264.

71 *In Re McE* [2009] 2 Cr App R 1. See Ch 12 and Dennis, above n 62, 346.

72 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.

73 *John Fairfax & Sons Limited v Police Tribunal of NSW* (1986) 5 NSWLR 465, [476]–[477] (McHugh JA, Glass JA agreeing).

74 *Commissioner of the Australian Federal Police v Zhao* (2015) 316 ALR 378, [44] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

8.54 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 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.[75]

8.55 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'.[76]

8.56 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.[77]

8.57 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', and therefore '[n]othing should be done to discourage fair and accurate reporting of proceedings'.[78]

Limitations on open justice

8.58 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 it is otherwise in the public interest.[79]

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75 *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].

76 *Hogan v Hinch* (2011) 243 CLR 506, [27] (French CJ).

77 Bosland and Bagnall, above n 72, 674.

78 *John Fairfax Publications v District Court of NSW* (2004) 61 NSWLR 344, [20] (citations omitted).

79 '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).

8.59 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'.[80] 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'.[81]

8.60 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.[82] French CJ has said that the categories of case are not closed, but they 'will not lightly be extended'.[83]

8.61 In *John Fairfax Group v Local Court of New South Wales*, Kirby P said:

> 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.[84]

8.62 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 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.[85]

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80 *Russell v Russell* (1976) 134 CLR 495, 520.

81 Ibid 520 [8].

82 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].

83 *Hogan v Hinch* (2011) 243 CLR 506, [21].

84 *John Fairfax Group v Local Court of NSW* (1991) 36 NSWLR 131, 141 (citations omitted).

85 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.1. The meaning of many terms related to limitations in the ICCPR was considered by a panel of experts and set out in the Siracusa Principles: United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984).

8.63 Among other common law powers to limit open justice, courts may in some circumstances conduct proceedings *in camera* and make suppression orders.[86] 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 the courts

8.64 Federal courts have express statutory powers to make suppression orders and non-publication orders.[87] Section 37AE of the *Federal Court of Australia Act 1976* (Cth), 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'.[88]

8.65 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;
>
> (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).[89]

8.66 These grounds are reflected in other statutes, discussed below, that concern limits on open justice.

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86 '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 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 (29 July 1999).

87 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. See *Access to Justice (Federal Jurisdiction) Amendment Act 2011* (Cth). NSW and Victoria have also implemented the model provisions.

88 Ibid s 37AE.

89 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).

8.67 Under s 17(4) of the *Federal Court of Australia Act 1976* (Cth), the Federal Court may exclude members of the public where it is satisfied that this would be in the interests of justice.

8.68 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.[90]

National security

8.69 A number of provisions limit open justice for national security reasons. For example, sch 1 s 93.2 of the *Criminal Code Act 1995* (Cth) (*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'.[91]

8.70 Similar provisions include s 85B of the *Crimes Act 1914* (Cth) and s 31(1) of the *Defence (Special Undertakings) Act 1952* (Cth), although the relevant proviso reads: if 'satisfied that such a course is *expedient* in the interest of the defence of the Commonwealth'.[92]

8.71 In making orders under these provisions, courts may consider the principles of open justice and the need to provide a fair trial.[93] In *R v Lodhi,* McClellan CJ at CL 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 with a fair trial, determine whether, balancing all of these matters, protective orders should be made.[94]

8.72 Under s 127(4) of the *Service and Execution of Process Act 1992* (Cth), 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.

8.73 Section 40 of the *Nuclear Non-Proliferation (Safeguards) Act 1987* (Cth) concerns closing courts and making suppression orders to prevent the disclosure of information related to nuclear weapons and other such material.

8.74 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.[95] The *NSI Act*'s interference with the principle of full disclosure is discussed later in this chapter. Limits on disclosure affect open justice, but open justice may be more directly

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90 See *Competition and Consumer Act 2010* (Cth) s 163.
91 *Criminal Code* s 93.2(1).
92 Emphasis added.
93 *Lodhi v R* (2006) 65 NSWLR 573; *R v Benbrika (Ruling No 1)* [2007] VSC 141 (21 March 2007).
94 *Lodhi v R* (2006) 65 NSWLR 573, 584 [27] (McClellan CJ at CL).
95 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 3.

affected by the closed hearing provisions in the Act.[96] Further, the court may exclude both the defendant and their lawyer from these hearings, if the lawyer does not have an appropriate security clearance.[97] These procedures have been criticised.[98]

Witness protection

8.75 The other major ground for limiting open justice is to protect certain witnesses, particularly children and other vulnerable witnesses.

8.76 In the Federal Court, all witnesses in 'indictable primary proceedings' may be protected (not just those involved in criminal proceedings involving a sexual offence). Under s 23HC(1)(a) of the *Federal Court of Australia Act 1976* (Cth), the Court may make such orders as it thinks appropriate in the circumstances to protect witnesses.[99] However, although the Federal Court has been given jurisdiction to hear indictable cartel offences,[100] criminal trials are otherwise rarely heard in federal courts.

8.77 Under s 28 of the *Witness Protection Act 1994* (Cth), 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'.[101]

8.78 Similarly, law enforcement 'operatives' are given some protection under s 15MK(1) of the *Crimes Act*, 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'.

8.79 The courts may exclude members of the public from a proceeding where a vulnerable witness is giving evidence under s 15YP of the *Crimes Act*. 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.[102]

8.80 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'.[103]

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96 Ibid ss 27, 38G. The closed hearing requirements are set out in Ibid ss 29, 38I.

97 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 29(3), 38I(3). The limits on the right to a lawyer in the *NSI Act* are discussed later in this chapter.

98 See, eg, Law Council of Australia, *Submission 75*.

99 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).

100 See *Competition and Consumer Act 2010* (Cth) s 163.

101 *Witness Protection Act 1994* (Cth) s 28A(1).

102 *Crimes Act 1914* (Cth) s 15Y.

103 Ibid s 15YAB(1). See also Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) Ch 7.

8.81 It is an offence under s 15YR(1) of the *Crimes Act* 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

8.82 Other non-criminal Commonwealth statutes that may limit open justice, often to protect children and other vulnerable people, 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';[104]
- *Migration Act 1958* (Cth) s 91X—the names of applicants for protection visas are 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; and
- *Administrative Appeals Tribunal Act 1975* (Cth) ss 35(2), 35AA.

8.83 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 obtain and adduce evidence and confront witnesses

8.84 A person's right to defend themself against a criminal charge includes the right to cross-examine the prosecution's witnesses and to obtain and adduce other evidence in support of their defence. Disclosure of evidence also serves the proper administration of justice. The High Court has spoken of 'the desirability, in the interests of justice, of obtaining the fullest possible access to the facts relevant to the issues in a case'.[105]

8.85 At common law, the prosecution has a duty to disclose all relevant evidence in its possession to an accused.[106] This is said to be an incident of an accused's right to a

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104 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 27.

105 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [35] (Gleeson CJ, Gaudron and Gummow JJ).

106 *Grey v The Queen* (2001) 75 ALJR 1708; *Mallard v The Queen* (2005) 224 CLR 125, [17] (Gummow, Hayne, Callinan and Heydon JJ).

fair trial[107] and full disclosure has been called a 'golden rule'.[108] An accused also has a right to adduce other evidence in support of their defence.

8.86 Confrontation and the opportunity for cross-examination has also been said to be of 'central significance to the common law adversarial system of trial'.[109] The right to confront an adverse witness is 'basic to any civilised notion of a fair trial'.[110] In *R v Davis*, Lord Bingham said:

> 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.[111]

8.87 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'.[112]

8.88 These rights are also recognised in the *United States Constitution*. The Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right 'to be confronted with the witnesses against him' and 'to have compulsory process for obtaining witnesses in his favor'.

Limitations

8.89 A number of laws may limit the right to confront witnesses, test evidence and adduce 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.

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107 *R v Ward* [1993] 1 WLR 619, 674. Quoted with approval by Lord Bingham in *R v H* [2004] 2 AC 134, 147. 'The prosecution's duty of disclosure is an incident of an accused's right to a fair trial': '*D' v Western Australia* (2007) 179 A Crim R 377 (Buss JA).

108 *R v H* [2004] 2 AC 134, 147 (Lord Bingham).

109 *Lee v The Queen* (1998) 195 CLR 594, [32].

110 *R v Hughes* [1986] 2 NZLR 129, 149 (Richardson J).

111 *R v Davis* [2008] 1 AC 1128, [5].

112 Ibid.

Hearsay evidence

8.90 Exceptions to hearsay allow evidence to be adduced that cannot be the subject of cross-examination, and therefore have some potential, in principle, to affect the fairness of a trial.[113]

8.91 The importance of being able to cross-examine adverse witnesses is one of the rationales for the rule against hearsay evidence.[114] As noted above, confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial.[115] 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'.[116]

8.92 However, many exceptions to the hearsay rule have been recognised both at common law and statute. The exceptions in the Uniform Evidence Acts are set out in ss 60–75 and have been said to be 'a significant departure from the common law'.[117] Australia has 'followed the common law trend of shifting the traditional exclusionary rule in a markedly pro-admissibility direction'.[118]

> 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.[119]

8.93 If the Uniform Evidence Acts allow for more hearsay evidence to be admitted, this could, in principle, affect the fairness of a trial. But it is not suggested that they do in fact cause unfairness and no such suggestion was made in submissions.[120]

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113 The hearsay rule 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': Uniform Evidence Acts 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': JD Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2013) [31010].

114 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': *Lee v The Queen* (1998) 195 CLR 594, [32]. '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': Heydon, above n 113, [31015].

115 *Lee v The Queen* (1998) 195 CLR 594, [32].

116 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.

117 Westlaw AU, *The Laws of Australia* (at 20 July 2015) 16 Evidence, '16.4 Testimony' [16.4.1950].

118 Henning and Hunter, above n 116, 347.

119 Westlaw AU, *The Laws of Australia* (at 20 July 2015) 16 Evidence, '16.4 Testimony' [16.4.1950].

120 Hearsay evidence was not discussed in submissions and the question of whether the exceptions in the statute are appropriate has not been considered in this Inquiry.

8.94 Gans and Palmer write that the past exceptions to hearsay at common law were developed in a haphazard way and were unsatisfactory in principle and policy and difficult to apply.[121] The legislation 'comprehensively rationalises and liberalises' the law.[122]

8.95 It is not only the prosecution that may wish to adduce hearsay evidence. Given a defendant may wish to do so in aid of their defence, some exceptions to the hearsay rule may be necessary to give a defendant a fair trial.

Vulnerable witnesses

8.96 The vulnerable witness provisions under pt IAD of the *Crimes Act* 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.[123]

8.97 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 included 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).[124]

8.98 Laws to protect vulnerable witnesses recognise the importance of treating all participants in criminal proceedings fairly, rather than only the accused. 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'. Consequently:

> Major procedural reforms have been implemented in many common law jurisdictions over the last several decades designed to assist complainants and witnesses to give

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121 Jeremy Gans and Andrew Palmer, *Uniform Evidence* (Oxford University Press, 2014) 107–8.

122 Ibid 109.

123 *Crimes Act 1914* (Cth) pt IAD div 3. 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.

124 Women's Legal Services Australia, *Submission 5*. Recommendations about the cross-examination of complainants in sexual assault proceedings have been made 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 No 128 (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. Access to justice for persons with disability is discussed in Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) ch 7.

> their best evidence in a humane procedure which treats them with appropriate concern and respect.[125]

8.99 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'.[126] 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'.[127]

Evidentiary certificates

8.100 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:

> 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.[128]

8.101 Section 34AA of the *Australian Security Intelligence Organisation Act 1979* (Cth) enables evidentiary certificates to be issued, setting out facts in relation to certain acts done by ASIO. The Law Council of Australia (the Law Council) 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.[129]

8.102 However, the certificates in s 34AA are only 'prima facie evidence of the matters stated in the certificate'.[130] 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.[131] There are a number

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125 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.

126 Ibid.

127 Ibid.

128 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 54.

129 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.

130 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34AA(4).

131 Like placing a legal onus of proof on a defendant, this may undermine the presumption of innocence. On burdens of proof, see Ch 9.

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.[132]

Public interest immunity and national security information

8.103 The common law and Commonwealth statutes both recognise some limits on disclosure—for example, when disclosure would not be in the public interest, perhaps because it might threaten national security, and when disclosure would involve breaking a protected confidence, such as that between client and lawyer. Such limits on these principles are discussed in the following section.

8.104 Statutes that provide that a court may order that evidence not be admitted or disclosed in a criminal trial on public interest grounds may limit a person's right to a fair trial. Although they appear to be justified, two such provisions are s 130 of the Uniform Evidence Acts and s 31 of the *NSI Act*.

8.105 A public interest immunity to protect certain information was recognised in the common law,[133] and is provided for in s 130 of the Uniform Evidence Acts, which provides in part:

> If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.[134]

8.106 In making such a direction in criminal proceedings, the Acts state, a court may consider, among other things, 'whether the party seeking to adduce evidence of the

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132 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 55.

133 'The general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it': *Sankey v Whitlam* (1978) 142 CLR 1, 38 (Gibbs ACJ). 'Public interest immunity is a doctrine of substantive law. It represents a fundamental immunity. It allows for the withholding of documents in a variety of circumstances where disclosure of the documents would harm the public interest. The balancing process applied in determining whether a claim for public interest immunity should be upheld requires that the public interest in confidentiality must be weighed against the public interest in disclosure. Section 130 of the *Evidence Act* invokes the same two stage process of analysis as the common law': *R v Richard Lipton* (2011) 82 NSWLR 123, [84] (McColl JA).

134 Uniform Evidence Acts s 130(1).

information or document is a defendant or the prosecutor'.[135] If the information or document is needed to support the defence, this will strongly favour disclosure.[136]

8.107 A related provision is s 31 of the *NSI Act*, which provides that in a criminal trial a court may make orders to prevent, or place conditions on, the disclosure of national security information.[137] The court must consider not only any risk to national security, but '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'.[138]

8.108 This provision of the *NSI Act* has attracted some criticism, particularly in relation to s 31(8),[139] which provides that in deciding whether to make an order to protect national security information, a court 'must give greatest weight' to the question of national security.[140] 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'. His Honour also said:

> 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.[141]

8.109 The Gilbert and Tobin Centre of Public Law suggested the provision's impact on procedural fairness was nevertheless neither justified nor appropriate:

> The court's decision-making process should be rebalanced to give equal weight to procedural fairness and national security considerations, and it should require that information be excluded from the proceedings altogether if admitting it in summary or redacted form would undermine the defendant's right to a fair trial.[142]

8.110 The Councils for Civil Liberties also criticised the provision, preferring the balancing test in the Uniform Evidence Acts s 130.[143]

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135 Ibid s 130(5)(b).

136 Stephen Odgers, *Uniform Evidence Law* (Lawbook Company, 9th ed, 2009) [1.3.13600].

137 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) 31. For civil proceedings, see s 38L.

138 Ibid 31(7)(b).

139 Eg, Gilbert and Tobin Centre of Public Law, *Submission 22*; Law Council of Australia, *Submission 75*.

140 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 31(7),(8). There are also related provisions for civil proceedings in pt 3A of the Act.

141 R v Lodhi (2006) 163 A Crim R 448, [108]. The reasoning of Whealy J in this case was upheld in the NSW Court of Criminal Appeal: see *Lodhi v R* (2007) 129 A Crim R 470 [36]. In a related appeal, 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 provision of guidance, or an indication of weight, will affect the balancing exercise, it does not change the nature of the exercise': *Lodhi v R* (2006) 65 NSWLR 573, [45].

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

143 Councils for Civil Liberties, *Submission 142*.

8.111 Although not greatly concerned by its impact,[144] the Independent National Security Legislation Monitor (INSLM) suggested s 31(8) be repealed.[145] 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'.[146]

8.112 However, even without this amendment, the *NSI Act* does not, in the INSLM's view, undermine a person's right to a fair trial. In making an order under s 31, the *NSI Act* provides that a court must 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'.[147] In the opinion of the INSLM, this suffices to protect against any potential unfairness.[148]

8.113 More generally, the INSLM said that the *NSI Act* 'represents a serious and valuable reform in granting to the court a power to modify disclosure so as to protect national security information while vindicating open and fair, or at least fair, justice'.[149]

Secret evidence

8.114 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.*[150]

8.115 The INSLM has said that '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'.[151]

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144 The INSLM said the provision is 'little more than an otiose reminder' to judges of the importance of national security: Independent National Security Legislation Monitor, Australian Government, *Annual Report* (2013) 139.

145 Ibid.

146 Ibid.

147 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 31(7)(b).

148 Independent National Security Legislation Monitor, Australian Government, above n 144, 143. The matter is discussed extensively in this INSLM report.

149 Ibid 136. The protection of national security information in criminal proceedings was the subject of a 2004 ALRC report: Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98 (2004).

150 *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [1] (French CJ) (emphasis added).

151 Independent National Security Legislation Monitor, Australian Government, above n 144, 142.

8.116 Article 14 of the ICCPR also provides that defendants must have the opportunity to examine witnesses against them.

8.117 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'.[152]

8.118 The use of secret evidence in tribunals, particularly in immigration cases, is discussed in the ALRC's 2004 report, *Keeping Secrets*.[153]

Privileges

8.119 Statutory privileges have the potential to prevent an accused person from obtaining or adducing evidence of their innocence, and may have some potential to deny a person a fair trial.[154] A privilege is essentially a right to resist disclosing information that would otherwise be required to be disclosed.[155]

> 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.[156]

8.120 The recognition of certain privileges suggests that 'truth may sometimes cost too much'.[157] Unlike other rules of evidence, privileges are 'not aimed at ascertaining truth, but rather at upholding other interests'.[158]

8.121 Many statutory privileges provide for exceptions, usually with reference to the public interest, which may allow a court to permit a defendant in criminal proceedings to adduce what would otherwise be privileged evidence. Such exceptions exist to the privileges for journalists' sources, self-incrimination, public interest immunity and

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152 Ibid 140.

153 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98 (2004) ch 10.

154 J Gans, *Submission 2*.

155 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.

156 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.

157 *R v Young* (1999) 46 NSWLR 681, 696–7 (Spigelman CJ).

158 J Gans, *Submission 2*.

settlement negotiations.[159] However, these exceptions are arguably more limited or do not exist for client legal privilege and the privilege for religious confessions.[160] Gans submitted that this needs careful review.[161]

8.122 Section 123 of the Uniform Evidence Acts appears to provide for an exception to client legal privilege for defendants seeking to adduce evidence in criminal proceedings.[162] However, the provision was given a confined interpretation in *DPP (Cth) v Galloway*.[163] The Victorian Court of Appeal ruled that s 123 applied only to 'the adducing by an accused of evidence already in the accused's possession or knowledge'.[164] The section therefore simply preserved a more limited exception recognised by the common law.[165] The High Court in *Carter v Northmore Hale Davey & Leake*[166] and the House of Lords in *R v Derby Magistrates' Court*[167] had both rejected an exception to the privilege in favour of a defendant seeking to adduce evidence in their defence.[168]

8.123 Nevertheless, that the privilege may sometimes conflict with fair trial principles has been recognised. In *Grant v Downs*, the existence of the privilege was said to reflect that one public interest is paramount over 'a more general public interest' that 'requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available'.[169] In *Carter v Northmore Hale Davey & Leake*, Toohey J noted that 'it may seem somewhat paradoxical that "the perfect administration of justice" should accord priority to confidentiality of disclosures over the interests of a fair trial, particularly where an accused is in jeopardy in a criminal trial for a serious offence'.[170]

8.124 Some have criticised the priority given to the privilege. Professor Colin Tapper, co-author of the classic text, *Cross and Tapper on Evidence*, has written that in *Derby Magistrates* the House of Lords 'chose to exult the doctrine of legal professional privilege into an absolute right to which the need of the accused for access to evidence to promote his defence was subordinate'.[171] Professor Tapper argued that 'this betrays conceptual confusion, and can be justified neither in principle nor on authority'.[172] Others have called the House of Lords decision a 'significant—and somewhat surprising—derogation from traditional priorities'.[173] Jonathan Auburn was also critical

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159 Uniform Evidence Acts ss 126H(2), 128(4), 129(5), 130(5), 131(2). See J Gans, *Submission 2*.
160 Uniform Evidence Acts ss 118–120, 127.
161 J Gans, *Submission 2*.
162 Although the exception does not apply to a co-accused's privileged communications and documents.
163 *DPP (Cth) v Galloway* [2014] VSCA 272.
164 Ibid.
165 Ibid.
166 *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121.
167 *R v Derby Magistrates' Court; Ex parte B* [1996] 1 AC 487.
168 Roberts and Zuckerman state that such an exception was well established at common law: Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (Oxford University Press, 2004) 237.
169 *Grant v Downs* (1976) 135 CLR 674, 685.
170 *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121, 154 [35].
171 Colin Tapper, 'Prosecution and Privilege' (1996) 1 *International Journal of Evidence & Proof* 5, 24.
172 Ibid.
173 Roberts and Zuckerman, above n 168, 238.

of the position taken by the courts in Australia and England, and stressed the strong interest in giving a criminal accused access to all exculpatory evidence.[174]

8.125 An exception to the privilege has been recognised in Canada[175] and New Zealand. Section 67(2) of the *Evidence Act 2006* (NZ) makes an exception for communications or information where 'the Judge is of the opinion that evidence of the communication or information is necessary to enable the defendant in a criminal proceeding to present an effective defence'.

8.126 Client legal privilege is an important right which should only be limited when strictly necessary. However, given the importance of allowing a defendant to bring evidence in support of their defence, the ALRC considers that s 123 of the Uniform Evidence Acts should be reviewed and further consideration should be given to enacting a clear exception to the privilege for defendants seeking to adduce evidence.

Right to a lawyer

8.127 A defendant's right to a lawyer does not have a particularly long history. People accused of a felony had no right to be represented by a lawyer at their trial until 1836.[176] Moisidis explains that 'English criminal procedure for centuries stood for the principle that an accused charged with a felony should not be represented by counsel'.[177] The truth, it was thought, might be hidden behind the 'artificial defence' of a lawyer—better for the court to hear the accused speak for themselves and judge their manner and countenance.[178] Therefore, up until the late 18th century, defendants would typically respond to accusations in person.[179]

8.128 The right to a lawyer is now much more widely recognised and subject to relatively few restrictions, as discussed below. However, 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, if necessary.

8.129 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

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174 Jonathan Auburn, *Legal Professional Privilege: Law and Theory* (Hart Publishing, 2000) 192, and more generally, Ch 9, 'Criminal Exculpatory Evidence'.

175 *Smith v Jones* [1999] 1 SCR 455.

176 *Dietrich v The Queen* (1992) 177 CLR 292, 317 (citations omitted). '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': Baker, above n 14, 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.

177 Moisidis, above n 13, 10.

178 Ibid 9.

179 Ibid 10.

> 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.

8.130 In Australia, 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.[180]

8.131 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'.[181] Mason CJ and McHugh J also said that

> 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 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.[182]

8.132 While it is within judicial power to delay a trial or set aside a conviction on natural justice or procedural fairness grounds, it is questionable whether it is part of the judicial function to order government to provide a service.

8.133 The right to a lawyer is undermined—made considerably less useful—where communications between client and lawyer are monitored or may later be required to be disclosed. Chapter 12 discusses the importance of protecting lawyer-client confidentiality and statutory limits on legal professional privilege.

Laws that limit legal representation

8.134 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.

8.135 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

180 *Dietrich v The Queen* (1992) 177 CLR 292, 311.
181 Ibid.
182 Ibid [1].

exception for when questioning is considered so urgent, having regard to the safety of other people, that it cannot be delayed.[183]

8.136 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.[184] The ALRC has not received submissions suggesting that these limits are unjustified.

8.137 The Law Council criticised the limited access to a lawyer for persons subject to a preventative detention order under pt 5.3 div 105 of the *Criminal Code*, which enables a person to be taken into custody and detained by the Australian Federal Police 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.[185]

8.138 Section 34ZO of the *Australian Security Intelligence Organisation Act 1979* (Cth) 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'.

8.139 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.[186] 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.[187]

8.140 This scheme has been criticised.[188] The Law Council, for example, submitted that it restricts a person's right to a lawyer of his or her choosing and 'threatens the independence of the legal profession'.[189]

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183 *Crimes Act 1914* (Cth) s 23L(1)(b). See also Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *12th Report of 2002* (October 2002) 416.

184 The 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).

185 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. See Ch 12.

186 See, eg, *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 29, 39, 46.

187 Ibid s 39(5).

188 Law Council of Australia, *Submission 75*; Councils for Civil Liberties, *Submission 142*.

189 Law Council of Australia, *Submission 75*.

8.141 Some have suggested that 'special advocates'—lawyers with a security clearance permitted to access classified information—could be appointed to represent defendants in certain circumstances.[190] Special advocate regimes are found in Canada, New Zealand and the United Kingdom.[191]

Legal aid and access to justice

8.142 As discussed above, the positive right to be provided with a lawyer at the state's expense is not a traditional common law right, but it is nonetheless very important—particularly, as the High Court has recognised, for those on trial for serious offences.[192] Even if a court will order a stay of proceedings against an unrepresented defendant in a serious criminal trial, this may be of little assistance to those charged with non-serious offences. It will also not help victims of crimes and others who may seek access to justice but cannot afford to pay for legal representation. 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.

8.143 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.[193] 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'.[194] The Council stressed the importance of access to legal representation and highlighted some of the practical restrictions on access to legal aid, stating that 'it is clear that under existing guidelines it is possible to convict and imprison a person who is not deemed eligible for legal aid'.[195]

8.144 Access to justice has been the subject of many reports, in Australia and elsewhere, including recent reports by the Attorney-General's Department[196] and the Productivity Commission.[197] The Law Council suggested that an 'in-depth inquiry into the consequences of denials of legal assistance' still needs to be conducted.[198]

190 Gilbert and Tobin Centre of Public Law, *Submission 22*; Law Society of NSW Young Lawyers, *Submission 69*.
191 Gilbert and Tobin Centre of Public Law, *Submission 22*.
192 *Dietrich v The Queen* (1992) 177 CLR 292.
193 Women's Legal Services Australia, *Submission 5*.
194 Law Council of Australia, *Submission 75*.
195 Law Council of Australia, *Submission 140*.
196 Attorney-General's Department, 'A Strategic Framework for Access to Justice in the Federal Civil Justice System' (2009).
197 Productivity Commission, above n 124.
198 Law Council of Australia, *Submission 140*.

Appeal from acquittal

8.145 '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'.[199] 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.[200]

8.146 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,[201] or appeals from an acquittal by a court of appeal following conviction by a jury.[202]

8.147 The rule against double jeopardy can be traced to Greek, Roman and Canon law and is considered a cardinal principle of English law.[203] By the 1660s it was considered a basic tenet of the common law.[204] 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'.[205]

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199 *Davern v Messel* (1984) 155 CLR 21, 338 (Murphy J).

200 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). Justice Michael Kirby identified ten separate grounds offered by the law for the 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 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).

201 *Davern v Messel* (1984) 155 CLR 21, 62 (Murphy J).

202 Ibid 39–40 (Gibbs CJ); *R v Benz* (1989) 168 CLR 110, 112 (Mason CJ).

203 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).

204 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.

205 William Blackstone, *Commentaries on the Laws of England* (Clarendon Press reprinted by Legal Classics Library, 1765) vol IV, bk IV, ch 26, 329–30.

8.148 In Australia, the principle of legality provides some protection for this principle.[206] 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.[207] 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.[208] 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.[209]

8.149 The double jeopardy principle is protected 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'.

8.150 Bills of rights and human rights statutes prohibit laws that permit an appeal from an acquittal in the United States,[210] Canada[211] and New Zealand.[212] The prohibition is also recognised in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT).[213]

Laws that allow an appeal from an acquittal

8.151 Section 73 of the *Constitution* provides the High Court with extensive jurisdiction, including jurisdiction to hear appeals from an acquittal made by a judge or jury at first instance.[214] 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.[215] In *R v Wilkes*, Dixon CJ said the Court should

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206 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 2.

207 *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* (2002) 211 CLR 287, 289.

208 *Thompson v Mastertouch Television Service Pty Ltd (No 3)* (1978) 38 FLR 397, 408 (Deane J).

209 '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) 175 Crim R 108, [115] (Spigelman CJ).

210 *United States Constitution* amend V.

211 *Canadian Charter of Rights and Freedoms* s 11(h).

212 *New Zealand Bill of Rights Act 1990* (NZ) s 26(2).

213 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 26; *Human Rights Act 2004* (ACT) s 24.

214 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).

215 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.[216]

8.152 The ALRC is not aware of any other Commonwealth law that allows an appeal from an acquittal.[217]

8.153 Some state laws permit an appeal from an acquittal,[218] and such laws will be picked up and applied by s 68 of the *Judiciary Act*.[219] The state laws largely follow the model developed by the Council of Australian Governments in 2007. Gans has raised a number of concerns about the Victorian law, 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.[220]

8.154 However, as noted above, state laws are not reviewed in this Report, nor is the general policy of s 68(2) of the *Judiciary Act*, 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'.[221]

8.155 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 not only be 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'.[222]

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216 *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].

217 Neither was the Law Council. '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*.

218 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.

219 See *R v JS* [2007] NSWCCA 272 [93]–[119] (Spigelman CJ).

220 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': J Gans, *Submission 2*.

221 *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).

222 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, above n 200.

8.156 Where fresh and truly compelling evidence of guilt emerges—perhaps, for example, from DNA evidence[223]—a new trial may seem particularly justified, not only to the victims of the particular crime, but also to the broader community.

8.157 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?'[224]

8.158 Limits on the principle appear only to be justified when they are strictly necessary. The Law Commission of England and Wales considered the rule against double jeopardy and prosecution appeals in 2001. Its findings and recommendations have laid the foundation for laws limiting the rule in the UK and in other jurisdictions, including 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'.[225] The scope of the interference must be clear-cut and notorious.[226]

8.159 The Law Commission recommended that additional incursions on the rule against double jeopardy be limited to acquittals for murder or genocide.[227] This built on existing rights of appeal from an acquittal where the accused has interfered with or intimidated a juror or witness.[228]

8.160 Civil Liberties Australia submitted that the right to appeal against *conviction* was also integral to the right to a fair trial and suggested that existing restrictions on the right of appeal in most Australian jurisdictions are too strict and failed to comply with Australia's international human rights obligations.[229]

Other laws

8.161 In addition to the laws discussed above, stakeholders commented on other laws that may limit fair trial rights.

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223 See Kelley Burton, 'Reform of the Double Jeopardy Rules on the Basis of Fresh and Compelling DNA Evidence in New South Wales and Queensland' (2004) 101 *James Cook University Law Review* 84. See also K Burton et al, *Submission 123*.

224 J Gans, *Submission 2*.

225 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].

226 Ibid [4.35].

227 Ibid [4.30]–[4.36].

228 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.

229 Civil Liberties Australia, *Submission 94*.

Trial by jury

8.162 The *Constitution* provides that the 'trial on indictment of any offence against any law of the Commonwealth shall be by jury'.[230] As discussed above, this has been given a narrow interpretation: Parliament may determine which offences are indictable. Therefore any criminal law that provides for a summary trial may, broadly speaking, be said to deny a jury trial to a person charged with that offence.

8.163 Section 4G of the *Crimes Act* 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.' Section 4H of the *Crimes Act* 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'.

8.164 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.

8.165 The second situation is perhaps of greater concern. An example is s 232A of the *Customs Act 1901* (Cth), 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'.

8.166 Section 4J of the *Crimes Act* 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

8.167 Evidence obtained by torture or duress is unreliable, and its use in a trial would not be fair, whether the torture was conducted in Australia or in another country.[231]

8.168 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

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230 *Australian Constitution* s 80.

231 Lord Hoffmann said 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 HM Advocate, Coulter v H M Advocate* [2003] 1 AC 641 649. Evidence obtained by torture is not only unreliable, but torture is of course widely recognised as immoral, criminal and a breach of an absolute human right. Freedom from torture is one of only a few absolute rights in the ICCPR: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 4, 7.

the Torture Convention'.[232] 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.[233]

8.169 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.[234]

8.170 The Law Council also submitted that s 27D 'permits evidence of foreign material and foreign government material obtained *indirectly* by torture or duress'.[235]

Civil penalty provisions that should be criminal

8.171 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.

8.172 The Law Council has expressed concerns about the sometimes 'punitive' civil confiscation proceedings provided for in the *Bankruptcy Act 1966* (Cth),[236] 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.[237]

8.173 The Parliamentary Joint Committee on Human Rights has discussed whether civil penalty provisions should instead be characterised as criminal offences in the context of a range of bills[238] and has published a valuable guidance note on this topic.[239]

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232 *A v Secretary of State for the Home Department* [2005] 2 AC 68.

233 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].

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

235 Law Council of Australia, *Submission 75* (emphasis added).

236 *Bankruptcy Act 1966* (Cth) ss 154(6A), 231A(2A).

237 Law Council of Australia, *Submission 75*.

238 Eg, the Agricultural and Veterinary Chemicals Legislation Amendment Bill 2013 (Cth), 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).

239 Parliamentary Joint Committee on Human Rights, 'Offence Provisions, Civil Penalties and Human Rights' (Guidance Note No 2, Parliament of Australia, 2014) 3–5.

Conclusion

8.174 Although it will never be justified to hold an unfair trial, specific fair trial rights are not absolute and may sometimes be qualified, for example to protect vulnerable witnesses and national security information. The structured proportionality test is a useful tool to test whether laws that limit fair trial rights are justified.

8.175 Laws that alter fair trial procedures for national security reasons were criticised in some submissions and clearly warrant ongoing and careful scrutiny, including by relevant parliamentary committees and the INSLM.

8.176 Client legal privilege and the privilege for religious confessions in the Uniform Evidence Acts may unjustifiably limit the right of a defendant in a criminal trial to adduce evidence in their defence and should therefore be reviewed.

9. Burden of Proof

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Summary

9.1 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]

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1 *Woolmington v DPP* [1935] AC 462, 481–2 (Viscount Sankey). This statement was affirmed in *Environment 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.

9.2 This principle and the related principle that guilt must be proved beyond reasonable doubt are fundamental to the presumption of innocence.[4] Reversing the burden of proof may be justified in some circumstances, including where the reversal relates to an exception to criminal responsibility, or to an issue that is peculiarly within the knowledge of the accused.

9.3 This Inquiry has focused on the burden of proof in criminal, rather than civil, law, and considers examples of criminal laws that reverse the legal burden of proof. Reversals of the onus of proof in civil matters that may be considered criminal in nature are also briefly discussed.

9.4 A number of Commonwealth laws reverse the legal burden of proof on some elements of a criminal offence and may be seen as interfering with the principle that a person is presumed innocent until proved guilty according to law.

9.5 Reversal of the legal burden of proof on an issue essential to culpability in an offence arguably provides the greatest interference with the presumption of innocence, and its necessity requires the strongest justification.

9.6 Further review of the reversals of the legal burden of proof in these laws may be warranted. Laws that may merit further review include deeming provisions in relation to the requisite intention or belief for serious drug offences, and directors' liability for taxation offences committed by a corporation. Any such review should consider whether placing an evidential rather than legal burden on the defendant would be sufficient to balance the presumption of innocence with the legitimate objectives pursued by these laws.

9.7 There can be a blurring of distinctions between criminal and civil penalties, such that some civil laws may effectively be criminal in nature. Reversals of the burden of proof in such laws merit careful scrutiny.

A common law principle

9.8 The presumption of innocence has been recognised since 'at latest, the early 19th Century'.[5] In 1935, the 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 is that to place the burden of proof on a defendant is 'repugnant to ordinary notions of fairness'.[7]

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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); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

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).

9.9 Professor Andrew Ashworth has expanded on the rationale for the presumption of innocence:

> the 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]

9.10 In the High Court of Australia, French CJ called the presumption of innocence 'an important incident of the liberty of the subject'.[9]

9.11 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

> [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]

Legal and evidential burdens

9.12 There is a distinction between a legal and an evidential burden of proof. These terms are defined in sch 1 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*):

> ***legal burden***, in relation to a matter, means the burden of proving the existence of the matter.[12]
>
> ***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.[13]

9.13 Generally, the prosecution will bear both the legal and evidential burdens of proof.[14] However, an offence may be drafted so that the accused bears either the

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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.

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 *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].

13 *Criminal Code* 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].

14 Where the prosecution bears the legal burden, the standard of proof is beyond reasonable doubt, unless another standard of proof is specified: *Criminal Code* s 13.2.

evidential or legal burden, or both, on some issues.[15] Lord Hope in the House of Lords has explained 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, the burden of proof remains with the prosecution. The accused need only raise a reasonable doubt about his guilt.[16]

9.14 The placement of the burden of proof may also be expressed in the language of a 'presumption'. A presumption that a matter exists unless the contrary is proved places a legal burden on the defendant.[17] A defendant must rebut such a presumption on the balance of probabilities.

9.15 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]

9.16 This chapter is 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]

9.17 Accordingly, this Inquiry has not considered whether particular reversals of the evidential burden of proof are justified. However, Professor Jeremy Gans submitted

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15 Where the defendant bears the legal burden, the standard of proof is the balance of probabilities: Ibid s 13.5.

16 *R v DPP; Ex parte Kebilene* [2000] 2 AC 326, 378–79.

17 *Criminal Code* 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 word 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].

18 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 51.

19 *Criminal Code* 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.

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'.[22]

Essential elements of offence

9.18 It is possible to distinguish between the defining elements of an offence (its physical and mental—or 'fault'[23]—elements) and an exception, exemption, excuse, qualification or justification to it (often referred to as defences).[24] Such defences include, for example, self-defence or duress.

9.19 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.

9.20 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

9.21 The *Australian Constitution* does not expressly protect the principle that the burden of proof in a criminal trial should be borne by the prosecution. 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'.[25]

9.22 It has been held that Commonwealth laws which reverse the traditional onus of proof on some elements of an offence do not contravene Ch III of the *Constitution*.[26]

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22 J Gans, *Submission 2*. The Corporations Committee of the Business Law Section of the Law Council of Australia also contended that 'reversing the evidential burden of proof to place the burden on the accused can and does bear significant consequences': Corporations Committee, Business Law Section, Law Council of Australia, *Submission 124*. See also Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 14th Report of the 44th Parliament* (2014) 37.

23 *Criminal Code* pt 2.2 div 5.

24 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.

25 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

26 *Nicholas v The Queen* (1998) 193 CLR 173, [152]–[156].

However, a presumption that has the effect of usurping judicial power would be constitutionally invalid.[27] Brennan CJ provided an example of such a law in *Nicholas v The Queen*: 'If a court could be directed by the legislature to find that an accused, being found in possession of stolen goods, had stolen them, the legislature would have reduced the judicial function of fact finding to the merest formality'.[28]

9.23 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.

9.24 It has been suggested that the principle that the prosecution bear the burden of proof is implicit in any constitutional protection of fair trial rights.[31] An important feature of the Australian criminal justice system, according to Kirby J in *Carr v Western Australia*, is that '[v]alid 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'.[32] Kirby J further observed that this feature of the criminal justice system 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*'.[33]

Principle of legality

9.25 The principle of legality provides some protection for the principle that the prosecution should bear the burden of proof in criminal proceedings.[34] In *Momcilovic v The Queen* (*Momcilovic*), French CJ held that

> [t]he 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

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27 Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 3rd ed, 2012) 202–204.

28 *Nicholas v The Queen* (1998) 193 CLR 173, [24]. In the same case, Gummow J stated that a law that deemed to exist, or to have been proved to the satisfaction of the tribunal of fact, any ultimate fact, being an element of the offences with which the accused is charged … might well usurp the constitutionally mandated exercise of the judicial power for the determination of criminal guilt': [156].

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*.

31 The right to a fair trial is considered in detail in Ch 8.

32 *Carr v Western Australia* (2007) 232 CLR 138, [103].

33 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), 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.

34 The principle of legality is discussed more generally in Ch 2.

> 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.[35]

9.26 However, the principle cannot be used to override the clear and unequivocal language of a section. It does not 'constrain legislative power'.[36]

9.27 *Momcilovic* concerned the construction of s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic), which deemed 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.

9.28 In *Momcilovic*, the High Court confirmed that the section placed a legal burden on the accused.[37] 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'.[38]

International law

9.29 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.[39]

9.30 The protection of the presumption of innocence is provided in the same terms in art 11.1 of the *Universal Declaration of Human Rights*.[40]

9.31 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

9.32 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 *United States Constitution* guarantee a right not to be deprived of life, liberty or

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35 *Momcilovic v The Queen* (2011) 245 CLR 1, [44] (French CJ).

36 Ibid [43] (French CJ). See also Ibid [512] (Crennan and Kiefel JJ).

37 *Momcilovic v The Queen* (2011) 245 CLR 1, [56] (French CJ), [466]–[468] (Heydon J), [512], [581] (Crennan and Kiefel JJ), [665]–[666], [670] (Bell J).

38 Ibid [56].

39 *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.

40 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948).

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 2.

43 The protection provided by bills of rights and human rights statutes is discussed more generally in Ch 2.

property without due process of law[44] and have been interpreted by the US Supreme Court as including a presumption of innocence.[45]

9.33 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]

9.34 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]

9.35 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 the *European Convention for the Protection of Human Rights and Fundamental Freedoms*—including the protection of 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]

Justifications for reversing legal burden

9.36 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.[53]

Proportionality

9.37 As discussed in Chapter 2, proportionality is, generally speaking, the accepted test in international law for justifying most limitations on rights. The Parliamentary Joint Committee on Human Rights (Human Rights Committee) has noted that offences that reverse the burden of proof are likely to be 'compatible with the presumption of innocence where they are … reasonable, necessary and proportionate in pursuit of a

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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).

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). UK jurisprudence on the presumption of innocence is discussed further below.

52 Richard Glover and Peter Murphy, *Murphy on Evidence* (OUP Oxford, 2013) 11.

53 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*.

legitimate objective'.[54] Some stakeholders expressly endorsed proportionality as a means of assessing justifications for reversals of the burden of proof.[55]

9.38 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.[56]

9.39 In the 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.[57]

9.40 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'.[58]

9.41 A number of considerations may be relevant to evaluating whether a reversal of the burden of proof satisfies a proportionality test.

Where not an essential element of the offence

9.42 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 a significant

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54 Parliamentary Joint Committee on Human Rights, 'Offence Provisions, Civil Penalties and Human Rights' (Guidance Note No 2, Parliament of Australia, 2014) 2.

55 Law Council of Australia, *Submission 75*; UNSW Law Society, *Submission 19*.

56 *Salabiaku v France* [1988] ECHR 19 [28]. In *Salabiaku*, the Court found that a French customs law that deemed a person in possession of contraband goods liable for an offence remained within 'reasonable limits' because the defence of force majeure remained available to the applicant: Ibid [29]–[30].

57 *Attorney General's Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264, [21]. In this conjoined appeal, the House of Lords considered reversals of the legal burden in relation to an offence of being in charge of a motor car in a public place while over the drink-drive limit contrary to s 5(1)(b) of the *Road Traffic Act 1988* (UK); and an offence concerning membership of a proscribed organisation under s 11(1) of the *Terrorism Act 2000* (UK).

58 Ibid.

encroachment on the presumption of innocence.[59] Shifting the burden of proof on such an issue involves the possibility of unfair conviction. In the Supreme Court of Canada, 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.[60]

9.43 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'.[61]

9.44 In contrast, it may be more readily justifiable to shift the burden of proof on issues that are 'optional exceptions to criminal responsibility'.[62]

9.45 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.[63]

9.46 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.[64]

9.47 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'.[65]

9.48 In *R v Lambert* (*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

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59 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*.

60 *R v Whyte* (1988) 51 DLR 4th 481, 493.

61 *Attorney General's Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264, [26] (Lord Bingham).

62 J Gans, *Submission 2*.

63 *R v Lambert* [2002] 2 AC 545, [35].

64 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 50.

65 J Gans, *Submission 2*.

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'.[66]

9.49 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*.[67]

9.50 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.[68]

Seriousness

9.51 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.[69]

9.52 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. However, the House of Lords has not routinely considered a reversal of the burden of proof to be appropriate where the consequences of an offence are serious.

66 *R v Lambert* [2002] 2 AC 545, [35].
67 Ibid [38] (emphasis in original).
68 Dennis, above n 20, 920.
69 *State v Coetzee* [1997] 2 LRC 593 [220] at 677.

9.53 For example, in *Lambert,* the imposition of a legal burden of proof 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.[70]

9.54 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'.[71]

9.55 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.[72]

9.56 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.[73]

9.57 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'.[74] Associate Professor David Hamer has argued that such regulations play a important 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'.[75] However, the penalty for regulatory offences is not always minor, with conviction for some carrying 'moral opprobrium and the possibility of a prison sentence'.[76]

Difficulties of proof

9.58 Reversing the onus of proof is sometimes said to be justified where it is particularly difficult for a prosecution to meet a legal burden.[77]

70 *R v Lambert* [2002] 2 AC 545, [17] (Lord Slynn); [41]–[42] (Lord Steyn); [84], [91], [94] (Lord Hope); [156]–[157] (Lord Clyde).

71 *Attorney General's Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264, [41] (Lord Bingham).

72 Ibid [51] (Lord Bingham).

73 *R v Williams (Orette)* [2013] 1 WLR 1200.

74 Chung Ong, above n 59, 256.

75 Hamer, above n 59, 166.

76 Ibid 149.

77 *Williamson v Ah On* (1926) 39 CLR 95, 113 (Isaacs J).

9.59 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 produce the information needed to avoid conviction. This would generally be unjust.[78]

9.60 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'.[79]

9.61 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.[80] 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.[81]

9.62 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'.[82] 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'.[83]

9.63 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'.[84]

Laws that reverse the legal burden

9.64 This section identifies a number of Commonwealth laws that place a legal burden on the defendant in respect of particular issues. 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. Such laws, including deeming provisions in relation to serious drug offences, and directors' liability for taxation offences, may warrant further review. Any such review should consider whether placing an evidential rather than

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78 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 50.

79 Institute of Public Affairs, *Submission 49*.

80 *R v Turner* (1816) 5 M&S 206.

81 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*.

82 Consumer Action Law Centre, *Submission 35*.

83 Jobwatch, *Submission 46*.

84 Hamer, above n 59, 166.

legal burden on the defendant would be sufficient to balance the presumption of innocence with the legitimate objectives pursued by these laws.

Criminal Code

9.65 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 offences relating to unmarked plastic explosives.

Terrorism offences

9.66 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.[85]

9.67 Section 102.6 creates the offence of getting funds to, from, or for a terrorist organisation. A person will not commit an offence if they prove that the funds were received solely for the purpose of the provision of legal representation for a person in proceedings relating to terrorist organisation offences, or assisting the organisation to comply with Australian law.[86] The Law Council of Australia (Law Council) 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'.[87]

9.68 A review of counter-terrorism legislation by the Council of Australian Governments (COAG) recommended that 'the legal burden in the note in subsection 102.6(3) be reduced to an evidential one'.[88] This recommendation echoed similar recommendations made in 2006 by the Security Legislation Review Committee and the Parliamentary Joint Committee on Intelligence and Security.[89]

Drug offences

9.69 The *Criminal Code* contains a series of deeming provisions in relation to the fault elements 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 the requisite intention or belief to have been

85 *Criminal Code* s 102.3(2).

86 Ibid s 102.6(3).

87 Law Council of Australia, *Submission 75*. See also J Gans, *Submission 2*.

88 Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) 28.

89 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (December 2006) 77; Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006), 120.

either: trafficking in a substance;[90] cultivating a plant for a commercial purpose;[91] or manufacturing a substance for a commercial purpose.[92]

9.70 The legal onus lies on the defendant to defeat these presumptions—that is, the defendant must prove, on the balance of probabilities, that they did not have the requisite intention or belief for the offence.

9.71 The drug offences in the *Criminal Code* were introduced in 2005,[93] 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.[94]

9.72 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.[95]

9.73 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.[96]

9.74 The Law Council supported a review of the reversal of the burden of proof in these laws. Commentators have noted that such presumptions are ‘unique relative to

90 *Criminal Code* s 302.5.

91 Ibid s 303.7.

92 Ibid s 305.6. A similar set of deeming provisions operates in relation to offences involving precursors: Ibid div 306.

93 *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* (Cth).

94 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* (1998).

95 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 6 Serious Drug Offences* (1998) 81.

96 Ibid 82–5.

most other drug trafficking threshold systems across the world, where deemed supply laws are explicitly avoided'.[97]

9.75 One justification for the reversal of the burden of proof in these offences is the difficulties of proof faced by the prosecution. The Commonwealth Director of Public Prosecutions has stated that, without the reversal of the burden of proof on this issue, 'the prosecution would face formidable difficulty in securing convictions'.[98]

9.76 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.[99]

9.77 Such provisions have also been justified 'under goals of delivering proportionality and effective responses to those who inflict widespread suffering—drug traffickers'.[100] 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'.[101]

Child sex offences outside Australia

9.78 The defendant bears a legal burden in relation to a number of defences to sexual offences against children outside Australia.[102] Section 272.9(5) imposes a legal burden on a defendant to prove that they did not intend to derive gratification from a child

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97 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 No 467, Australian Institute of Criminology, 2014) 2.

98 Senate Legal and Constitutional Legislation Committee , Parliament of Australia, *Provisions of the Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005*, (August 2005) 21.

99 *Momcilovic v The Queen* (2011) 245 CLR 1, [467].

100 Hughes et al, above n 97, 6.

101 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)).

102 *Criminal Code* ss 272.9–272.10, 272.13, 272.16–272.17.

being present during sexual activity. The Law Council 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.[103]

Plastic explosives

9.79 The *Criminal Code* creates a number of offences in relation to trafficking in,[104] importing or exporting,[105] manufacturing[106] or possessing[107] unmarked plastic explosives. If no detection agent (a marking requirement for plastic explosives)[108] 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.[109]

9.80 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.[110]

Taxation

9.81 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,[111] and incorrectly keeping records.[112]

9.82 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.[113]

9.83 The Australian Institute of Company Directors (AICD) expressed concern about s 8Y of the *Taxation Administration Act*, 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.[114]

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103 Law Council of Australia, *Submission 75*.
104 *Criminal Code* s 72.12.
105 Ibid s 72.13.
106 Ibid s 72.14.
107 Ibid s 72.15.
108 Ibid s 72.33(2).
109 Ibid s 72.35.
110 Ibid s 72.16(1).
111 *Taxation Administration Act 1953* (Cth) s 8K.
112 Ibid s 8L.
113 Ibid s 8Y(2).
114 Australian Institute of Company Directors, *Submission 42*.

9.84 Provisions imposing personal liability for corporate fault may encourage greater transparency in management process, and improve accountability and performance standards of corporate officers. Such provisions ensure that 'human agents of prohibited conduct will … face the legal ramifications of their acts and will not be able to abuse or hide behind the corporate structure'.[115]

9.85 In 2009, COAG agreed to a set of principles relating to personal liability for corporate fault and developed guidelines for their application.[116] The Principles stated that provisions that place an evidential or legal onus on a director to establish a defence that the director 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'.[117] Relevant considerations for justification include where:

- there is a serious risk of potential significant public harm resulting from the offence;
- the size and nature of the penalties indicate a very serious offence; and
- the offence is a core element of the relevant regulatory regime.[118]

9.86 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 proposed amendments 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

115 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2003) 310.

116 Council of Australian Governments, *Personal Liability for Corporate Fault—Guidelines for Applying the COAG Principles* (2012).

117 Ibid.

118 Ibid.

> 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.[119]

9.87 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'.[120] The Corporations Committee of the Business Law Section of the Law Council strongly endorsed the AICD's submission.[121] The Law Council also supported review.[122]

Copyright

9.88 The *Copyright Act 1968* (Cth) contains a number of criminal offences in relation to copyright infringement.[123]

9.89 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.[124] It also includes presumptions relating to computer programs,[125] sound recordings[126] and films.[127]

9.90 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.[128]

9.91 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'.[129] It 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 presumptions 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

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119 Explanatory Document, Personal Liability for Corporate Fault Reform Bill 2012—Tranche 3 (2012) 3.
120 Australian Institute of Company Directors, *Submission 42*. See also Australian Institute of Company Directors, *Submission 105*.
121 Corporations Committee, Business Law Section, Law Council of Australia, *Submission 124*.
122 Law Council of Australia, *Submission 140*.
123 *Copyright Act 1968* (Cth) pt V div 5.
124 Ibid s 132A.
125 Ibid s 132AAA.
126 Ibid s 132B.
127 Ibid s 132C.
128 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth).
129 Ibid.

> 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.[130]

9.92 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.[131]

9.93 In contrast, the Commonwealth Director of Public Prosecutions supported a reversal of the legal burden, submitting to 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'.[132]

9.94 The *Guide to Framing Commonwealth Offences* states that 'presumptions have a similar effect to defences, and are only appropriate in certain circumstances'.[133] 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.[134]

Other laws

9.95 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 a marriage between other persons to assist a person to obtain permanent residence, it is a defence if the defendant proves they believed on reasonable grounds that the marriage would result in a genuine and continuing marital relationship.[135]

9.96 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.[136] For the offence of an unauthorised vessel entering an area to be

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130 Australian Digital Alliance and Australian Libraries Copyright Committee, *Submission 61*.

131 Luke Pallaras, 'Falling between Two Stools: Presumptions under the *Copyright Act 1968* (Cth)' (2010) 21 *Australian Intellectual Property Journal* 100, 104.

132 Commonwealth Director of Public Prosecutions, Submission No 53 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Copyright Amendment Bill 2006*, 2006.

133 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 53.

134 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest*, No 3 of 2010, 10 March 2010, 14.

135 *Migration Act 1958* (Cth) s 240(3). See also ss 219, 229(5)–(6), 232(2)–(3).

136 *Great Barrier Reef Marine Park Act 1975* (Cth) s 59H(1).

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.[137]

9.97 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.[138] The defendant bears the legal burden of proving that a prohibited reason was not the dominant reason for engaging in discriminatory conduct.[139] The placement of the burden of proof on the defendant on this issue 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'.[140]

Bail

9.98 The presumption of innocence may be understood in both a broad and narrow sense.[141] The narrower sense of the presumption of innocence refers to the principle that the prosecution should bear the burden of proof of guilt,[142] and has been the focus of this chapter.

9.99 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'.[143] Procedures relating to bail engage the presumption of innocence in its wider sense.

9.100 The New South Wales 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'.[144]

9.101 The Law Council 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'.[145] Legal Aid NSW argued that 'a reversal of the presumption in favour of bail effectively removes an important check and balance on the power and decision-making capacity of law enforcement officers'.[146]

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137 *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).

138 *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.

139 Ibid s 110.

140 Explanatory Memorandum, Work Health and Safety Bill 2011 (Cth).

141 Ashworth notes that the scope and meaning of the presumption of innocence are 'eminently contestable': Ashworth, above n 8, 243.

142 Ibid 244.

143 Ibid 243.

144 NSW Law Reform Commission, *Bail*, Report 133 (2012).

145 Law Council of Australia, *Submission 75*.

146 Legal Aid NSW, *Submission 134*.

9.102 Examples of laws that reverse the presumption in favour of bail include s 15(6) of the *Extradition Act 1988* (Cth), 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), which reverses for terrorism offences the presumption in favour of bail.

9.103 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.[147]

9.104 The Independent National Security Legislation Monitor has noted that the application of the 'presumption against bail in terrorism trials to date demonstrates 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)'.[148]

9.105 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 expressed its concern regarding the presumption against bail, and the justification for it:

> 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.[149]

9.106 The Australian Human Rights Commission has 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'.[150]

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147 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.

148 Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) 54.

149 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.

150 Australian Human Rights Commission, Submission No 18 to 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*, 6 May 2010.

Civil laws

9.107 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.[151]

9.108 A number of submissions discussed civil laws that place the burden of proof on some issues on the defendant.[152] However, the 'cardinal'[153] common law principle examined in this chapter is that the prosecution should bear the onus of proof in criminal proceedings. Accordingly, this chapter has focused on criminal laws that reverse the legal burden of proof.

9.109 The distinction between civil and criminal proceedings may not always be clear. The ALRC's 2003 report on civil and administrative penalties noted that the

> 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 procedural aspects, such as the different standards of proof for civil and criminal sanctions, are not always clearly distinguishable.[154]

9.110 The Institute of Public Affairs observed that governments 'increasingly regulate behaviour through the civil law, rather than the criminal law'.[155] 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'.[156]

9.111 Where there is such a blurring of distinctions between criminal and civil penalties, careful scrutiny of any reversals of the burden of proof is merited. 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

151 *Currie v Dempsey* (1967) 69 SR (NSW) 116, 125.

152 These are outlined in the Interim Report: Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Interim Report No 127 (2015) [11.95]–[11.102]. See also National Association of Community Legal Centres, *Submission 143*; Legal Aid NSW, *Submission 134*; FamilyVoice Australia, *Submission 122*; Victorian Gay and Lesbian Rights Lobby and NSW Gay and Lesbian Rights Lobby, *Submission 120*; JobWatch, *Submission 115*; Adriana Orifici, Professor Beth Gaze and Associate Professor Anna Chapman, *Submission 86*.

153 *Sorby v Commonwealth* (1983) 152 CLR 281, 294 (Gibbs CJ).

154 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2003) 84.

155 Institute of Public Affairs, *Submission 49*.

156 Anthony Gray, 'The Compatibility of Unexplained Wealth Provisions and Civil Forfeiture Regimes with *Kable*' (2012) 12 *QUT Law and Justice Journal* 18, 19.

> 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.[157]

9.112 For the Human Rights Committee, 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.[158]

Proceeds of crime

9.113 Some aspects of proceeds of crime laws may be considered to involve civil penalties that are criminal in nature. The *Proceeds of Crime Act 2002* (Cth) (*Proceeds of Crime Act*) establishes a scheme to confiscate the proceeds of crime.[159]

9.114 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.[160] A court may make an unexplained wealth order if a preliminary unexplained wealth order[161] has been made, and the court is not satisfied that the person's wealth was not derived from an offence.[162]

9.115 The burden of proving that the person's wealth is not derived from an offence lies on that person.[163] The person need not have been charged or convicted of any offence.

9.116 Gray has argued that civil forfeiture regimes are criminal in nature:[164]

> 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.[165]

9.117 Section 179E was added to the *Proceeds of Crime Act* in 2010,[166] 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

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157 Parliamentary Joint Committee on Human Rights, 'Offence Provisions, Civil Penalties and Human Rights' (Guidance Note No 2, Parliament of Australia, 2014).

158 Ibid.

159 *Proceeds of Crime Act 2002* (Cth) s 6. See also Ch 19.

160 Ibid s 179A.

161 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).

162 Ibid s 179E(1).

163 Ibid s 179E(3).

164 Gray, above n 156, 32.

165 Gray, above n 33, 135–36.

166 *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.

> 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.[167]

9.118 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'.[168] However, the Scrutiny of Bills Committee was concerned about the 'potential impact of such an onerous provision on a person's civil liberties'.[169]

9.119 The operation of the unexplained wealth provisions is subject to the oversight of the Parliamentary Joint Committee on Law Enforcement.[170] That Committee may require law enforcement bodies to appear before it to give evidence.[171] Additionally, the Commissioner of the Australian Federal Police must report to the Committee each financial year.[172]

9.120 In an independent review of the *Proceeds of Crime Act* in 2006 Tom Sherman 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.[173]

9.121 In 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.[174]

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167 Revised Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009.

168 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *10th Report of 2009* (September 2009).

169 Ibid.

170 *Proceeds of Crime Act 2002* (Cth) s 179U(1).

171 Ibid s 179U(2).

172 Ibid s 179U(3).

173 Tom Sherman, 'Report on the Independent Review of the Operation of the *Proceeds of Crime Act 2002* (Cth)' (Attorney-General's Department, 2006) 37.

174 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) 10.

9.122 The Law Council 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’.[175]

Conclusion

9.123 Reversal of the legal burden of proof on an issue essential to culpability in an offence arguably provides the greatest interference with the presumption of innocence, and its necessity requires the strongest justification.

9.124 The ALRC concludes that further review of the reversals of the legal burden of proof in these laws may be warranted, to determine whether they unjustifiably interfere with the presumption of innocence. Laws that may merit further review include deeming provisions in relation to the requisite intention or belief for serious drug offences, and to directors’ liability for taxation offences committed by a corporation. Any such review should consider whether placing an evidential rather than legal burden on the defendant would be sufficient to balance the presumption of innocence with the legitimate objectives pursued by these laws.

9.125 The ALRC notes that there can be a blurring of distinctions between criminal and civil penalties, such that some civil laws may effectively be criminal in nature. Reversals of the burden of proof in such laws merit careful scrutiny.

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175 Law Council of Australia, *Submission 75*.

10. Strict and Absolute Liability

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Summary

10.1 It is an important principle of the common law that a person generally should not be criminalised for committing a physical act (*actus reus*) without an accompanying 'guilty mind' (*mens rea*). However, some statutes impose strict or absolute liability on one or more physical acts, meaning that proof of *mens rea* is not required.

10.2 This chapter considers examples of offences where strict or absolute liability is imposed on any physical element of an offence. It discusses the source and rationale of the common law principle; how it is protected from statutory encroachment; and when Commonwealth laws that impose strict or absolute liability may be justified.

10.3 Strict liability offences do not require proof of fault, and provide for a defence of an honest and reasonable mistake of fact. It is generally considered justified to impose strict liability to protect public health, safety and the environment. It may also be imposed 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.

10.4 A defence of an honest and reasonable mistake of fact is not available for absolute liability offences. Such offences usually arise when an element is essentially a pre-condition of the offence, and the state of mind of the defendant is not relevant.

10.5 There are strict and absolute liability offences across many areas of law, including corporate and commercial regulation, environmental regulation, work health and safety, customs and border protection, counter-terrorism and national security, and copyright.

10.6 Some areas of particular concern have been identified. These include:

- various counter-terrorism offences provided under sch 1 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*) and ss 20 and 21 of the *Charter of the United Nations Act 1945* (Cth);
- reporting requirements under customs legislation; and
- the imposition of strict liability in relation to commercial scale infringement offences in copyright law.

10.7 Counter-terrorism and national security laws, including those mentioned above, should be subject to further review to ensure that the laws do not unjustifiably impose strict or absolute liability, or encroach upon other rights and freedoms. Further review on this basis could be conducted by the Independent National Security Legislation Monitor (INSLM) and the Parliamentary Joint Committee on Intelligence and Security.

10.8 The Productivity Commission may wish to consider the imposition of strict liability in relation to commercial scale copyright infringement offences as part of its review of Intellectual Property arrangements.

10.9 Finally, strict and absolute liability provisions should be reviewed to ensure they provide a consistent and uniform standard of safeguards.

A common law principle

10.10 There is a common law principle that presumes '*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 (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) [2.26].

3 Ibid.

10.11 Professors Andrew Ashworth and Jeremy Horder commented that:

> 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]

10.12 In *He Kaw Teh v The Queen*, 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]

10.13 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]

10.14 In his *Commentaries on the Laws of England*, 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]

10.15 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[9]—the prosecution is not required to prove *mens rea*, but there is a defence of reasonable mistake available;[10] and
- absolute liability offences—proof of *mens rea* is not required and the defence of reasonable mistake is not available.[11]

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4 Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th ed, 2013) 155.

5 *He Kaw Teh v The Queen* (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 7, 14.

8 William Blackstone, *Commentaries on the Laws of England*, (Clarendon Press reprinted by Legal Classics Library, first published 1765–1769, 1983 ed) vol IV, bk IV, ch 2, 21.

9 At common law, strict liability does not extend to criminal conduct. However, Parliament may impose strict (or absolute) liability on an offence by statute.

10 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).

11 *Wampfler v The Queen* (1987) 67 CLR 531. See further, Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2003) [4.4].

10.16 In the mid to late 19th century, strict and absolute liability offences were increasingly created by statute, particularly so-called 'regulatory offences'.[12] Regulatory offences were designed to protect individuals from the risks that came with greater industrialisation and mass consumerism.

10.17 In Australia, the common law presumes that *mens rea* is an essential ingredient of a criminal offence is reflected in statute. Chapter 2 of of the *Criminal Code* codifies the general principles of criminal responsibility which apply to all Commonwealth offences. Offences are made up of physical elements (*actus reus* at common law) and fault elements (*mens rea* at common law).[13]

10.18 A law may expressly provide that there is no fault element for one or more physical elements of an offence. If an offence is designated as a strict or absolute liability offence, no fault elements apply to all of the physical elements of the offence.[14] If strict or absolute liability is designated to apply to a physical element of an offence, no fault elements apply to that physical element.[15] A defence of an honest and reasonable mistake of fact applies only in relation to strict liability offences.[16] Different fault elements may apply to different physical elements of an offence.[17]

10.19 Where an offence is silent on the fault element that applies to one or more physical elements of the offence, s 5.6 operates to impose a default fault element. If the physical element relates to conduct, the prosecution must prove intention in relation to that conduct (that is, that the conduct was intended).[18] If the physical element relates to a circumstance or result, the prosecution must prove recklessness in relation to that circumstance or result.[19]

10.20 A number of Commonwealth laws expressly impose strict or absolute liability on some physical elements of an offence.[20] Most commonly, these relate to technical[21]

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12 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* 55, 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 by P of *actus reus* only': Colin Howard, *Strict Responsibility* (Sweet & Maxwell, 1963) 1.

13 *Criminal Code* s 3.1(1).

14 Ibid ss 6.1(1), 6.2(1).

15 Ibid ss 6.1(2), 6.2(2).

16 Ibid ss 6.1, 6.2.

17 Ibid s 3.1(2).

18 Ibid s 5.6(1).

19 Ibid s 5.6(2).

20 See, eg, *Corporations Act 2001* (Cth) ss 200B, 791A, 820A, 952J; *Customs Act 1901* (Cth) ss 96A, 99–102A, 102CK, 102DE, 102FA, 105C, 112; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 15A, 15C, 17B, 207B, 229; *Great Barrier Reef Marine Park Act 1975* (Cth) ss 38BC, 38BD, 38EA, 61AAC, 61ACB.

21 For example, strict liability is imposed with respect to the fact that the conduct occurred within a protected zone: *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 15A. Another example is, where a provision makes it an offence to give a defective disclosure document or statement, strict liability is imposed in relation to whether the person is a financial services licensee, and whether they gave or made the document available to another person: *Corporations Act 2001* (Cth) s 952E. In relation to a provision that goods should not be transferred between certain vessels, strict liability is imposed on the circumstance that an aircraft is making an international or prescribed flight or voyage:

or jurisdictional[22] elements, and as such don't offend the common law principle. However, problems arise when strict or absolute liability applies to physical elements that would normally require fault to render them culpable.[23] Professor Jeremy Gans submitted:

> 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 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.[24]

10.21 Accordingly, this chapter focuses on laws which impose strict or absolute liability on physical elements that would normally require fault to render them culpable.

Protections from statutory encroachment

Australian Constitution

10.22 The *Australian Constitution* does not expressly require that criminal offences include *mens rea*,[25] nor has this been specifically implied into the *Constitution* by the High Court.[26]

Principle of legality

10.23 The principle of legality provides some protection to the principle of *mens rea*.[27] 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.[28]

Customs Act 1901 (Cth) s 175. Absolute liability is imposed in some corporate offences, in relation to whether an entity was a company at the time of the offence: *Corporations Act 2001* (Cth) s 592. In relation to aggravated people smuggling offences, absolute liability applies to the circumstance that at least five of the persons entering a foreign country are not citizens or permanent residents of that country: *Criminal Code* s 73.3.

22 For example, in relation to theft and other property offences, absolute liability is imposed on the circumstance that the Commonwealth owned or occupied the property: *Customs Act 1901* (Cth) s 33L; *Criminal Code* ss 131.1, 132.4, 134.1. Another example relates to offences relating to fraudulent conduct, where absolute liability is imposed on the circumstance that the person or entity (to whom the fraudulent statements were made) was a Commonwealth public official or Commonwealth entity: Ibid ss 134.2, 135.1, 135.2, 136.1, 137. These are referred to as jurisdictional elements, as a connection with the Commonwealth is necessary to demonstrate a connection with the Commonwealth's power to legislate under the *Constitution*.

23 See, eg, *Criminal Code* s 102.5(2)(b).

24 J Gans, *Submission 2*.

25 This section and the section following refer to *mens rea* rather than fault elements, as it relates to the protection of the underlying common law principle, rather than the statutory expression of the principle under the *Criminal Code*.

26 However, where an offence in a Commonwealth law encroaches upon a constitutional right (express or implied), imposing strict or absolute liability on the offence may mean it is more difficult to establish that the offence is a proportionate limitation on the constitutional right.

27 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 2.

28 *He Kaw Teh v The Queen* (1985) 157 CLR 523, 528 (Gibbs CJ); *Sherras v De Rutzen* [1895] 1 QB 918.

10.24 In *CTM v The Queen*, for example, 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) (*Crimes Act*), 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.[29]

10.25 An amendment to the *Crimes Act* in 2003 had 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'.[30] It was designed to provide equal treatment of sexual offences against males and females.[31]

10.26 A majority of the High Court held that the offence in s 66C was not an absolute liability offence, despite the repeal of s 77(2), because it did not prevent the ongoing 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 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'.[32]

International law

10.27 The imposition of strict or absolute liability is seen to engage and limit the presumption of innocence protected under art 14.2 of the *International Covenant on Civil and Political Rights* (ICCPR), [33] because it allows for the imposition of criminal liability without proof of fault. Article 14.2 therefore provides some protection to the principle of *mens rea.* While international instruments cannot be used to 'override clear and valid provisions of Australian national law',[34] where a statute is ambiguous, courts

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29 *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] (Heydon J).

30 New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 May 2003, 376 (Bob Debus, Attorney–General).

31 New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 May 2003, 834 (Kristina Keneally).

32 *CTM v The Queen* (2008) 236 CLR 440, [30] (Gleeson CJ, Gummow, Crennan and Kiefel JJ).

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

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

will generally favour a construction that accords with Australia's international obligations.[35]

Justifications for imposing strict and absolute liability

10.28 The imposition of strict or absolute liability is a departure from the common law principle that a criminal offence must include a *mens rea* element. 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.

10.29 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) published a report on the application of strict and absolute liability in 2002 (*Strict and Absolute Liability Report*). It 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 (for example, public health, the environment, financial or corporate regulation).[36]

10.30 Additionally, the following general principles are relevant to the imposition of 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.
- 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.

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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 2.

36 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002) 284.

- 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*.[37]

10.31 On the question of absolute liability, the *Strict and Absolute Liability Report* stated that the imposition of absolute liability should be 'rare and limited to jurisdictional or similar elements of offences'.[38] 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'.[39]

10.32 The Parliamentary Joint Committee on Human Rights (Human Rights Committee) considers strict and absolute liability offences in light of art 14.2 of the ICCPR.[40]

10.33 The Human Rights Committee has 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.[41] 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*[42] are likely to satisfy this test.[43] In relation to absolute liability, the Human Rights Committee has stated that imposing absolute liability on jurisdictional elements is unlikely to raise human rights concerns.[44]

Laws that impose strict or absolute liability

10.34 There are a range of Commonwealth laws that could be said to impose strict or absolute liability. This chapter examines laws that arise in the following areas:

- corporate and prudential regulation;

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37 Ibid 283–6.

38 Ibid 285. For example, in relation to aggravated people smuggling offences, absolute liability applies to the circumstance that at least five of the persons entering a foreign country are not citizens or permanent residents of that country: *Criminal Code* s 73.3.

39 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002) 285.

40 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) [1.139], [1.308].

41 See, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Bills Introduced 18–29 June 2012, First Report of 2012* (2012) 13.

42 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011).

43 See, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Bills Introduced 18–29 June 2012, First Report of 2012* (2012) 13.

44 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* (2012) [1.24].

- environmental protection;
- work health and safety laws;
- customs and border protection legislation;
- national security legislation; and
- copyright legislation.

10.35 The imposition of absolute liability is relatively rare, and is largely confined to technical or jurisdictional elements.[45] Some notable exceptions arise in relation to customs and border protection and national security.

Corporate and prudential regulation

10.36 Strict liability offences are a common feature of regulatory frameworks underpinning corporate and prudential regulation, and may be appropriate to ensure the integrity of a financial or corporate regulatory regime.[46]

10.37 Strict liability is imposed on elements of a variety of corporate offences, including: the composition of corporate entities and licensing;[47] the provision of information, both to the general public and the regulator;[48] compliance with regulator and court/tribunal directions;[49] directors' duties and remuneration;[50] corporate governance, including audit requirements;[51] and the holding of monies on behalf of others.[52]

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45 For example, absolute liability is imposed on elements relating to the value of 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* 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 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.

46 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002) 284.

47 See, eg, *Corporations Act 2001* (Cth) ss 113, 115, 624, 630, 633, 640, 664D, 672B, 723–725, 734, 736, 791A, 820A.

48 See, eg, Ibid ss 123, 136, 139, 142–144, 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, 643–644, 648G, 650B, 650E–650F, 651A, 652C, 661B, 662A, 665A, 666A–666B, 667A, 670C, 912F, 952C, 952E, 952G, 985J, 1020AI, 1021C, 1021E, 1021FA–1021FB, 1021H, 1021M, 1021NA–1021NC, 1041E, 1274, 1299G, 1300, 1308.

49 See, eg, Ibid 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.

50 See, eg, *Corporations Act 2001* (Cth) ss 191, 195, 199B, 200B, 201D, 202B, 203D, 205G, 206J–206K, 206M, 588G.

51 See, eg, Ibid ss 249K, 250PA, 307A–307C, 308–309, 312, 324B, 601HG, 989CA.

52 See, eg, Ibid ss 666B, 722, 993B–993D, 1021O.

10.38 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).[53] Strict liability in prudential regulation aims to ensure 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.[54]

10.39 Based on this reasoning, non-compliance provisions relating to APRA directions,[55] superannuation payments and related commissions and brokerages,[56] 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, failures to provide APRA with information, documents or assistance are also designated strict liability offences.

10.40 Two examples of corporate and prudential regulation were highlighted in submissions to this Inquiry. The Australian Institute of Company Directors (AICD) submitted that s 588G of the *Corporations Act 2001* (Cth) (*Corporations Act*) is the 'most notable example' of a suite of provisions imposing strict or absolute liability for a breach of directors' duties at state, territory and Commonwealth level.

10.41 Section 588G of the *Corporations Act* states:

> (3) A person commits an offence if:
>
> (a) a company incurs a debt at a particular time; and
>
> (aa) at the time, a person is a director of the company; and
>
> (b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or incurring at that time debts including that debt; and
>
> (c) the person suspected at the time when the company incurred the debt that the company was insolvent or would become insolvent as a result of incurring that debt or other debts (as in paragraph (1)(b)); and
>
> (d) the person's failure to prevent the company incurring the debt was dishonest.

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53 See, eg, *Superannuation Industry (Supervision) Act 1993* (Cth) ss 11B–11C, 18, 29JA–29JB, 29JCA, 29W–29WB, 34M–34Q, 34Z, 35A–35D, 63–64, 71EA, 103–105, 107–108A, 122–124, 126K, 129–130, 130C, 131AA, 131B–131C, 135, 140, 141A, 154, 159–160, 201, 242P, 252A, 254, 260, 262, 265, 299C, 299F–299K, 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.

54 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Ninth Report of 2000* (June 2000) 247.

55 See, eg, *Superannuation Industry (Supervision) Act 1993* (Cth) ss 29JB, 34P–34Q, 63, 131AA, 159–160; *Life Insurance Act 1995* (Cth) ss 88B, 98B, 125A, 230F; *Insurance Act 1973* (Cth) ss 7A, 17, 27, 49, 49F, 62ZD, 108.

56 See, eg, *Superannuation Industry (Supervision) Act 1993* (Cth) ss 29WA–29WB, 34M–34N.

(3A) For the purposes of an offence based on subsection (3), absolute liability applies to paragraph 3(a).

(3B) For the purposes of an offence based on subsection (3), strict liability applies to paragraphs (3)(aa) and (b).

10.42 The AICD submitted that imposing criminal liability for the acts of the company 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'.[57] In determining whether a company is likely to be insolvent, a director is likely to be required to make complex commercial decisions without full information, and with limited time.[58]

10.43 The Australian Securities and Investments Commission (ASIC) suggested that the imposition of strict liability in s 588G reflects a drafting error. According to ASIC, the requirement for a reasonable suspicion set out in s 588G(3)(c) should be the fault element that applies to s 588G(3)(b). It submitted that s 588G should be amended to delete s 588G (3B).[59]

10.44 While the Scrutiny of Bills Committee has accepted the general approach to the imposition of strict liability in prudential regulation,[60] the Committee drew attention to amendments inserted by the *General Insurance Reform Act 2001* (Cth). This inserted the following 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.

10.45 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. While the Committee left the question for the Senate as a whole to

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57 Australian Institute of Company Directors, *Submission 42*.

58 Australian Institute of Company Directors, *Submission 105*.

59 Australian Securities and Investments Commission, *Submission 125*.

60 See, eg, Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Ninth Report of 2000* (June 2000) 245–7; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Seventh Report of 2002* (June 2002) 304–5; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *15th 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, Parliament of Australia, *Second Report of 2008* (March 2008) 61–4.

consider, by the time the Scrutiny of Bills Committee had published its report, the Bill had already been passed, and there was no whole of Senate consideration of the issue.[61]

Environmental protection

10.46 Strict liability is a key feature of a variety of environmental regulatory frameworks, including in relation to protection of the environment 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.

10.47 The ALRC received one submission on such provisions. The Environmental and Planning Law Committee submitted that such offences were justified:

> 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.[62]

10.48 However, it is desirable to scrutinise each strict or absolute liability offence individually, to determine whether it is a proportionate response to the underlying needs sought to be addressed.

10.49 The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) is the central plank of environmental regulation at the Commonwealth level.[63] 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 that the defendant knew that a species is a protected species, or that the conduct occurred in a protected place.[64] 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.[65]

10.50 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

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61 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *11th Report of 2001* (August 2001) 483.

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

63 See also Ch 20.

64 See, eg, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12, 15A–15C, 16, 17B, 18, 18A, 20, 20A, 21, 22A, 23, 24A, 24D–24E, 354A, 355A.

65 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *11th Report of 2006* (November 2006) 214.

> was reckless as to the fact that a species is a listed threatened species) is a substantial impediment to proving these offences.[66]

10.51 Strict liability has also been justified on the grounds that it overcomes a knowledge of law problem.[67]

10.52 By contrast, the Scrutiny of Bills Committee did not accept such justifications for similar provisions in the *Fisheries Management Act 1991* (Cth) (*Fisheries Management Act)*. For example, s 100B of the *Fisheries Management* states:

> (1) A person commits an offence if:
>
> (a) the person intentionally uses a boat; and
>
> (b) the boat is a foreign boat and the person is reckless as to that fact; and
>
> (c) the use of the boat is for commercial fishing and the person is reckless as to that fact; and
>
> (d) the boat is at a place that is, at the time of the use, in a part of the territorial sea of Australia that is in the [Australian Fishing Zone].
>
> (1A) Strict liability applies to paragraph (1)(d).[68]

10.53 In its 2007 consideration of the insertion of ss 100B and 101AA of the *Fisheries Management Act*, the Scrutiny of Bills Committee expressed an initial view that these provisions did not appear to comply with the principles set out in the *Strict and Absolute Liability Report*.[69]

10.54 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'.[70] The Scrutiny of Bills Committee 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.[71]

10.55 A number of provisions in the *Great Barrier Reef Marine Park Act 1975* (Cth) are potentially analogous to this. These provisions impose strict liability in relation to

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66 Ibid.

67 Ibid. The Scrutiny of Bills Committee's comments in relation to this Bill reflect its general approach to this issue.

68 See also *Fisheries Management Act 1991* (Cth) ss 99–100, 101–104, 105AA.

69 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Seventh Report of 2007* (June 2007) 233.

70 Ibid.

71 Ibid 235.

whether certain conduct was engaged in within specified zones in the Great Barrier Reef Marine Park.[72] However, this issue was not raised in submissions to this Inquiry.

Work health and safety

10.56 The *Work Health and Safety Act 2011* (Cth) (*WHS Act*) imposes strict liability on 'each physical element of each offence under [the *WHS Act*] unless otherwise stated'.[73]

10.57 The National Farmers Federation submitted that reg 49 of the *Work Health and Safety Regulations 2011* (Cth) 'appears impossible to comply with', because it imposes strict liability for accidental exposure despite the presence of safe systems of work.[74]

10.58 Regulation 49 requires that 'a person conducting a business or undertaking at a workplace must ensure that no person at the workplace is exposed to a substance or mixture in an airborne concentration that exceeds the exposure standard for the substance or mixture'. Section 12F of the *WHS Act* imposes strict liability on all physical elements of offences under the Act (and by extension, regulations under the Act). However, s 17 of the *WHS Act* defines a duty to ensure health and safety imposed under the Act or regulations as requiring that risks are eliminated as far as is reasonably practicable. Where it is not reasonably practicable to eliminate the risk, it should be minimised as far as reasonably practicable. Following this definition, it appears that so long as the safe systems of work eliminate or minimise the risk of exposure, a person carrying on a business or undertaking would not be committing an offence.

Customs and border protection

Strict liability offences

10.59 The customs and border protection regulatory framework is based on risk assessments. These risk assessments rely on information provided to Customs officials.[75] Inaccurate, false or misleading information can result in inaccurate risk assessments, and may result in the entry of prohibited imports (for example, narcotics or weapons) into the community.[76] As a result, the *Customs Act 1901* (Cth) (*Customs*

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72 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). However, these provisions may be considered a technical element, thus justified.

73 *Work Health and Safety Act 2011* (Cth) s 12F(2). See also *Industrial Chemicals (Notification and Assessment) Act 1989* (Cth); *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth); *Seafarers Rehabilitation and Compensation Act 1992* (Cth).

74 The National Farmers Federation provided a copy of its submission to the Improving the Model Work Health and Safety Laws Issues Paper and Consultation Regulation Impact Statement Questions as an attachment to its submission to this Inquiry: National Farmers Federation, *Submission 127*.

75 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2002* (May 2002) 149.

76 Ibid.

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.[77]

10.60 The Law Council of Australia (Law Council) 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.[78]

10.61 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.[79] The strict liability regime was introduced to 'preserve appropriate border control'[80] and reflects the view that isolated non-compliance, when viewed in its entirety, 'can have significant consequences for the community as a whole'.[81] Incorrect information 'renders ineffective' Customs' capacity to regulate using risk management techniques.[82]

10.62 However, bodies such as the Australian Federation of International Forwarders (AFIF) and Customs Brokers and Forwarders Council of Australia Inc (CBFCA) raised concerns before the Legal and Constitutional Affairs Committee's Inquiry about the application of strict liability, particularly in relation to false or misleading statements and late reporting.

10.63 AFIF noted that, in some cases, data received from exporters is is simply forwarded directly to Customs, and shipping companies are reliant on overseas exporters for the accuracy and timeliness of the reporting.[83] 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'.[84] 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.[85]

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77 See, eg, *Customs Act 1901* (Cth) ss 64–64ABA, 64ACD, 64AE, 64A, 65, 67EI, 71AAAQ, 71G, 74, 90, 101–102A, 102DG, 105C, 113, 114F, 116, 117AA, 117A, 118, 119, 123–124, 213A, 214AI, 240, 243SA–243SB, 243T–243V.

78 Law Council of Australia, *Submission 75*.

79 Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *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* (2001).

80 Ibid [1.27].

81 Ibid.

82 Ibid.

83 Ibid [1.46].

84 Ibid [1.47].

85 Ibid [1.50].

10.64 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'.[86] For example:

> 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 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.[87]

Absolute liability offences

10.65 In the customs and border protection context, some provisions impose absolute liability on elements other than technical or jurisdictional elements. Examples include ss 233BABAB and 233BABAC of the *Customs Act*, which impose absolute liability in relation to whether importation of a particular good was prohibited under the *Customs Act*. 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'.[88]

National security

Strict liability offences

10.66 A number of submissions to this Inquiry have identified strict liability offences relating to counter-terrorism and national security as examples of unjustified impositions of strict or absolute liability.[89]

Associating with a terrorist organisation

10.67 The Law Council and the joint submission by the Councils for Civil Liberties 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.[90] These provisions are discussed in greater detail in Chapter 6, 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.

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86 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Ninth Report of 2000* (June 2000) 374.

87 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002) 286.

88 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Eighth Report of 2007* (August 2007) 297.

89 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*.

90 Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 75*.

10.68 The Attorney-General's Department argued that the fault 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.[91]

10.69 The Security Legislation Review Committee, chaired by Simon Sheller QC, considered this submission, and stated in its report (*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'.[92] Further, it concluded that offences that carry custodial penalties of 25 years (s 102.5) and three years (s 102.8) should not be subject to strict liability.[93]

10.70 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.[94]

10.71 The Council of Australian Governments, in its 2013 review of counter-terrorism legislation, adopted the Sheller Report's comments relating to s 102.5,[95] and recommended the repeal of s 102.8.[96]

Financial transactions

10.72 The *Charter of the United Nations Act 1945* (Cth) includes provisions which prohibit dealings with assets owned or controlled by proscribed persons or entities, and giving assets to proscribed persons or entities.[97] Under ss 20 and 21 of the *Charter of the United Nations Act 1945* (Cth),[98] 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 about these provisions, stated that the imposition of strict liability

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91 Attorney-General's Department (Cth), Submission No 14(a) to Security Legislation Review Committee, *Report of the Security Legislation Review Committee*, 2006, 21.

92 Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006), [10.36].

93 Ibid.

94 Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) [104], quoting Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) [10.32].

95 Ibid [104]–[105].

96 Ibid rec 23.

97 The Minister must proscribe a person or entity if they are satisfied on reasonable grounds of matters prescribed by regulation. These matters must give effect to a decisions related to terrorism and dealings with assets made by the Security Council under ch VII of the Charter of the United Nations, which must be carried out by Australia under art 25: *Charter of the United Nations Act 1945* (Cth) s 15.

98 Inserted into the *Charter of the United Nations Act 1945* (Cth) by the *Suppression of the Financing of Terrorism Act 2002* (Cth).

> 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.[99]

10.73 Notwithstanding the Attorney-General's response, 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

10.74 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 4 discusses this provision in greater detail, including the ALRC's recommendations in a previous Inquiry in relation to such secrecy provisions.

Declared area offences

10.75 Several stakeholders raised concerns about s 119.2 of the *Criminal Code*, as inserted by the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).[100]

10.76 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.

10.77 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.

10.78 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 conduct.

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99 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2002* (May 2002) 180.

100 Councils for Civil Liberties, *Submission 142*; Australian Lawyers for Human Rights, *Submission 43*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*. The extent to which this provision encroaches on freedom of movement is discussed in Chapter 7.

10.79 The Gilbert and Tobin Centre of 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 of 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'.[101] It contended 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'.[102] Australian Lawyers for Human Rights echoed the concerns raised by the Gilbert and Tobin Centre of Public Law.[103]

10.80 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'.[104] 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 would demonstrate that there was no intent to support terrorist groups or engage in terrorist activities overseas.[105]

10.81 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.[106]

10.82 The Human Rights Committee also noted that a person could commit the offence without intending to engage in or support terrorist activity.[107]

10.83 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.[108]

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

102 Ibid.

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

104 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *14th Report of 2014* (October 2014) 58.

105 Ibid.

106 Ibid 59.

107 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 14th Report of the 44th Parliament* (2014) [1.170].

108 UNSW Law Society, *Submission 19*.

Other laws

Copyright

10.84 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'.[109] 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.[110]

10.85 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 [their] current form'.[111]

10.86 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.[112]

10.87 Other jurisdictions such as the United Kingdom, Canada and the United States have not imposed strict liability for copyright infringements.[113] Similar offences do not exist in the regulatory framework for patents and trademarks.[114]

10.88 A number of submissions to the inquiry by the Legal and Constitutional Affairs Committee stated that strict liability for copyright infringement 'should be rejected as a matter of principle'.[115] 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.[116]

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109 Australian Digital Alliance and Australian Libraries Copyright Committee, *Submission 61*.

110 Ibid.

111 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Copyright Amendment Bill 2006 [Provisions]* (2006) [3.16].

112 Australian Digital Alliance and Australian Libraries Copyright Committee, *Submission 61*.

113 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Copyright Amendment Bill 2006 [Provisions]* (2006) [3.16], [3.36].

114 Ibid rec 2.

115 Ibid [3.17].

116 Ibid [3.18].

10.89 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'.[117] 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',[118] 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.[119]

10.90 Following this recommendation, the Government removed 11 proposed strict liability offences and amended one to 'address the perception of possible overreach'.[120]

10.91 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'.[121] It cited s 132AO(5) of the *Copyright Act* as an example. The relevant provision states:

> (5) A person commits an offence if:
>
> (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.

10.92 The Australian Digital Alliance submitted that

> the 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.[122]

10.93 The phrase 'in public' is not defined in the *Copyright Act*. A place of public entertainment is also not exhaustively defined.[123] Divisions 3 and 4 of pt III outline relevant acts which do not constitute infringements of copyright.

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117 Ibid [3.128].

118 Ibid.

119 Ibid rec 2.

120 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *First Report of 2007* (February 2007) 12.

121 Australian Digital Alliance and Australian Libraries Copyright Committee, *Submission 61*.

122 Ibid.

123 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'.

10.94 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?[124]

10.95 Based on the reasoning in *Australasian Performing Right Association Ltd v Commonwealth Bank*,[125] it appears that the scenario described by the Australian Digital Alliance may breach s 132AO of the *Copyright Act*.

10.96 Such issues might be considered by the Productivity Commission as part of its current inquiry into intellectual property arrangements.[126]

Family law

10.97 The Law Council 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.[127] These provisions relate to providing the Registrar with information about payments, changes in circumstances, or other information sought by written notice.

10.98 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. Further, an offence in a family law context usually will occur whilst other litigation is pending and can impact upon it.[128]

10.99 The specific instances of strict liability identified by the Law Council 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.[129] 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

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124 *Australasian Performing Right Association Ltd v Commonwealth Bank of Australia* (1992) 40 FCR 549, [55].

125 *Australasian Performing Right Association Ltd v Commonwealth Bank of Australia* (1992) 40 FCR 549.

126 The terms of reference for the Productivity Commission's inquiry are available on its website: <www.pc.gov.au>

127 These include: *Child Support (Registration and Collection) Act 1988* (Cth) ss 23(7), 33(2), 34(2), 72W(2), 111(3), 113A(3), 120(3); *Child Support (Assessment) Act 1989* (Cth) ss 160(3), 161(3).

128 Law Council of Australia, *Submission 75*.

129 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002) 285.

of documents or the provision of documentary information, it would be more appropriate if the legislation imposed a strict liability.[130]

General review

10.100 In 2004, the Scrutiny of Bills Committee recommended that the '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'.[131]

10.101 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.[132]

10.102 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. The amendments simply seek to ensure that existing strict or absolute liability offences are not interpreted as fault-based offences, as a result of the operation of s 5.6 of the *Criminal Code*, by expressly stating that the relevant offences are strict or absolute liability offences.[133] This suggests that there may be a continuing need to undertake a project of the kind suggested by the Scrutiny of Bills Committee, including the examination of issues such as the drafting of s 588G of the *Corporations Act* and provisions in prudential and environmental regulation discussed in this chapter.

Conclusion

10.103 The ALRC concludes that the following Commonwealth laws should be further reviewed to determine whether they unjustifiably impose strict liability:

- various counter-terrorism and national security offences provided under the *Criminal Code 1995* (Cth) and ss 20 and 21 of the *Charter of the United Nations Act 1945* (Cth);
- reporting requirements under customs legislation; and

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130 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Ninth Report of 2000* (June 2000) 246.

131 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002) 289.

132 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* (2004) 6.

133 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).

- the imposition of strict liability in relation to commercial scale infringement offences in copyright law.

10.104 Counter-terrorism and national security laws, including those mentioned above, should be subject to further review to ensure that the laws do not unjustifiably impose strict or absolute liability, or encroach upon other rights and freedoms. Further review on this basis could be conducted by the Independent National Security Legislation Monitor (INSLM) and the Parliamentary Joint Committee on Intelligence and Security.

10.105 The Productivity Commission may wish to consider the imposition of strict liability in relation to commercial scale copyright infringement offences as part of its review of intellectual property arrangements.

10.106 Finally, strict and absolute liability provisions should be reviewed to ensure they provide a consistent and uniform standard of safeguards.

11. Privilege Against Self-incrimination

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Summary

11.1 The privilege against self-incrimination allows a person to refuse to answer any question, or produce any document or thing, if doing so would tend to expose the person to conviction for a crime.

11.2 A statutory form of the privilege is available in the Uniform Evidence Acts. The statutory protection is only available to resist disclosure of information in a court proceeding. The common law privilege is available to persons subject to questioning in both judicial and other proceedings.

11.3 A number of rationales have been said to underpin the privilege. In recent judgments, it has been said to be necessary to preserve the proper balance between the powers of the state and the rights and interests of citizens, to preserve the presumption of innocence and to ensure that the burden of proof remains on the prosecution. At other times, the courts have described the privilege as a human right, necessary to protect the privacy, freedom and dignity of the individual.

11.4 The privilege places barriers in the way of investigations and prosecutions, particularly where information is peculiarly within the knowledge of certain persons who cannot be expected to share that information voluntarily. Parliament has, at times, considered that the public interest in the full investigation of matters of public concern outweighs the public interest in the maintenance of the privilege. Many Commonwealth statutes give government agencies—including the Australian Crime Commission (ACC), the Australian Competition and Consumer Commission (ACCC), the Australian Security Intelligence Organisation (ASIO), and the Australian Securities and Investments Commission (ASIC)—the power to compel a person to answer questions, and provide that the privilege against self-incrimination does not excuse a person from answering questions. These powers are intended to facilitate the timely exposure of wrongdoing and prevent further harm.

11.5 Laws abrogating the privilege usually provide use immunity regarding the answers given—that is, they provide that the answers given are not admissible against the person in a subsequent proceeding. Some laws also provide derivative use immunity—that is, they provide that evidence obtained as a result of a person having made a statement is not admissible against the person in a subsequent proceeding. Other statutory safeguards against incrimination may also be provided, including restrictions on sharing the information obtained with law enforcement agencies. The courts also have inherent powers to exclude evidence that would render a trial unfair.

11.6 There have been several reviews of the privilege against self-incrimination and the availability of use immunities to protect witnesses who are compelled to answer questions or produce documents. These reviews largely concluded that use immunities are an appropriate safeguard of individual rights and may, therefore, appropriately justify laws that exclude the privilege against self-incrimination. However, there have been recent developments in the area, including the use of compulsory powers to question a person subject to charge. The High Court has said that such questioning has the potential to 'fundamentally alter the accusatorial judicial process'.[1] The Court has also expressed concern about the publication of transcripts of examinations to prosecutors.[2]

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1 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [124] per Hayne and Bell JJ, Kiefel J agreeing.

2 *Lee v The Queen* [2014] HCA 20 (21 May 2014).

11.7 The ALRC considers further review of the abrogation of self-incrimination in Commonwealth laws is warranted. Such a review could consider whether the abrogation in more than 40 Commonwealth laws has been sufficiently justified, and if so, what type of immunity is appropriate. It could also consider whether, and in what circumstances, the compulsory examination of persons subject to charge, about the subject matter of the charge, and the publication of transcripts of examinations to prosecutors, is justified.

11.8 The *Taxation Administration Act 1953* (Cth) Sch 1 s 353-10 is unusual, in that it abrogates the privilege against self-incrimination,[3] and no use immunity is available. The Commissioner of Taxation may disclose the information provided to a law enforcement agency.[4] Further review should consider whether these laws are appropriately justified, or whether statutory protections should be made available.

A common law right

11.9 The privilege against self-incrimination is 'a basic and substantive common law right, and not just a rule of evidence'.[5] It reflects 'the long-standing antipathy of the common law to compulsory interrogations about criminal conduct'.[6]

11.10 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'.[7]

11.11 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.[8]

11.12 The common law privilege is available not only to persons questioned in criminal proceedings, but to persons suspected of a crime,[9] to persons questioned in civil proceedings[10] and in non-curial contexts.[11]

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3 *Taxation Administration Act 1953* (Cth) sch 1 s 353–10; *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564.

4 *Taxation Administration Act 1953* (Cth) s 355–190.

5 *Reid v Howard* (1995) 184 CLR 1, [8].

6 *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, [1] (French CJ).

7 *Sorby v Commonwealth* (1983) 152 CLR 281, 288. The Court cited *Lamb v Munster* (1882) 10 QBD 110, 111.

8 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, [27]; *Sorby v Commonwealth* (1983) 152 CLR 281, [44].

9 *Petty & Maiden v R* (1991) 173 CLR 95.

10 *Reid v Howard* (1995) 184 CLR 1, [15].

11 *Griffin v Pantzer* (2004) 137 FCR 209, [44].

11.13 The privilege is one aspect of the right to silence.[12] The right to silence protects the right not to be made to testify against oneself (whether or not that testimony is incriminating).[13] 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.[14]

11.14 There are two closely related privileges that arose in equity: the privileges against exposure to a civil penalty and exposure to a forfeiture.[15] This Inquiry focuses on the common law privilege against self-incrimination.

Testimony and documents

11.15 The privilege is testimonial in nature, protecting a witness from being convicted 'out of his own mouth'.[16]

11.16 The privilege does not prevent persons from being compelled to incriminate themselves through the provision of evidence that is non-testimonial in nature.[17] Non-testimonial evidence may include, for instance, fingerprints or DNA samples.[18] 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.[19]

11.17 While recent Australian decisions have indicated that the privilege extends to documents,[20] 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.[21]

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12 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.

13 Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 204.

14 See, eg, *Broadcasting Services Act 1992* (Cth) s 202.

15 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [45]. See also Dyson Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2013) [25070]; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, [24], [50]. The privilege against exposure to a civil penalty is now recognised by the common law: *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [13].

16 *Hamilton v Oades* (1989) 166 CLR 486, 496.

17 See, eg, Australian Securities and Investments Commission, *Submission 74*.

18 Heydon, above n 15, [25095].

19 *Sorby v Commonwealth* (1983) 152 CLR 281, 292.

20 Ibid 288; *Griffin v Pantzer* (2004) 137 FCR 209, 37.

21 Australian Securities and Investments Commission, *Submission 74*; ASIC relied upon the following authorities: *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.

11.18 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 being '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.[22] 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.

11.19 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.[23]

Corporations may not claim the privilege

11.20 The privilege against self-incrimination extends to natural persons, but not corporations.[24] In *Environment Protection Authority v Caltex*, the High Court reviewed 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.[25]

11.21 The privilege is also not available to other entities such as political parties, sporting clubs, advocacy groups, small businesses and unions.[26]

The origins of the privilege

11.22 There is some debate among legal historians about the origins of the privilege.[27] 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

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22 *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385, 392; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 326; *Environment 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].

23 Heydon, above n 15, [25090].

24 *Environment 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 Uniform Evidence Acts s 187 which abolished the privilege regarding bodies corporate.

25 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 500.

26 Jeremy Gans, *Prove Your Own Contempt: CFMEU v Boral* (20 July 2015) Opinions on High <http://blogs.unimelb.edu.au/opinionsonhigh/2015/07/20/gans-boral/>.

27 McHugh J details some of the arguments in *Azzopardi v R* (2001) 205 CLR 50, [119]–[152]. See also Cosmas Moisidis, *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).

themselves.[28] Professor Richard Helmholz said 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.[29]

11.23 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'.[30]

11.24 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.[31]

11.25 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.[32]

11.26 In a vigorous dissent in *Azzopardi v R*, McHugh J endorsed Langbein's approach, observing that:

> 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.[33]

The rationale for the privilege

11.27 A number of rationales have been offered for the privilege. Most recently, the High Court has emphasised the functional role of the privilege. In *X7 v Australian Crime Commission*, it was said to be essential to the accusatorial system:

> The accusatorial process of criminal justice and the privilege against self-incrimination both reflect and assume the proposition that an accused person need never make any answer to any allegation of wrong-doing.[34]

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28 Richard Helmholz, 'Introduction' in Richard Helmholz (ed), *The Privilege Against Self-incrimination: Its Origins and Development* (University of Chicago Press, 1997).

29 Ibid 7.

30 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) vol IV, bk IV, ch 22, 293.

31 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.

32 John Langbein, 'The Historical Origins of the Privilege against Self-Incrimination at Common Law' (1994) 92 *Michigan Law Review* 1047, 1047.

33 *Azzopardi v R* (2001) 205 CLR 50; see also Moisidis, above n 27; *X7 v Australian Crime Commission* (2013) 248 CLR 92, 135 [100].

34 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [104].

11.28 The High Court returned to this theme in *Lee v The Queen*, when considering the compulsory examination powers of the NSW Crime Commission:

> Our 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. This was accepted as fundamental in *X7*. The principle is so fundamental that 'no attempt to whittle it down can be entertained' albeit its application may be affected by a statute expressed clearly or in words of necessary intendment. The privilege against self-incrimination may be lost, but the principle remains. The principle is an aspect of the accusatorial nature of a criminal trial in our system of criminal justice.
>
> The companion rule to the fundamental principle is that an accused person cannot be required to testify. The prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof.[35]

11.29 The privilege has been 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.[36]

11.30 Another functional role of the privilege is to reduce the power imbalance between the prosecution and a defendant,[37] or as Gleeson CJ put it, to hold 'a proper balance between the powers of the State and the rights and interests of citizens'.[38]

11.31 Rights based rationales are also important. The privilege is said to protect the right to dignity, privacy and freedom. 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.[39]

11.32 Also in *Pyneboard*, the privilege was described as a 'fundamental bulwark of liberty'.[40]

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35 *Lee v The Queen* [2014] HCA 20 (21 May 2014) [32]–[33]. See also *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 [146].

36 *Cornwell v R* (2007) 231 CLR 260, [176]; see also *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 527; *X7 v Australian Crime Commission* (2013) 248 CLR 92, [55].

37 Moisidis, above n 27, 136.

38 *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118, 127. See also Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) [857].

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

40 Ibid 340 (Mason CJ, Wilson and Dawson JJ).

11.33 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.[41]
- It may protect individuals from unlawful coercive methods used to obtain confessions,[42] and in this sense protects personal liberty.
- 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'.[43] Being compelled to give a statement in this environment could exacerbate the problem.
- It may reduce the incidence of untruthful evidence in court proceedings, on the basis that a person who is compelled to give evidence is more likely to lie.[44]

Protections from statutory encroachment

Australian Constitution

11.34 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*'.[45] For instance, in *Sorby v Commonwealth,* a majority of the 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*.[46]

Principle of legality

11.35 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 a legislative intent to do so 'clearly emerges, whether by express words or necessary implication'.[48]

11.36 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

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41 Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) [852], [861]; Heydon, above n 15, [25140].

42 Moisidis, above n 27, 133.

43 Ibid 129.

44 Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) [855].

45 See discussion in Anthony Gray, 'Constitutionally Protecting the Presumption of Innocence' (2012) 31 *University of Tasmania Law Review* 132, 162.

46 *Sorby v Commonwealth* (1983) 152 CLR 281, 308 (Mason, Wilson and Dawson JJ). See also *X7 v Australian Crime Commission* (2013) 248 CLR 92, [63]–[65] (French CJ and Crennan J).

47 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 2.

48 *Sorby v Commonwealth* (1983) 152 CLR 281, [14] (Gibbs CJ); Gibbs CJ relied on DC Pearce, *Statutory Interpretation in Australia* (Butterworths, 2nd ed, 1981).

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

11.37 The right to claim the privilege against self-incrimination is contained in art 14.3(g) of the *International Covenant on Civil and Political Rights* (ICCPR)[50] 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.

11.38 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

11.39 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]

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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).

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 2.

53 *Environment 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. Ibid.Ibid.Ibid.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].

11.40 In the UK case of *R v Lambert,* Lord Hope explained that art 6.2 is

> 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]

11.41 The privilege is protected in bills of rights and human rights statutes in the United States,[57] the United Kingdom,[58] Canada,[59] South Africa[60] and New Zealand.[61] 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.[62]

11.42 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*.[63]

Justifications for excluding the privilege against self-incrimination

11.43 The right to claim the privilege against self-incrimination is not absolute and may be removed or diminished by statute.[64] 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.[65]

11.44 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'.[66]

11.45 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.

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56 *R v Lambert* [2002] 2 AC 545, [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* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 13.

60 *Constitution of the Republic of South Africa Act 1996* (South Africa) s 35.

61 *New Zealand Bill of Rights Act 1990* (NZ) s 25(d).

62 *Canada Act 1982* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 11(c).

63 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(k); *Human Rights Act 2004* (ACT) s 22(2)(i).

64 See, for example, *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 503 (Mason CJ and Toohey J).

65 *Hamilton v Oades* (1989) 166 CLR 486, 494.

66 *Environment 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).

11.46 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.[67]

11.47 The High Court, in the passages above, described the public interest being balanced against the individual's interest in avoiding self-incrimination. A slightly 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.[68]

11.48 Stakeholders and commentators have proposed a range of factors that should be considered in the balancing exercise.

Public benefit and avoiding serious risks

11.49 The Law Council of Australia 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'.[69] The Law 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'.[70]

11.50 The Australian Council of Trade Unions (ACTU) agreed that only the intention to avoid serious risks would justify abrogating the privilege.[71] The ACTU 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. However, the ACTU was critical of the abrogation of the privilege in workplace relations laws, arguing that no such pressing public interest was at stake.[72]

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67 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [28].

68 Queensland Law Reform Commission, *The Abrogation of the Principle against Self-Incrimination* Report No 59 (2004) [6.3].

69 Law Council of Australia, *Submission 75*.

70 Ibid.

71 Australian Council of Trade Unions, *Submission 44*.

72 Ibid.

11.51 In 2000, the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) 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'.[73]

11.52 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.[74]

Proportionality

11.53 Justifications that refer to public benefit and the investigation of serious offences implicitly incorporate a proportionality approach, which asks whether the law limiting the right pursues an objective of sufficient importance to warrant limiting the right. 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.[75]

11.54 Professor Gans et al also endorsed a proportionality approach. He explaiend the balancing exercise which must be conducted in any coercive information-gathering exercise and said:

> 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.[76]

11.55 It cannot be assumed that limiting the privilege against self-incrimination will necessarily result in better investigation, detection, prevention and prosecution of crime.[77] Evidence regarding the effect of changing legal processes is not easy to come by, but there is some evidence that curtailing the right to silence does not produce increased conviction rates.[78] Justifications for encroachments on fundamental common law rights should include some assessment of whether the encroachment will actually achieve the identified purpose.

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73 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest* No 4 of 2000 12, 20.

74 Australian Securities and Investments Commission, *Submission 74*.

75 Law Council of Australia, *Submission 75*.

76 Gans et al, above n 13, 235.

77 Justice Mark Weinberg, 'The Impact of Special Commissions of Inquiry/Crime Commissions on Criminal Trials' (Paper, Supreme Court of NSW Annual Conference, Wollongong, 1 August 2014) 204; Mark Findlay, Stephen Odgers and Stanley Yeo, 'Expanding Crime Investigation' in *Australian Criminal Justice* (Oxford University Press, 2014).

78 See the studies of Professors Jackson and Leng referred to in Barbara Hocking and Laura Manville, 'What of the Right to Silence: Still Supporting the Presumption of Innocence, or a Growing Legal Fiction?' (2001) 1 *Macquarie Law Journal* 63, 71.

11.56 The Parliamentary Joint Committee on Human Rights (Human Rights Committee) has noted that, while art 14.3(g) of the ICCPR protects the right not to incriminate oneself, 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'.[79]

11.57 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'.[80] 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 European Convention.[81]

Voluntary participation in regulatory scheme

11.58 Infringements on the privilege may be justified when the person required to provide information is a voluntary participant in a regulatory scheme.[82] 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.[83]

11.59 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'.[84] 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.[85]

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79 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]. See also United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984), discussed in Ch 2.

80 *Procurator Fiscal v Brown (Scotland)* (Unreported, UKPC D3, 5 December 2000) (Lord Hope).

81 Ibid.

82 J Gans, *Submission 2*; Australian Securities and Investments Commission, *Submission 74*. See further Cole J's comments in *Spedley Securities Ltd v Bond Brewing Investments Pty Ltd* (1991) 4 ACSR 229.

83 J Gans, *Submission 2*.

84 Queensland Law Reform Commission, *The Abrogation of the Principle against Self-Incrimination* Report No 59 (2004) [6.54].

85 Australian Securities and Investments Commission, *Submission 74*.

11.60 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'.[86]

Immunities

11.61 Nearly all laws that abrogate the privilege provide a safeguard in the form of use immunity regarding the answers given—that is, they provide that the answers given are not admissible against the person in a subsequent proceeding.[87] Some laws also provide derivative use immunity—that is, they provide that evidence obtained as a direct or indirect result of a person having made a statement is not admissible against the person. 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-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'.[88]

11.62 The Human Rights Committee and the Scrutiny of Bills Committee have both indicated that noted that an abrogation of the privilege is more likely to be considered justified if it is accompanied by both use and derivative use immunity.[89]

Inherent powers

11.63 The courts have inherent power to exclude evidence where admitting such evidence would render the trial unfair.[90] This may be used to justify a statutory encroachment on the privilege against self-incrimination, because it reduces or eliminates the risk that the encroachment will result in an unfair trial.[91]

11.64 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.[92]

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86 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 95.

87 Some statutes provide that the answers are inadmissible in all proceedings, others refer only to criminal proceedings, and still others to criminal proceedings and proceedings for a civil penalty.

88 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 96.

89 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]; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2006* (June 2006) 81.

90 *Dietrich v R* (1992) 177 CLR 292, [4]. See further Ch 8.

91 See, eg, Australian Securities and Investments Commission, *Submission 125*.

92 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [58].

11.65 A court may prevent the examination of a person if such an examination would prejudice the person in their criminal trial.[93] It may quash a conviction if compelled questioning results in a trial that is fundamentally flawed. The High Court exercised this power in *Lee v The Queen* when the transcripts of the defendants for questioning before the NSW Crime Commission were published to the prosecution:

> It is a breach of the principle of the common law, and a departure in a fundamental respect from a criminal trial which the system of criminal justice requires an accused person to have, for the prosecution to be armed with the evidence of an accused person obtained under compulsion concerning matters the subject of the charges.[94]

11.66 The common law regarding contempt of court also restrains the use of coercive information-gathering powers. In *Deputy Commissioner of Taxation v De Vonk*, the Full Federal Court held that the questioning of a person charged with a criminal offence about matters relevant to that charge will be contempt of court if there is a real risk of interference with the course of justice. The Court relied on Gibbs CJ in *Hammond v Commonwealth:*

> Once it is accepted that the plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to me inescapably to follow, in the circumstances of this case, that there is a real risk th at the administration of justice will be interfered with. It is clear that the questions will be put and pressed. It is true that the examination will take place in private, and that the answers may not be used at the criminal trial. Nevertheless, the fact that the plaintiff has been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence.[95]

11.67 ASIC emphasised the existence of

> wide and flexible judicial discretion to exclude the admission of derivative evidence, and further restrict the use of both information compelled from a person and derivative evidence, in order to prevent unfair prejudice to an accused or fundamental departures from ordinary criminal trial processes.[96]

11.68 However Warren CJ of the Victorian Supreme Court, considering the compatibility of certain coercive questioning powers with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) has cast some doubt on whether the discretions available to the trial judge sufficiently protect the privilege against self-incrimination, particularly with regard to derivative evidence.[97]

Other statutory safeguards

11.69 Statutes that abrogate the privilege may be more justifiable if they include safeguards such as a requirement for reasonable suspicion of wrongdoing before a

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93 *Hammond v Commonwealth* (1982) 152 CLR 188.

94 *Lee v The Queen* [2014] HCA 20 (21 May 2014) [46].

95 *Hammond v Commonwealth* (1982) 152 CLR 188 cited in *Deputy Commission of Taxation v de Vonk* (1995) 61 FCR 564.

96 Australian Securities and Investments Commission, *Submission 125*.

97 *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 [57]–[78]. ASIC submitted that it is now clear that courts have sufficient discretion: Australian Securities and Investments Commission, *Submission 125*.

person can be subject to compulsory questioning, as is the case in s 39A of the *Proceeds of Crime Act (2002)* (Cth). Examples of other statutory safeguards in relation to the powers of the Australian Crime Commission, ASIC and Australian Security Intelligence Organisation are noted below.[98]

11.70 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'.[99]

Laws that exclude the right to claim the privilege

11.71 A range of Commonwealth laws empower federal agencies to conduct coercive information-gathering investigations. For the purpose of performing their investigatory functions, these agencies have the power to require a person to produce documents and answer questions. Most of these laws provide that those answers or documents are not admissible against the person in criminal proceedings or proceedings for a penalty. It is possible to characterise these laws as preserving the privilege against self-incrimination, because of inadmissibility of the material.[100] 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.[101] 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. Most include use or derivative use immunity. However, as Professor Ben Saul and Michelle McCabe reported, 'there is no consistent approach to the individual rights and protections available'.[102]

11.72 This chapter will focus particularly on laws that abrogate the privilege and offer either no immunity, or use immunity only. Such laws give federal government agencies, including the Australian Tax Office (ATO), ASIC, ASIO, the ACC, and the Australian Competition and Consumer Commission (ACCC), powers to require persons to answer questions or produce documents.

Taxation

11.73 Section 353–10 of sch 1 of the *Taxation Administration Act 1953* (Cth) provides that the Australian Tax Commissioner may require a person to give the Commissioner any information that the Commission requires, attend and give evidence before the Commissioner, or produce any document in the person's custody or control. The

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98 See further the safeguards recommended in Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies*, Report No 48 (May 2008) Principle 17.

99 *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, [340]; *X7 v Australian Crime Commission* (2013) 248 CLR 92, [50].

100 See, eg, J Gans, *Submission 2*.

101 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [104]; *Sorby v Commonwealth* (1983) 152 CLR 281, 290–292.

102 Ben Saul and Michelle McCabe, 'The Privilege against Self-Incrimination in Federal Regulation' (2001) 78 *Australian Law Reform Commission Reform Journal* 54.

Commissioner may also enter premises and inspect and make copies of any documents.[103]

11.74 This provision does not expressly abrogate the privilege against self-incrimination, but in *Deputy Commissioner of Taxation v De Vonk* the Federal 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.[104]

11.75 However, the Court also held that the coercive questioning of a taxpayer about matters that are before the court could amount to contempt.[105]

11.76 The Tax Institute raised concerns about these powers. It submitted that the laws should be subject to the privilege against self-incrimination. It also noted that there are provisions in the *Taxation Administration Act* which allow the disclosure of information by taxation officers to the court for the purpose of criminal proceedings, and was concerned that the encroachment on the privilege is not 'balanced by statutory limitations on derivative use of the information in criminal proceedings'.[106]

11.77 The ATO has indicated that its notice powers, which include the power to require a person to attend and give evidence, are

> wide and flexible, but they are not unlimited. We endeavour to exercise our powers:
>
> - in good faith
> - in strict compliance with the law under which the notice has been issued
> - for the proper purposes of that law.[107]

11.78 On its face, s 353–10 is a significant encroachment on the common law privilege against self-incrimination. It is not balanced by any statutory immunity, although the court's inherent power to ensure a fair trial provides some protection. It may be that this encroachment is necessary for the protection of public revenue. Further review should consider whether this provision is appropriately justified, or whether statutory protections should be made available.

Corporate and commercial regulation

11.79 ASIC is the Commonwealth's corporate, markets and financial services regulator. It is empowered to compel persons to produce books and attend

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103 *Taxation Administration Act 1953* (Cth) s 353–15.

104 *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564, 583; *Binetter v Deputy Commissioner of Taxation* (2012) 206 FCR 37.

105 *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564, [60].

106 The Tax Institute, *Submission 68*.

107 Australian Taxation Office, *Our Approach to Information Gathering* <https://www.ato.gov.au/About-ATO/Access,-accountability-and-reporting>.

examinations and answer questions.[108] The privilege against self-incrimination is not available, but use immunity is available regarding statements and the signing of a record.[109] ASIC may only begin an investigation if it has reason to suspect wrongdoing,[110] and may only question a person if it has reasonable grounds for believing that the person can provide relevant information.[111] However, there is no requirement that ASIC suspect that the person questioned was involved in the wrongdoing. ASIC may release the transcripts to private litigants and government agencies in certain circumstances.[112]

11.80 ASIC may also apply to a court for an officer or a provisional liquidator of a corporation to be summoned for a public examination about the corporation's affairs. The privilege against self-incrimination is not an excuse for not answering a question, and use immunity is available.[113]

11.81 ASIC submitted that because company officers occupy positions of trust, and have extensive opportunities to commit wrongdoing and cause immense harm, the need to regulate them justifies excluding the privilege. ASIC also suggested that company officers should be considered to be voluntary participants in a regulatory scheme, which would justify the abrogation of the privilege.[114]

11.82 ASIC's powers, particularly regarding the use to which compelled disclosures may be put, have been the subject of several reviews since 1989. 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.[115] One outcome was that 'investigations which could be discharged within a period of months are taking periods of years'.[116] 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 in a compelled examination.[117] Other stakeholders challenged these claims.[118]

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108 *Australian Securities and Investments Commission Act 2001* (Cth) ss 19, 21, 30, 31, 33.

109 Ibid s 68.

110 *Australian Securities and Investments Commission Act 2001* (Cth) s 13.

111 Ibid s 19(1).

112 Ibid ss 25, 37 and 127; see further Australian Securities and Investments Commission, *Confidentiality and Release of Information* Regulatory Guide 103, 27 November 1995.

113 *Corporations Act 2001* (Cth) s 597(12).

114 Australian Securities and Investments Commission, *Submission 74*.

115 Joint Statutory Committee on Corporations and Securities, 'Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law' (1991) [3.1.5].

116 Ibid [3.2.1].

117 Ibid [3.5.1].

118 Ibid [3.5.3]–[3.10.3].

11.83 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.[119]

11.84 Professor Gans criticised the quality of both the Joint Statutory Committee's review and the Kluver review. He argued that the concerns about derivative use immunity have been overstated,[120] while ASIC restated its concerns about such an immunity impeding the regulation of corporations and the prosecution of criminal activities.[121] In particular, ASIC expressed concern that derivative use immunity would exclude evidence discovered as a result of the disclosure, 'even if it would or could have been discovered without the particular information disclosed by the person'.[122] ASIC offered examples of situations where a suspect would be effectively rendered 'conviction-proof' for an unforeseeable range of offences by such an immunity.[123]

11.85 In later submissions, both ASIC and Professor Gans pointed to a possible model approach to immunity—a flexible approach that would exclude some, but not all, derivative evidence.[124] This model is discussed further in the conclusion to this chapter.

Serious and organised crime

11.86 The ACC is a criminal intelligence agency, responsible for investigating serious and organised crime. The ACC Board may declare that an investigation is a 'special investigation', in which case the coercive information-gathering powers in pt II div 2 of the *Australian Crime Commission Act 2002* (Cth) (*ACC Act*) are available.[125]

11.87 The ACC may summon a person for questioning.[126] Failing to attend or answer questions, as required by a summons, is an offence.[127] Self-incrimination is not an excuse for such failure, but if the person claims that answering the question or producing a document might incriminate the person, the answer or document is not admissible in a criminal proceeding.[128]

11.88 There are safeguards in the Act, including a requirement that an examination must be held in private. Transcripts and derivative material may be disclosed to the

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119 John Kluver, *Report on the Review of the Derivative Use Immunity Reforms* (Australian Government Press, 1997).

120 J Gans, *Submission 77*; J Gans, *Submission 2*.

121 Australian Securities and Investments Commission, *Submission 74*.

122 Australian Securities and Investments Commission, *Submission 125*; Australian Securities and Investments Commission, *Submission 74*.

123 Australian Securities and Investments Commission, *Submission 125*.

124 Ibid; J Gans, *Submission 77*.

125 *Australian Crime Commission Act 2002* (Cth) s 7C(3).

126 Ibid s 28.

127 Ibid s 30(6).

128 Ibid s 30.

prosecutor of the examinee,[129] but the examiner must direct that a transcript must not be published if to do so would prejudice the person's safety or their fair trial.[130]

11.89 The predecessor to the ACC Act was the *National Crime Authority Act 1984* (Cth), which, for a time, provided derivative use immunity to witnesses. When the legislation was changed to allow use immunity only, the Explanatory Memorandum said:

> The Authority is unique in nature and has a critical role in the fight against serious and organised crime. This means that the public interest in the Authority having full and effective investigatory powers, and to enable, in any subsequent court proceedings, the use against the person of incriminating material derived from the evidence given to the Authority, outweigh the merits of affording full protection to self-incriminatory material.[131]

11.90 Part II div 2 was recently the subject of High Court consideration in *X7 v Australian Crime Commission* (*X7 v ACC*).[132] The plaintiff was charged with drug trafficking offences, and while in custody, was served with a summons to appear before an ACC examiner. When he declined to answer questions concerning the subject matter of the charges, he was informed that he would be charged with failing to answer questions.

11.91 The Court held (by majority) that the *ACC Act* did not authorise the examination of an accused person about the subject matter of the pending charge. Hayne and Bell JJ said that if the provisions did this, 'they would effect a fundamental alteration to the process of criminal justice', and that such an alteration could only be made 'clearly by express words or necessary intendment'.[133] Kiefel J agreed, and added that 'the conduct of any inquiry parallel to a person's criminal prosecution would ordinarily constitute a contempt because the inquiry presents a real risk to the administration of justice'.[134]

11.92 Since *X7 v ACC*, the *ACC Act* has been amended to clarify that an ACC examiner may question a person who has been charged with an offence about matters that are the subject matter of the charge.[135] The Explanatory Memorandum for the amending act indicated that these amendments were necessary to ensure that the ACC has 'appropriate powers to understand, disrupt and prevent … serious and organised criminal activity'. It also noted that requiring the ACC to wait until the conclusion of criminal proceedings to examine the person 'would diminish the value of any intelligence gained out of the examination or hearing about the contemporary activities, operations and practices of the organised criminal group'.[136]

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129 Ibid ss 25B, 25C.
130 Ibid s 25A.
131 Explanatory Memorandum, National Crime Authority Legislation Amendment Bill 2000.
132 *X7 v Australian Crime Commission* (2013) 248 CLR 92.
133 Ibid [118]–[119].
134 Ibid [161].
135 *Law Enforcement Legislation Amendment (Powers) Act 2015* (Cth); *Australian Crime Commission Act 2002* (Cth) ss 25A–25E.
136 Explanatory Memorandum, Law Enforcement Legislation Amendment (Powers) Bill 2015 15.

11.93 The Law Council has expressed concern that the amendments to the *ACC Act* 'would allow derivative use to be made of post-charge examination material, which could then be made available to the prosecutor of the person being examined, which may affect the right to a fair trial'. The Law Council suggested that ACC examiners should be required to seek judicial authorisation before conducting a post-charge examination of a witness, providing a further safeguard to the right to a fair trial.[137]

Proceeds of crime

11.94 The ACC has joint responsibility, with the Australian Federal Police and the Commonwealth Director of Public Prosecutions, for the administration of the *Proceeds of Crime Act 2002* (Cth). This Act enables the seizure of property used in, or derived from, terrorism offences, and the confiscation of profits from drug trafficking, people smuggling, money laundering and large-scale fraud.[138] Several provisions exclude the privilege against self-incrimination:

- s 39A excludes the use of the privilege as a reason to refuse to provide a sworn statement to the Australian Federal Police 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.
- s 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.
- s 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.

Competition and consumer law

11.95 The *Competition and Consumer Act 2010* (Cth) includes several provisions that encroach on the privilege against self-incrimination. The most important of these is s 155, which allows a member of the ACCC to issue a notice requiring a person to provide information, documents, or evidence, if the ACCC has reason to believe that the person has information about a contravention of the Act. Self-incrimination is not an excuse not to answer, and use immunity is available. The Act also includes other coercive information-gathering powers that exclude the privilege against self-incrimination, all of which provide use or derivative use immunity.[139]

11.96 The ACCC has noted that there are implied limits on the use of s 155 powers, and in particular, that

> issuing s 155 notices to respondents in proceedings instituted by the ACCC may interfere with rights and protections against self-incrimination … which apply in court proceedings, and may interfere with the court's inherent power to conduct its own

137 Law Council of Australia, *Submission 140*.

138 Explanatory Memorandum, Proceeds of Crime Bill (Cth) 2002.

139 *Competition and Consumer Act 2010* (Cth) ss 133D, 135B, 151BUF, 155B.

> proceedings … Accordingly, the ACCC is unlikely to issue a notice addressed to a respondent or non-party to ACCC proceedings where the notice relates to the subject matter of those proceedings.[140]

National security

11.97 ASIO's main role is 'to gather information … that will enable it to warn the government about activities or situations that might endanger Australia's national security'.[141]

11.98 The Director-General may request a warrant authorising a person to be taken into custody and questioned.[142] Section 34L(8) provides that a person cannot fail to provide information to ASIO officers even if that information may incriminate them.[143] Use immunity is available in s 34L(9).

11.99 According to the Explanatory Memorandum,

> [T]he 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.[144]

11.100 Several stakeholders raised concerns about this provision.[145] Lisa Burton, Nicola McGarrity and Professor 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.[146]

11.101 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.[147]

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140 Australian Competition and Consumer Commission, *Section 155 of the Trade Practices Act* (2008) 12.

141 *Home* (2015) ASIO <www.asio.gov.au>.

142 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34D.

143 This provision was raised by several stakeholders: Law Council of Australia, *Submission 75*; Gilbert and Tobin Centre of Public Law, *Submission 22*.

144 Explanatory Memorandum, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.

145 Law Council of Australia, *Submission 75*; Institute of Public Affairs, *Submission 49*; Gilbert and Tobin Centre of Public Law, *Submission 22*.

146 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.

147 *Australian Security Intelligence Organisation Act 1979* (Cth) ss 30E, 34J, 34M, 34N, 34R, 34T.

11.102 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.[148]

11.103 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:

> [o]n 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.[149]

11.104 The Australian Human Rights Commission also raised concerns about this provision, particularly the lack of protection against derivative use.[150]

Workplace relations laws

11.105 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.

11.106 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 that person;
- *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; and
- *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.

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148 Law Council of Australia, *Submission 75*.

149 Independent National Security Legislation Monitor, Australian Government, *Annual Report* (2011) 28.

150 Australian Human Rights Commission, *Submission to the Independent National Security Legislation Monitor* (2012).

11.107 The ACTU criticised the encroachment on the privilege in workplace relations laws. It suggested that abrogating the privilege is justifiable when the intention is to avoid 'serious damage to property or the environment, danger to human life or significant economic detriment'. It commented that

> [n]o 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'.[151]

Environmental regulation

11.108 A number of Commonwealth laws with the objective of environmental protection encroach upon the privilege against self-incrimination, and all provide both use and derivative use immunities. For example:

- *Quarantine Act 1908* (Cth) s 79A;
- *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 189, 202;
- *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 112, 486J;
- *Great Barrier Reef Marine Park Act 1975* (Cth) s 39P(4);
- *Protection of the Sea (Oil Pollution Compensation Funds) Act 1993* (Cth) ss 44(4), 46S(4).

Uniform Evidence Acts

11.109 The common law privilege against self-incrimination is replaced by s 128 of the Uniform Evidence Acts in federal courts, New South Wales, Victoria, Tasmania, the ACT and the Northern Territory. These provisions encroach on the common law privilege to the extent that a court may require the witness to give evidence 'if the interests of justice require'.[152] If a witness is required to give incriminating evidence, the court must give the witness a certificate which provides that the evidence cannot be directly or indirectly used against the witness in any proceeding in an Australian court.[153]

11.110 The Uniform Evidence Acts are only relevant to court proceedings, and do not apply to compulsory questioning by other government agencies.

Other laws

11.111 A large number of other laws exclude the right to claim the privilege, some expressly, and some by necessary intendment. The ALRC has identified 26 laws that provide use immunity only and 46 that provide derivative use immunity.[154] These laws

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151 Australian Council of Trade Unions, *Submission 44*.

152 Uniform Evidence Acts s 128(4).

153 Ibid s 128(6), (7).

154 Some of these provisions were highlighted by stakeholders: J Gans, *Submission 77*; The Tax Institute, *Submission 68*; Institute of Public Affairs, *Submission 49*; J Gans, *Submission 2*.

cover a wide range of areas, including the regulation of transport, charities, sports doping, crime and the proceeds of crime, superannuation and many other matters.

Approaches to immunities

11.112 The privilege against self-incrimination is abrogated in a wide range of Commonwealth laws. Some of these laws provide use immunity and some derivative use immunity, and there is no consistent approach.[155] The laws administered by four of the Commonwealth's most active and powerful agencies—ACC, ACCC, ASIC and ASIO—contain use immunity only, while tax laws contain no immunity. In the Interim Report, the ALRC proposed that there should be further review of use and derivative use immunities.

11.113 Two regulators responded to this proposal, and their responses have been discussed above. ASIC considered that use immunity was appropriate in the context of corporations law, and both ASIC and the ATO emphasised that the inherent power of the court to ensure a fair trial provides important safeguards.[156]

11.114 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.[157] It suggested that the 'exercise of coercive information gathering powers should be regarded as exceptional … because of the intrusive impact on individual rights'.[158]

11.115 The National Association of Community Legal Centres (NACLC) considers the privilege against self-incrimination to be a key protection 'for vulnerable individuals facing the weight of state resources and prosecution' and was concerned about 'a general trend towards limiting the privilege'. NACLC supported a review of immunities but preferred protections to ensure that privilege could not be overridden.[159]

11.116 The Councils for Civil Liberties (CCL) were also concerned about the 'significant loss of personal liberty for persons who are forced to answer questions'. The CCL supported both a review of immunities and a broader review of justification for abrogation.[160]

11.117 Professor Gans pointed out that at least 40 Commonwealth laws encroach upon this important common law right, and submitted that previous reviews of use and derivative use immunities have not all been of high quality, and have been limited in scope. He argued that further consideration of the issue is necessary.[161]

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155 Saul and McCabe, above n 102.
156 Australian Taxation Office, *Submission 137*; Australian Securities and Investments Commission, *Submission 125*.
157 Law Council of Australia, *Submission 75*.
158 Law Council of Australia, *Submission 140*.
159 National Association of Community Legal Centres, *Submission 143*.
160 Councils for Civil Liberties, *Submission 142*.
161 J Gans, *Submission 77*.

11.118 Professor Gans also suggested that the conversation has, to date, been based on a false dichotomy between US style derivative use immunity, and bare use immunity.

11.119 The US approach is usefully described in the submission from ASIC. It imposes a positive obligation on the prosecution to prove that the evidence it proposes to adduce is wholly independent of the compelled testimony. Such an approach is said to lead to the exclusion of evidence even where that evidence would or could have been discovered without the compelled testimony, and to have led to the failure of many prosecutions.[162] ASIC reported that the likely result of the introduction of such immunity in Australian corporations law is that ASIC would exercise its compulsory information-gathering powers less frequently, undermining the public purpose for which those powers were created.[163]

11.120 In contrast, bare use immunity only renders inadmissible the statements made and documents provided by the compelled witness. Evidence discovered as a result of those statements is not rendered inadmissible, even where it could not have been discovered, or its significance could not been understood, without the compelled disclosure.

11.121 Professor Gans suggested that consideration should be given to whether Commonwealth statutes abrogating the privilege should contain a flexible, or partial, derivative use immunity. Such an immunity would render inadmissible only evidence which would not have been discovered without the compelled disclosure (rather than all evidence that was in fact discovered in reliance on leads from the disclosure).[164]

11.122 Warren CJ of the Supreme Court of Victoria considered that the partial derivative use immunity adopted in Canada was the appropriate protection for the privilege. The Canadian Supreme Court held 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'.[165] However, Warren CJ found that, while Australian courts have inherent powers to exclude evidence that would render a trial unfair, a discretionary or case-by-case approach would not provide sufficient protection.[166]

11.123 ASIC also considered that the Canadian approach offered a useful model for the appropriate immunity but emphasised that the Canadian courts rejected US style statutory derivative use immunity in favour of 'use immunity plus a flexible judicial discretion to exclude a narrow category of derivative evidence'.[167]

11.124 The ALRC has considered this question in three reports—*Principled Regulation* (2003), *Privilege in Perspective* (2008), and *Making Inquiries* (2009). In

162 Australian Securities and Investments Commission, *Submission 125*.
163 Australian Securities and Investments Commission, *Submission 74*.
164 J Gans, *Submission 77*.
165 *R v S (RJ)* [1995] 1 SCR 451, 561.
166 *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 [159].
167 Australian Securities and Investments Commission, *Submission 125*.

each of these it concluded that use immunity was appropriate.[168] The Queensland Law Reform Commission in 2004 also concluded that the default position should be use immunity, rather than derivative use.[169] However, those inquiries did not address some issues that have only recently arisen, including the compelled questioning of persons subject to charge regarding the subject matter of the charge, and the publication of transcripts of compelled questioning to prosecutors. These inquiries also did not consider whether statutes should include partial derivative use immunity.

Conclusion

11.125 The ALRC considers further review of the encroachments on the privilege against self-incrimination in Commonwealth laws is warranted. The following matters have led to this conclusion:

- the large number of Commonwealth acts that encroach upon the privilege, and the apparent inconsistency regarding the availability of use and derivative use immunity;
- the serious concerns raised by the High Court in *X7 v ACC* and *Lee v The Queen,* and by Warren CJ in the Victorian Supreme Court, regarding the impact on the fair trial of compelled questioning of a person who is subject to charge; and
- concerns heard from stakeholders and commentators.[170]

11.126 Such a review could consider:

- whether the many encroachments on the privilege against self-incrimination on Commonwealth laws are justified, either by implied waiver (by persons participating in a regulatory scheme), or by the serious public risks that are sought to be averted by the encroachment;
- if an encroachment is justified, then whether use immunity, partial derivative use immunity, or full US-style derivative use immunity is appropriate;
- if partial derivative use immunity is appropriate, then whether the inherent powers of the court already provide, or could provide, such an immunity, or whether statutory protection is necessary;
- whether there should be any statutory immunity in relation to compelled examinations in taxation law;

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168 Australian Law Reform Commission, ‘Principled Regulation: Federal Civil and Administrative Penalties in Australia’ (No. 95 2003) ch 18; Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) ch 7; Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*, Report No 111 (2009) ch 17.

169 Queensland Law Reform Commission, *The Abrogation of the Principle against Self-Incrimination* Report No 59 (2004) [9.89].

170 National Association of Community Legal Centres, *Submission 143*; Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 140*; J Gans, *Submission 77*; The Tax Institute, *Submission 68*; J Gans, *Submission 2*.

- whether compelled examinations of persons subject to charge, regarding the subject matter of the charge, should be permitted, and if so, under what conditions; and
- whether it is appropriate for a prosecutor to be given transcripts of compelled questioning.

12. Legal Professional Privilege

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Summary

12.1 Legal professional privilege is a common law immunity. It allows a person to resist demands to disclose information or produce documents which would reveal communications between a client and their lawyer, where those communications were made for the dominant purpose of giving or obtaining legal advice or services.

12.2 It 'exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers'.[1] It has also been said to protect the right to privacy, the dignity of the individual, access to justice and equality before the law.

1 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [35] (Gleeson CJ, Gaudron and Gummow JJ).

12.3 A statutory form of the privilege is known as 'client legal privilege', and is found in the Uniform Evidence Acts. Client legal privilege is only available to resist disclosure of information in a court. The common law privilege can be claimed in both judicial and non-judicial proceedings.

12.4 Many Commonwealth agencies have coercive information-gathering powers, but almost all of those powers are subject to legal professional privilege. This chapter will focus on the infrequent exceptions to that rule.

12.5 Some statutes concerned with open government and preventing corruption, such as the *Ombudsman Act 1976* (Cth) and the *Law Enforcement Integrity Commissioner Act 2006* (Cth), empower agencies to require persons to reveal privileged communications, but the material is not admissible in proceedings against the person. Two statutes concerned with terrorism and the proceeds of crime abrogate the privilege, but the material is not admissible in proceedings against the person. The *Royal Commissions Act 1902* (Cth) allows a Commission to require a person to provide documents or information over which privilege is claimed, but only for the purpose of determining whether the material is in fact privileged. If it is, it must be returned and no use may be made of it.

12.6 Only one Commonwealth statute has been identified that abrogates the privilege completely. The *James Hardie (Investigations and Proceedings) Act 2004* (Cth) allowed the Australian Securities and Investments Commission (ASIC) and the Commonwealth Director of Public Prosecutions to obtain and use privileged information for both investigation and prosecution. This appears to have been in response to concerns about unwarranted claims of privilege during a special commission of inquiry into the James Hardie companies' handling of asbestos claims. ASIC's proceedings against the James Hardie companies concluded in 2012.

12.7 Concerns were expressed to this Inquiry about statutes that require communications between a person and their legal adviser to be monitored: *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZQ(2) and *Criminal Code* s 105.38(1). Both statutes provide that communications that are subject to privilege are not admissible against the person. Legal professional privilege allows a person to resist the compulsory disclosure of communications. It is not clear that it extends to prevent monitoring of communications.

12.8 Similarly, while concerns were expressed to this Inquiry regarding the mandatory data retention scheme in the *Telecommunications (Interception and Access) Act 1979* (Cth), it is not clear that legal professional privilege extends to prevent the surveillance of communications. It also does not extend to prevent the disclosure of the fact that a communication occurred, but only to the content of the communication.

12.9 While laws requiring monitoring of communications between lawyer and client may not limit legal professional privilege, they are not consistent with the underlying rationale for the privilege, that communications between client and lawyer should be confidential. They also interfere with the right to legal assistance and representation, an important fair trial right. They should be further reviewed to consider whether they are proportionate and justified.

12.10 In its 2008 report, *Privilege in Perspective*, the ALRC envisaged that abrogation of legal professional privilege would occur only in exceptional circumstances. This is indeed currently the case in Commonwealth laws. The ALRC recommended that, if the privilege is abrogated, the default position should be that the material should not be admissible against the client.

12.11 This has also been the case in Commonwealth laws, with the single exception of the *James Hardie* legislation.

A common law right

12.12 Legal professional privilege is an important common law right. It allows 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'.[2] It has been described as 'fundamental to the due administration of justice'.[3]

12.13 This chapter discusses the rationales for the privilege, its history and scope, and the protections that are available from statutory encroachment. It also identifies some laws that encroach on the privilege, and discusses the justifications offered for those encroachments. The common law privilege is less relevant to trial procedures, as the statutory privilege has largely taken its place. Accordingly, this chapter will focus on laws that require production of information or documents to government agencies with coercive information-gathering powers.

Rationale

12.14 The rationale most commonly given for the privilege is an instrumental one—that it serves the administration of justice by encouraging full and frank disclosure by clients to their lawyers.[4] Without a relationship of confidence and trust between a lawyer and a client, a person may choose not to engage a lawyer, or not to reveal all of the facts to their lawyer. The rationale is set out in detail in *Baker v Campbell*:

> It is necessary for the proper conduct of litigation that the litigants should be represented by qualified and experienced lawyers rather than that they should appear for themselves, and it is equally 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. The privilege is granted to ensure that the client can consult his lawyer with freedom and candour, it being thought that if the privilege did not exist 'a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case'.[5]

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2 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [9].

3 *Baker v Campbell* (1983) 153 CLR 52, 65 (Gibbs CJ).

4 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, 35 (Gleeson CJ, Gaudron and Gummow JJ). See further Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.8]–[2.34] regarding instrumental rationales for the privilege.

5 *Baker v Campbell* (1983) 153 CLR 52, 68 (Gibbs CJ).

12.15 In *Carter v Northmore Hale Davey & Leake*, Toohey J emphasised the instrumental nature of the privilege:

> Important, indeed entrenched, as legal professional privilege is, it exists to serve a purpose, that is to promote the public interest by assisting and enhancing the administration of justice. It is not an end in itself.[6]

12.16 The ALRC's 2008 *Privilege in Perspective* report identified the following potential benefits arising from the privilege:

- encouraging full and frank disclosure;
- encouraging compliance with the law—because a lawyer in possession of all the facts can more effectively provide appropriate advice;
- discouraging litigation and encouraging settlement—because a fully briefed lawyer can better advise the client about their prospects in court; and
- promoting the efficient operation of the adversarial system—because a party should gather their own evidence, not merely subpoena the work done by another.[7]

12.17 An alternative, rights-based, rationale for the privilege is sometimes offered. The privilege is said to protect individual rights, such as the right to privacy and the right to consult a lawyer.[8] Justice Kirby has described the privilege as 'an important human right deserving of special protection'[9] and, in *Esso Australia Resources v Commissioner of Taxation* (*Esso*), he 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'.[10]

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6 *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121, 147. See also Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.43].

7 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.8]–[2.20].

8 See further Jonathon Auburn, *Legal Professional Privilege: Law and Theory* (Hart Publishing, 2000) 13–35 on instrumental and rights based rationales for the privilege.

9 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [86].

10 *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. See also Young J in *AWB v Cole* (2006) 152 FCR 382 [37]: 'the privilege operates to secure a fair civil or criminal trial within our adversarial system'.

12.18 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. [11]

12.19 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'.[12]

12.20 As with the privilege against self-incrimination,[13] legal professional privilege is sometimes said to be a necessary part of an adversarial system of justice.[14] However, this rationale has not featured expressly in recent judgments of Australian courts.

12.21 Regardless of which rationale is adopted, the courts have been clear that the privilege is not to be weighed against other competing rights and interests, such as the public interest in having all relevant information before the court. In *Esso*, the court said

> … legal professional privilege is itself the product of a balancing exercise between competing public interests and that, given the application of the privilege, no further balancing exercise is required.[15]

12.22 The rationale that is relied upon for the privilege may have consequences when considering justifications for abrogating it. If the privilege is seen as having an instrumental justification, for example, then evidence that the privilege does not in fact contribute to the administration of justice would be relevant.[16] If the predominant justification is the protection of individual liberties and human rights, however, then withholding the privilege from companies and state agencies might be easier to justify.[17]

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11 *Baker v Campbell* (1983) 153 CLR 52, 89. However, Auburn notes that only two of the seven judges in *Baker v Campbell* adopted a rights-based rationale, and Gibbs CJ explicitly rejected it: Auburn, above n 8, 21.

12 *Baker v Campbell* (1983) 153 CLR 52, 95. See further Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.35]–[2.61].

13 See Ch 11.

14 *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121, 133, 139 (Deane J); 158 (Gaudron J); Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [3.22].

15 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [35]. See also *Waterford v Commonwealth* (1987) 163 CLR 54, 164–165.

16 See Liam Brown, 'The Justification of Legal Professional Privilege When the Client Is the State' (2010) 84 *Alternative Law Journal* 624, 636–8 for a discussion of the research on the impact of the privilege on client behaviour. Mason J observed in *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1, 26 that 'it is impossible to assess how significantly the privilege advances the policy which it is supposed to serve. The strength of this public interest is open to question.'

17 Brown, above n 16, 635–6; The claim of the privilege by corporations is discussed at length in *Grant v Downs* (1976) 135 CLR 674, 685–6.

History and scope

12.23 Legal professional privilege has existed for over 400 years in English law.[18] Indeed American legal historian, Professor John Wigmore, described the privilege as ‘the oldest of the privileges for confidential communications’.[19] Despite its age, it has undergone considerable change and development in recent times. The Administrative Review Council noted in 2008 that legal professional privilege continues to be an ‘evolving and often contentious area of the law’.[20]

12.24 The privilege may have been 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’.[21] The privilege is now separate from the lawyer’s duty to maintain confidentiality[22] and its name has been described as ‘unfortunate, because it suggests that the privilege is that of the members of the legal profession, which it is not. It is the client’s privilege’.[23] The name of the statutory privilege, client legal privilege, reflects the understanding that the privilege is that of the client, and can only be waived by the client. However in this Inquiry, the ALRC has referred to legal professional privilege as this phrase refers specifically to the common law privilege.

12.25 When the principles relating to legal professional privilege were developed, it was confined to legal proceedings, because at that time, there were no powers to compel the giving of information or documents other than those that were available in legal proceedings.[24] However, 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.[25] The courts have indicated that the privilege is not merely a rule of evidence—which would only be available in judicial proceedings—but a rule of substantive law.[26] It is therefore available to resist a demand for information or documents made by any agency with coercive information-gathering powers.[27]

12.26 The privilege was limited in its scope by the High Court in the 1976 case of *Grant v Downs*, where it was held that the privilege only protected documents brought into existence for the sole purpose of obtaining legal advice or use in legal

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18 *Baker v Campbell* (1983) 153 CLR 52, 84 (Murphy J). See further Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) 80–7.

19 John Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed, 1940) [2290].

20 Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies* Report No 48 (May 2008) 51.

21 *Baker v Campbell* (1983) 153 CLR 52, 66 (Deane J). However Auburn has argued that this is likely to be a misconception: Auburn, above n 8, 3–8.

22 *Baker v Campbell* (1983) 153 CLR 52, 65 (Gibbs CJ).

23 Ibid 85 (Murphy J).

24 Ibid 61 (Gibbs CJ).

25 Auburn, above n 8, 13.

26 *Baker v Campbell* (1983) 153 CLR 52; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [11]. See also Suzanne McNicol, *Law of Privilege* (Law Book Company Ltd, 1992) 52.

27 *Baker v Campbell* (1983) 153 CLR 52.

proceedings.[28] However, in 1991 the High Court rejected the sole purpose test and expanded the scope of the privilege to documents brought into existence for the dominant purpose of seeking legal advice.[29] This brought the Australian common law into line with England, New Zealand, Ireland and Canada.[30]

12.27 The High Court was also influenced by the development of a statutory privilege. In 1985, the ALRC recommended uniform comprehensive laws of evidence, and suggested that a dominant purpose test would strike the correct balance.[31] Five Australian jurisdictions now have such a statutory privilege, known as client legal privilege. This privilege is relevant only to the admissibility of communications into evidence, and in New South Wales, to pre-trial procedures, but not to non-judicial demands for disclosure.[32] In other situations, the common law privilege is available.

12.28 The privilege is not available to protect communications between a client and lawyer in the furtherance of wrongdoing. This limitation is sometimes known as 'the fraud exception' and it withdraws protection from communications in furtherance of the commission of a crime or the abuse of a statutory power, or where a claim would frustrate the process of law.[33] It also excludes communications made for illegal or improper purposes, trickery and shams.[34] It is 'sufficiently flexible to capture a range of situations where the protection of confidential communications between lawyer and client would be contrary to the public interest'.[35]

Protections from statutory encroachment

Australian Constitution

12.29 The *Australian Constitution* contains no express provision regarding legal professional privilege. However, the Australian Parliament's power to make laws of evidence to be applied in Chapter III courts is not unlimited.[36] The text and structure of Ch III imply that Parliament cannot make a law requiring the court to exercise judicial power in a way that is inconsistent with the nature of that power.[37]

12.30 The High Court has yet to consider whether legal professional privilege is protected by any implication arising from Ch III of the *Constitution.*

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28 *Grant v Downs* (1976) 135 CLR 674.

29 Ibid.

30 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [2].

31 Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) [11].

32 Sue McNicol, 'Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted' (1999) 18 *Australian Bar Review* 189, 195–6. In NSW the statutory privilege has been extended to pre-trial procedures in civil matters: *Uniform Civil Procedure Rules* r 5.7. See further Tom Bathurst, 'Lawyer/Client Privilege' in *College of Law Judges' Series* (2015). In its review of the Uniform Evidence Act, the ALRC recommended that the statutory provisions should apply to any compulsory process for disclosure: Australian Law Reform Commission; New South Wales Law Reform Commission; Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102 (2006).

33 Dyson Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2013) [25290].

34 *AWB Limited v Cole (No 5)* (2006) 155 FCR 30, [210]–[233].

35 Ibid [215].

36 *Nicholas v The Queen* (1998) 193 CLR 173. See further Enid Campbell, 'Rules of Evidence and the Constitution' (2000) 26 *Monash University Law Review* 312.

37 See further Ch 8.

12.31 The Full Federal Court has considered whether the abrogation of the privilege in the context of a royal commission would interfere with the judicial power of the Commonwealth. The court noted that the High Court has repeatedly confirmed that Parliament may abrogate the privilege, at least in the context of executive inquiries.[38] The Full Federal Court concluded that, while the High Court has not explicitly mentioned the constitutional question, '[w]e take the High Court's silence on this point as an indication that such an argument has no merit'.[39]

Principle of legality

12.32 The principle of legality provides some protection to legal professional privilege.[40] When interpreting a statute, courts will presume that Parliament did not intend to interfere with legal professional privilege, unless this intention was made unambiguously clear.[41] 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.[42]

12.33 Similarly, in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*, the majority noted:

> 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.[43]

International law

12.34 While legal professional privilege is not a human right in itself, the European Court of Justice has recognised the right to confidential communication with a lawyer as 'a fundamental, constitutional or human right, accessory or complementary to other such rights'.[44]

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38 *Esso Australia Resources Ltd v Dawson* (1999) 87 FCR 588, [21] referring to ; *Baker v Campbell* (1983) 153 CLR 52; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

39 *Esso Australia Resources Ltd v Dawson* (1999) 87 FCR 588, [22]; see also *John Fairfax Publications Pty Limited v A-G (NSW)* (2000) 158 FLR 81, [51].

40 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 2.

41 *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 (NSW) v Yuill* (1991) 172 CLR 319.

42 *Baker v Campbell* (1983) 153 CLR 52, 117 (Deane J).

43 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

44 *AM & S Europe Ltd v Commission of the European Communities* [1982] ECR 157, [8]. This approach was approved by Murphy J in *Baker v Campbell* (1983) 153 CLR 52, 85.

12.35 Article 14 of the *International Covenant on Civil and Political Rights* protects the right to a fair trial, including the right to legal assistance. The United Nations' *Basic Principles on the Role of Lawyers* call on governments to respect the confidentiality of 'all communications and consultations between lawyers and their clients'.[45]

12.36 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[46] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[47]

Bills of rights

12.37 In some jurisdictions, bills of rights or human rights statutes provide some protection to certain rights and freedoms relevant to legal professional privilege. 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'[48] and the right to a fair hearing and to communicate with his or her lawyer in criminal proceedings.[49] There is also protection for a fair hearing in *Human Rights Act 2004* (ACT).[50]

Justifications for encroachment

12.38 Legal professional privilege is the common law's way of resolving competing public interests: the public interest in the administration of justice, and the public interest in having all relevant evidence before the courts, in the interests of a fair trial.[51]

12.39 In *Esso Australia Resources v Commissioner of Taxation,* the High Court noted the 'obvious tension' between the policy behind legal professional 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.[52]

12.40 ASIC also noted the public interest in having all relevant information 'available to a court and to government agencies conducting investigations'.[53]

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45 United Nations, *Basic Principles on the Role of Lawyers*, Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (7 September 1990) Principle 22.

46 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

47 *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 2.

48 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13a.

49 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 24–25.

50 *Human Rights Act 2004* (ACT) s 21.

51 *Waterford v Commonwealth* (1987) 163 CLR 54, 64 (Mason and Wilson JJ).

52 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [35] (Gleeson CJ, Gaudron and Gummow JJ).

53 Australian Securities and Investments Commission, *Submission 74*.

12.41 An encroachment of the privilege may be justified when Parliament considers that the common law has not struck the correct balance between the competing public interests in a particular instance. Two competing public interests are discussed below: the public interest in open and accountable government, and the public interest in the efficient and effective investigation of wrongdoing.

Open government

12.42 Moves towards more open government in Australia have included the passage of freedom of information legislation, the establishment of the office of the Commonwealth Ombudsman, protected disclosure legislation and the Australian Government Information Publication Scheme.[54] Some of these schemes require government agencies to make information available, for example, to an Ombudsman. Such activities may be inhibited by the strict application of legal professional privilege.

12.43 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. Liam Brown has argued that the privilege is 'difficult to rationalise when the client is the state', and that a better position would be to require governments to justify the need for secrecy on a case by case basis.[55] Abrogating legal professional privilege for 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 legal professional privilege for state governments.[56]

Assisting investigations

12.44 Abrogation of legal professional privilege may sometimes be justified where the law is aimed at improving regulatory or investigative processes.

12.45 Some Commonwealth agencies possess coercive information-gathering powers to investigate complaints or instigate inquiries. It might be argued that the privilege should be abrogated when it creates an intolerable interference with these activities. ASIC has argued that the privilege may prevent or delay access to

> material that may otherwise facilitate an expeditious and thorough investigation, the results of which would inform subsequent, likely more speedy, action, to be taken by ASIC. Litigating claims of client legal privilege, if necessary, is also costly.[57]

12.46 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

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54 *Government accountability—Commonwealth Ombudsman* <http://www.ombudsman.gov.au>.
55 Brown, above n 16.
56 Ibid 638.
57 Australian Securities and Investments Commission, *Submission 74*.

> client legal privilege in relation to a particular investigation undertaken by a federal investigatory body, or a particular power of a federal investigatory body.[58]

12.47 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.[59]

12.48 The recommendations in that report serve as a useful guide for legislatures considering abrogating legal professional privilege. They are consistent with the proportionality approach taken in this Inquiry and discussed in Chapter 2. That is, an important common law right such as legal professional privilege should only be limited by statute when the limitation has a legitimate objective, is suitable and necessary to meet that objective, and when the public interest pursued by the law outweighs the public interest in preserving the right.

12.49 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.[60]

Unfounded claims

12.50 The privilege has the potential to hinder access by Commonwealth regulatory agencies to material that is *not* privileged. At common law a court may inspect documents over which privilege is claimed, to determine whether the claim is well founded.[61] However it does not appear that Commonwealth agencies, even those with coercive information-gathering powers, have the power to inspect documents over which privilege is claimed.[62] There is a risk that improper claims could be made. Over-claiming may cause considerable delay and expense if agencies are required to go to

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58 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) Rec 6–1.

59 Ibid.

60 Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies* Report No 48 (May 2008) 57.

61 *Grant v Downs* (1976) 135 CLR 674, 688.

62 *AWB Limited v Cole* (2006) 152 FCR 382, [59]. One exception is the *Royal Commissions Act 1902* (Cth) which was amended to allow a Commissioner to inspect documents following the *AWB v Cole* decision.

the courts to test claims of privilege.[63] Practices such as 'blanket claims' and over-claiming were discussed in the ALRC's 2008 *Privilege in Perspective* report and procedural reforms were recommended to address this issue.[64] Such reforms could sometimes avoid the need to abrogate the privilege. ASIC supported the implementation of such mechanisms.[65]

12.51 To date, only the *Royal Commissions Act 1902* (Cth) has been amended to allow the Commissioner to inspect documents for the purpose of determining whether the document is privileged. This amendment occurred in 2006, following the decision of Young J in *AWB Ltd v Cole (No 5)*.[66] The Law Council of Australia (Law Council) has questioned whether this amendment was sufficiently justified, and suggested that it would have been preferable to abrogate the privilege for the AWB inquiry rather than more generally.[67]

Statutory protection

12.52 Most laws that abrogate legal professional privilege provide that the privileged material is not admissible in evidence against the person (except for proceedings relating to a failure to comply with a direction to provide information or documents, or proceedings for giving false or misleading information).[68] The protection afforded by such provisions may justify the abrogation of the privilege, by ensuring that the privilege is impaired as little as possible.[69]

12.53 The Law Council suggested that where the 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'.[70] This Inquiry has not identified any statutes that abrogate the privilege and provide derivative use immunity—use immunity is the norm.

Laws that abrogate legal professional privilege

12.54 Commonwealth laws that abrogate legal professional privilege are rare. For example, this Inquiry has identified five that could be broadly described as concerning open government and two concerning crime and the proceeds of crime. Despite the large number of Commonwealth agencies with coercive information-gathering powers, none has the power to require the production of privileged material. The one exception in Commonwealth law, and it is of historic relevance only, was the power of ASIC to

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63 Australian Securities and Investments Commission, *Submission 74*. See also Auditor-General, 'Administration of Project Wickenby' (Audit Report 25, 2012) 185 regarding the cost of disputed claims of privilege.

64 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) Ch 8.

65 Australian Securities and Investments Commission, *Submission 74*.

66 *AWB Limited v Cole (No 5)* (2006) 155 FCR 30.

67 Law Council of Australia, *Submission 75*.

68 *Ombudsman Act 1976* (Cth) s 9.

69 See the discussion of proportionality in Ch 2.

70 Law Council of Australia, *Submission 75*.

require the production of privileged material in the James Hardie asbestos investigation and prosecution.

12.55 Stakeholders also raised concerns about laws that affect the right to confidential legal advice: mandatory data retention laws; and statutory access to communications between lawyers and individuals suspected of terrorism-related offences. It is not clear that these laws encroach upon legal professional privilege, but they do represent an infringement on the right to confidential legal advice.

Open government and accountability in decision-making

12.56 Documents over which legal professional privilege could be claimed do not have to be produced under the *Freedom of Information Act 1982* (Cth).[71] However there are some Commonwealth laws that abrogate legal professional 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 strengthen oversight and promote transparency in government decision-making. The following laws abrogate legal professional privilege, but provide that the privileged material is not admissible against the person:

- *Ombudsman Act 1976* (Cth) s 9(4)(ab)(ii)—the Ombudsman may require a person to furnish information or produce documents, and legal professional privilege cannot be used as an excuse to avoid producing those documents. The information or document is not admissible in evidence against the person who produced it, and the statute does not affect any claim of privilege that anyone may make: ss 7A(1B), (1E), 8(2B), (2E), 9(5A).
- *Crimes Act 1914* (Cth) s 3ZZGE(1)(d)(ii)—legal professional privilege is not an excuse for not disclosing information to the Commonwealth Ombudsman regarding the inspection of a prescribed Commonwealth agency's records. Information, answers or documents given are not admissible except for prosecutions for unauthorised disclosures under s 3ZZHA or pt 7 of the *Criminal Code* (Cth).
- *Crimes Act* s 15HV—legal professional privilege is not an excuse for not giving information, answering a question or giving access to a document to the Commonwealth Ombudsman regarding controlled operations. Privileged material is not admissible except for prosecutions for unauthorised disclosures, and the statute does not affect claims for legal professional privilege that anyone may make: s 15HV(2), (5).
- *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 96(5)—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

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71 *Freedom of Information Act 1982* (Cth) s 42.

protected by legal professional privilege. The privilege may still be claimed in other proceedings.

- *Inspector-General of Intelligence and Security Act 1986* (Cth) s 18—a person is not excused from giving information, producing a document or answering a question on the basis that it would disclose legal advice given to a Minister or a Commonwealth agency, but the material is not admissible in evidence against the person (with some exceptions).

Crime and the proceeds of crime

12.57 Section 3ZQR of the *Crimes Act 1914* (Cth) provides that a person cannot rely on legal professional privilege to avoid producing a document, information or other evidence related to a serious terrorism offence. This evidence is inadmissible in future proceedings against the person. The Explanatory Memorandum did not explain why the privilege was abrogated.[72]

12.58 Section 206 of the *Proceeds of Crime Act 2002* (Cth) provides that a person cannot rely on legal professional privilege to avoid producing a document. The document is not admissible in evidence in a criminal proceeding against the person, except in proceedings regarding providing false or misleading information. The Explanatory Memorandum did not explain why the privilege was abrogated, or why the statutory protection only extends to criminal proceedings, and not civil proceedings.[73]

Coercive information-gathering powers of government agencies

12.59 Commonwealth agencies, including the Australian Crime Commission, the Australian Competition and Consumer Commission, the ASIC and the Australian Taxation Office (ATO), have statutory coercive information-gathering powers, enabling them to investigate complaints and initiate inquiries into illegal activities such as corruption. Statutory officers are often empowered to compel witnesses to provide documents, information or evidence. None of these statutes include explicit abrogation of legal professional privilege, and therefore the privilege is preserved.[74]

12.60 There has been some doubt about whether the *Australian Securities and Investments Commission Act 2001* (Cth) abrogates legal professional privilege.[75] In *Corporate Affairs Commission (NSW) v Yuill,* the High Court held that the compulsory examination powers of the Corporate Affairs Commission of NSW (a precursor to ASIC) abrogated legal professional privilege.[76] The High Court in *Daniels* cast doubt on *Yuill* but did not overturn it.[77] Associate Professor Tom Middleton has argued that

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72 Explanatory Memorandum Anti-Terrorism Bill (No 2) 2005.

73 Explanatory Memorandum, Proceeds of Crime Bill (Cth) 2002.

74 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

75 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) 198–206.

76 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319.

77 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

the issue remains unresolved.[78] Since 3 December 2007, ASIC has notified persons subject to compulsory powers that they are not required to provide documents or information that are subject to privilege[79] and its *Information Sheet 165* indicates that a person may withhold information that attracts a valid claim of legal professional privilege.[80] If a person makes a statement at an examination that discloses information that might attract a claim of privilege, and the person objects to the admission of that evidence, then it is not admissible against them.[81]

12.61 The *James Hardie (Investigations and Proceedings) Act 2004* (Cth) provided that legal professional privilege may be abrogated in relation to a James Hardie investigation or proceeding, or James Hardie 'material'. This allowed ASIC and the Commonwealth DPP to obtain and use records produced to the James Hardie Special Commission of Inquiry and produced under ASIC's information-gathering powers.

12.62 This Act was passed after the report by DF Jackson QC included observations about 'claims for legal professional privilege that [the witness] knew could not honestly be made'.[82] The Explanatory Memorandum for the James Hardie (Investigations and Proceedings) Bill 2004 outlined the policy justification for the abrogation of legal professional privilege in that Bill:

> Any uncertainty over the power to obtain and use privileged material has the potential to severely inhibit ASIC's ability to exercise efficiently its information-gathering and investigative powers in relation to the conduct that gave rise to the James Hardie Special Commission of Inquiry.
>
> …
>
> 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.[83]

12.63 Section 6 provides that this does not create a general abrogation of legal professional privilege.

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78 Thomas Middleton, 'The Privilege against Self-Incrimination, the Penalty Privilege and Legal Professional Privilege under the Laws Governing ASIC, the ACCC and the ATO—suggested Reforms' (2008) 30 *Australian Bar Review* 282, 119.

79 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [5.50].

80 Australian Securities and Investments Commission, *Claims of Legal Professional Privilege*, Information Sheet 165.

81 *Australian Securities and Investments Commission Act 2001* (Cth) s 76(1)(d).

82 DF Jackson, 'Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation' (2004) 419.

83 Explanatory Memorandum, James Hardie (Investigations and Procedures) Bill 2004 (Cth) [4.24].

12.64 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'.[84]

12.65 The use of compulsory examination powers by regulatory agencies may result in the inadvertent disclosure of privileged communications, and the subsequent loss of privilege.[85] AWB Ltd raised this concern when its employees were subject to compulsory examination during the Oil for Food investigation. Subsequent litigation resulted in a settlement in which ASIC agreed to allow AWB access to transcripts of interviews in order to ensure the protection of privileged information.[86]

12.66 The access and information-gathering powers of the ATO are subject to legal professional privilege, so that privileged documents or communications need not be disclosed or produced to the ATO, whether in response to those powers or to an informal request.[87] The ATO must, in the exercise of its powers, ensure that a reasonable opportunity to claim the privilege is provided.[88]

Monitoring and surveillance

12.67 Stakeholders have raised concerns that laws that allow monitoring of contact between a person and their lawyer, or require the retention of telecommunications metadata to be retained and accessed, encroach upon legal professional privilege.[89] It is not clear that the common law privilege protects confidential communications from monitoring and surveillance. The privilege is usually described as a right to resist demands for documents or information made by judicial or administrative bodies,[90]

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84 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Seventh Report of 2005* (August 2005) 151.

85 Emily Rumble, 'Conflicting (Public) Interests Affecting Disclosure: Section 19 Examinations, Legal Professional Privilege, and Public Interest Immunity' (2014) 32 *Company and Securities Law Journal* 44.

86 Australian Securities and Investments Commission, *ASIC and AWB Reach Settlement of Privilege Claims* Media Release 10-41AD.

87 *Commissioner of Taxation v Citibank* (1989) 85 ALR 588, [22]. In the exercise of its statutory powers, the ATO must ensure that there is a reasonable opportunity provided to claim legal professional privilege: *Commissioner of Taxation v Citibank* (1989) 85 ALR 588. In relation to legal professional privilege, the Federal Court considered whether s 263 of the *Income Tax Assessment Act 1936* (Cth) overrode legal professional privilege.

88 *Commissioner of Taxation v Citibank* (1989) 85 ALR 588, [17]; *JMA Accounting Ptd Ltd v Commissioner of Taxation* (2004) 139 FCR 537.

89 See, eg, National Association of Community Legal Centres, *Submission 143*; Law Council of Australia, *Submission 75*; Gilbert and Tobin Centre of Public Law, *Submission 22*.

90 See, eg, *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

although it is sometimes conceived more broadly as a protection of the confidentiality of communications between clients and lawyers.[91]

12.68 The Full Federal Court appeared to take the latter approach in *Carmody v Mackellar*. It was asked to consider whether the *Telecommunications (Interception) Act 1979* (Cth) empowers a person to issue warrants authorising the interception of communications between lawyer and client. The court assumed that the privilege would protect such communications from interception and held the statute must be construed so as to abrogate the privilege, because it would be unworkable otherwise.[92]

12.69 Monitoring and surveillance of communications between a person and their lawyer might also be seen as an encroachment on the right to legal representation, as an essential element of legal assistance is that it is confidential. The right to legal representation is an important fair trial right, and is discussed further in Chapter 8.

12.70 The United Nations Human Rights Committee warned against 'severe restrictions or denial'[93] 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.[94]

12.71 Some Commonwealth laws require the monitoring of communications between a lawyer and a client.

Monitoring contact under preventative detention orders

12.72 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 must be capable of being 'effectively monitored by a police officer'. Communications that are for the purposes listed in s 105.37(1), which include obtaining legal advice about limited matters, are not admissible against the detained person.[95]

12.73 The Law Council submitted 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'.[96]

Monitoring contact under questioning or detention warrant

12.74 Section 34ZQ(2) of the *Australian Security Intelligence Organisation Act 1979* (Cth) requires that contact between a lawyer and a person who is the subject of a

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91 See, eg, Nick Goiran, Michael Burton, 'Integrity Bodies, Witness Surveillance and Legal Professional Privilege: A Case Study' (Paper, West Europe Pacific Legal Conference, Paris, France, January 2014). On the other hand, Jonathan Auburn said 'the privilege is not a branch or variant of any over-arching confidentiality doctrine': Auburn, above n 8, 1.

92 *Carmody v Mackellar* (1997) 148 ALR 210.

93 United Nations Human Rights Committee, *General Comment No 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial* 90th Sess, UN Doc CCPR/C/GC/32 (23 August 2007) [23].

94 Ibid [34].

95 *Criminal Code* s 105.38(5).

96 Law Council of Australia, *Submission 75*.

questioning or detention warrant 'must be made in a way that can be monitored'. The provision is said not to affect the law relating to legal professional privilege.[97]

12.75 The Explanatory Memorandum to the ASIO Legislation Amendment (Terrorism) Bill 2002 that introduced s 34ZQ(2) did not provide specific justification for the monitoring requirement, other than a general statement that the Bill will 'assist in the investigation of terrorism offences'.[98]

12.76 The Law Council's submission to the Independent National Security Legislation Monitor'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 their lawyer, there are no practical means to challenge any ill-treatment'.[99]

Listening devices and telephone intercepts

12.77 The *Telecommunications (Interception and Access) Act 1979* (Cth) (the TIA Act) and the *Surveillance Devices Act 2004* (Cth) do not explicitly refer to the privilege. As noted above, the court has held that these statutes abrogate the privilege, 'at least to the extent necessary to permit interception'.[100] Section 79 of the TIA provides that evidence that is otherwise inadmissible is not rendered admissible, thus preserving the privilege in its application to judicial proceedings.

Telecommunications data retention

12.78 The *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2014* (Cth) amended the TIA Act to introduce a mandatory data retention scheme. The scheme requires service providers to retain some telephone and web data for two years.

12.79 The statement of compatibility with human rights that accompanied the amending Bill acknowledged that the Bill engages and limits the right to privacy. The statement identifies the object of the legislation as being 'the protection of national security, public safety, [and] addressing crime'.[101]

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97 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZV.

98 Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.

99 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].

100 *Carmody v Mackellar* (1997) 148 ALR 210; See further Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [5.24].

101 Explanatory Memorandum, Telecommunications (Interception and Access Amendment (Data Retention) Bill 2014 (Cth) [33].

12.80 Several stakeholders raised concerns about whether the legislation abrogated legal professional privilege.[102] The National Association of Community Legal Centres (NACLC), 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 legal professional privilege.[103] Australian Lawyers for Human Rights proposed that the Bill include exemptions for lawyer/client communications,[104] and NACLC proposed that consideration be given to requiring agencies to obtain a warrant to access a lawyer's metadata.[105]

12.81 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 legal professional 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 disclose a defence case. A litigation strategy or case theory could be identified based on witnesses or experts contacted by the lawyer.[106]

12.82 Similarly, the Law Council 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; [and]
- the number of communications and type of communications between a lawyer and a client, witnesses and the duration of these communications.[107]

12.83 In response to such concerns, the Attorney-General's Department noted that, at common law, legal professional privilege attaches to the 'content of privileged

102 Law Council of Australia, *Submission 140*; Australian Privacy Foundation, *Submission 116*; 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 legal professional privilege where the legislative intention to do so is clear.

103 National Association of Community Legal Centres, *Submission 66*.

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

105 National Association of Community Legal Centres, *Submission 143*.

106 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].

107 Law Council of Australia, Submission No 126 to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*, 20 January 2015.

communications, not to the fact of the existence of a communication between a client and their lawyer'.[108] The Parliamentary Joint Committee on Intelligence and Security relied on the Department's response when concluding that there was no need for 'additional legislative protection in respect of accessing telecommunications data that may relate to a lawyer'.[109]

12.84 In a submission to this ALRC inquiry, ASIC suggested that the privilege would not attach to the type of data retained under the data retention laws, citing *Commissioner of Taxation v Coombes* where it was held that the privilege did not attach to a list of names and addresses of clients who had entered into a certain type of transaction.[110]

Other laws

12.85 The *Judiciary Act 1903* (Cth) s 55ZH 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 legal professional privilege. The privilege will continue to be available in respect of the communication.[111]

12.86 The *Criminal Code* s 390.3(6)(d) 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 argued that this burden may result in the need to disclose information that may otherwise be subject to legal professional privilege.[112]

12.87 Uniform evidence legislation, including the *Evidence Act 1995* (Cth) and its equivalents in some states and territories, provides a statutory form of privilege that applies to evidence adduced in court. The statutory privilege is similar in its scope to the common law privilege, with the limitations on the privilege in Uniform Evidence Act ss 121–126 largely reflecting the limits at common law. McNicol has identified some instances in which the scope of the statutory privilege is narrower than that of the common law privilege,[113] and these could be regarded as encroachments on the common law privilege.

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108 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).

109 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.

110 *Commissioner of Taxation v Coombes* [1999] FCA 842 (25 June 1999).

111 *Judiciary Act 1903* (Cth) s 55ZH(4).

112 Law Council of Australia, *Submission 75*.

113 McNicol, above n 32.

Conclusion

12.88 Commonwealth laws that abrogate legal professional privilege are rare. Some Commonwealth laws allow agencies to require a person to produce privileged documents or information. However, the material produced is not admissible in proceedings against the person. The ALRC does not consider further review of these laws is necessary.

12.89 Some Commonwealth laws allow or require the monitoring of communications between a person and their lawyer. While it is arguable that these laws do not limit legal professional privilege, they do interfere with its underlying rationale, that communications between lawyer and client should be confidential. They may also be characterised as interfering with the right to legal assistance and representation, an important element of the right to a fair trial. The following laws could be further reviewed:

- *Criminal Code* s 105.38(1) which requires contact between a lawyer and a detained person to be capable of being monitored; and
- *ASIO Act* s 34ZQ(2) which requires contact between a lawyer and a person the subject of a questioning or detention warrant to be capable of being monitored.

13. Retrospective Laws

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Summary

13.1 At common law, a statute will be presumed not to have retrospective operation. In the case of criminal laws, this presumption is based on a firm disapproval of laws that impose a penalty for an action that was lawful when it was done. Such laws make it difficult or impossible for individuals to choose to avoid conduct that will attract criminal sanction.

13.2 In the case of civil laws, there is a presumption that a civil law is not intended to have retrospective operation. However the common law does not condemn retrospective civil laws with the vigour reserved for retrospective criminal laws.

13.3 This chapter discusses concerns about laws with retrospective or retroactive operation. It identifies retrospective laws in a wide range of areas, including criminal, taxation, and migration laws, and the justifications that have been put forward for those laws.

13.4 Retrospective criminal laws may be justified where the law in question prohibits behaviour that could never have been considered innocent, legitimate or moral. The Australian Parliament has rarely made retrospective criminal laws, and those that have been made—including legislation prohibiting war crimes, hoaxes using the postal service, and offences against Australians overseas—would largely fall within this justification.

13.5 Retrospective civil laws—that is, those that retrospectively change rights and obligations—are reasonably common. Retrospective civil laws may create uncertainty for individuals and may disappoint legitimate expectations. Where they operate retrospectively only from the date of a government announcement of an intention to legislate, they do not generally disappoint legitimate expectations. They are not an effective way of deterring behaviour, but they may have other objectives, such as restoring a previous understanding of the law that has been unsettled by a court, validating decisions that have been found to be invalid, or protecting public revenue. Retrospective laws may also operate to extend a benefit to an individual who would not otherwise have been entitled to it.

13.6 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 took place before the relevant legislation commences'.[1] 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.

13.7 However, laws with a significant period of retrospectivity may be harder to justify. For example, the *Tax Laws Amendment (Cross-Border Transfer Pricing) Act (No 1) 2012* (Cth) made changes to the *Income Tax Assessment Act 1997* (Cth) with retrospective operation from 1 July 2004. The extent to which these changes merely confirmed previous understandings of the law, or introduce a new test, is contested. They were said to be necessary to avoid 'a significant risk to revenue'.[2] Taxation laws that provide for lengthy periods of retrospectivity might be reviewed to ensure that their retrospective nature has been adequately justified.

13.8 There are concerns that the retrospective operation of some of Australia's migration laws has not been sufficiently justified. The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) inserted reg 2.08F into the *Migration Regulations 1994* (Cth). Reg 2.08F converted all applications for protection visas into applications for temporary protection visas. The regulation commenced on 16 December 2014 and applied to visa applications made before that date. This change had very significant consequences for the people affected. The regulation was said to remove 'an incentive for asylum seekers to use irregular

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1 Les Nielson, Department of Parliamentary Services (Cth), *Bills Digest*, No 91 of 2012–13, 15 March 2013 22.

2 Explanatory Memorandum, Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No 1) 2012.

channels including dangerous journeys to Australia by sea'. It is not clear that retrospective operation is necessary to achieve the objectives of the legislation.

13.9 There have been people smuggling offences in the *Migration Act 1958* (Cth) since 1999. In 2011, there was a question before the courts as to whether an asylum-seeker had a 'lawful right to come to Australia'—if this was the case, then it would not be an offence to assist that person. The *Deterring People Smuggling Act 2011* (Cth) amended the people smuggling offences with retrospective effect, so that it had always been an offence to assist the entry of an asylum-seeker into Australia. The amendment may have retrospectively enlarged the scope of the criminal offence, criminalising behaviour that was not unlawful when it occurred. The stated intention of the retrospective aspect of the law was to 'address doubt that may be raised about convictions that have already been made'.[3]

13.10 The retrospective operation of these migration laws could be considered in the broader review of migration laws discussed in Chapter 1.

A common law principle

Criminal law

13.11 The common law's disapproval of retrospective criminal laws has deep roots and a long history.

13.12 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*:

> [h]ere 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]

13.13 This approach has become part of the common law of Australia. In *Polyukhovich*, Deane J said:

> The basic tenet of our penal jurisprudence is that every citizen is 'ruled by the law, and by the law alone'. The citizen 'may with us be punished for a breach of law, but he can be punished for nothing else'. Thus, more than two hundred years ago, Blackstone taught that it is of the nature of law that it be 'a rule prescribed' and that, in the criminal area, an enactment which proscribes otherwise lawful conduct as criminal will not be such a rule unless it applies only to future conduct.[6]

3 Explanatory Memorandum, Deterring People Smuggling Bill 2011 (Cth).
4 Thomas Hobbes, *Leviathan*, (Oxford University Press, first published 1651, 1996 ed) 207.
5 William Blackstone, *Commentaries on the Laws of England*, (Clarendon Press reprinted by Legal Classics Library, first published 1765–1769, 1983 ed) vol 1, Introduction, section 2, 46.
6 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, [27].

13.14 In *PGA v R*, Bell J indicated that the rule of law was an important rationale for the common law's disapproval of retroactive criminal offences.

> The rule of law holds that a person may be punished for a breach of the law and for nothing else. It is abhorrent to impose criminal liability on a person for an act or omission which, at the time it was done or omitted to be done, did not subject the person to criminal punishment. Underlying the principle is the idea that the law should be known and accessible, so that those who are subject to it may conduct themselves with a view to avoiding criminal punishment if they choose.[7]

13.15 Retrospective criminal laws are commonly considered inconsistent with the rule of law, which requires all members to be subject to publicly disclosed laws. In *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.[8]

13.16 In *Director of Public Prosecutions (Cth) v Keating*, the High Court of Australia 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]

13.17 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.[11]

Civil law

13.18 The common law does not condemn retrospective civil laws with the vigour reserved for retrospective criminal laws. Perhaps the strongest statement of the principle is found in *Maxwell on Statutes*, as cited by Isaacs J in the High Court in 1923:

> Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation.[12]

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7 *PGA v The Queen* (2012) 245 CLR 355, 245.

8 Tom Bingham, *The Rule of Law* (Penguin UK, 2011). The analogous principle regarding increased punishment is embodied in the ICCPR art 15(1), and in *Crimes Act 1914* (Cth) s 4F. It has not been addressed in this chapter, as the Terms of Reference direct the Inquiry to consider the creation of offences with retrospective application.

9 *DPP (Cth) v Keating* (2013) 248 CLR 459, 479 [48] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

10 Ibid [48].

11 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 608 (Toohey J).

12 *George Hudson Limited v Australian Timber Workers' Union* (1923) 32 CLR 413, 434.

13.19 However Isaacs J went on to say that, when the whole circumstances are considered, a retrospective law may be ‘absolutely just’.[13]

13.20 Dixon CJ’s formulation is often cited, but it is a statement of the common law’s approach to statutory interpretation, rather than a statement of disapproval:

> 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 the past events.[14]

13.21 In *Polyukhovich*, Dawson J indicated that retrospective civil laws do not raise the same concerns as retrospective criminal laws:

> Ex post facto laws may be either civil or criminal, but the description is frequently used to refer only to criminal laws, perhaps because the creation of crimes ex post facto is, for good reason, generally considered a great deal more objectionable than retrospective civil legislation … [15]

13.22 He also noted that the ‘resistance of the law to retrospectivity’ is found in the presumption against retrospective operation of civil laws, but that ‘justice may lay almost wholly upon the side of giving remedial legislation a retrospective operation’, in which case the presumption must ‘at best, be a weak presumption’.[16]

13.23 Retrospective civil laws are looked upon with disfavour by some legal commentators. Friedrich Hayek said that the rule of law means that

> the government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s affairs on the basis of this knowledge.[17]

13.24 As French CJ, Crennan and Kiefel JJ noted, rule of law principles underpin the common law presumption against retrospective operation of a statute:

> In a representative democracy governed by the rule of law, it can be assumed that clear language will be used by the Parliament in enacting a statute which falsifies, retroactively, existing legal rules upon which people have ordered their affairs, exercised their rights and incurred liabilities and obligations. That assumption can be viewed as an aspect of the principle of legality … [18]

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13 *George Hudson Limited v Australian Timber Workers’ Union* (1923) 32 CLR 413. Justifications for retrospective laws are discussed further below.

14 *Maxwell v Murphy* (1957) 96 CLR 261, 637–8. See also *Coleman v Shell Co of Australia Ltd* 45 SR NSW 27, 30.

15 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 642.

16 Ibid 642–3.

17 Friedrich Hayek, *The Road to Serfdom* (1944). See also HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994).

18 *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, [30].

13.25 Concerns have been raised about the efficacy of retrospective civil laws. 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 behaviour. As the Law Council of Australia (Law Council) 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.[19]

13.26 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;
>
> (d) corporate taxpayers to make informed dividend policy decisions; and
>
> (e) listed companies to produce timely financial statements that accurately reflect their tax expense.[20]

13.27 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.[21]

13.28 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 that will occur after the law has commenced but which are the result of arrangements entered into before the law commenced.[22]

Retrospective or retroactive?

13.29 A useful distinction may be made between retrospective and retroactive laws. The High Court has noted that retrospectivity is 'a word that is not always used with the constant meaning'.[23] Associate Professor Andrew Palmer and Professor Charles Sampford note that 'a range of definitions is on offer'.[24] This Inquiry uses Professor Elmer Driedger's distinction:

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19 Law Council of Australia, *Submission 75*.
20 The Tax Institute, *Submission 68*.
21 Law Council of Australia, *Submission 75*.
22 Ibid.
23 *Chang v Laidley Shire Council* 234 CLR 1, [111].
24 Andrew Palmer and Charles Sampford, 'Retrospective Legislation in Australia—Looking Back at the 1980s' (1994) 22 *Federal Law Review* 217, 220; Jeremy Waldron, 'Retroactive Law: How Dodgy Was Duynhoven?' (2004) 10 *Otago Law Review* 631, 632.

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted.[25]

13.30 For example, the *Criminal Code Amendment (Offences Against Australians) Act 2002* (Cth) created an offence of causing the death of an Australian overseas. It was assented to on 14 November 2002, but commenced on 1 October 2002.[26] It was retroactive, because it operates before the date of assent, although only for 45 days.

13.31 The *Native Title Act 1993* (Cth) is an example of a retroactive civil law. It commenced on 1 July 1994, but validated certain 'past acts' that occurred before that date and may have been invalid because of native title.[27] Section 14 provides that the past act is 'valid, and is taken always to have been valid'.

13.32 According to Driedger, retrospective (but not retroactive) laws change *present* legal rights and obligations with reference to *past* events or statuses. For example, a law that changes the maximum penalty, or non-parole period, for a crime that occurred in the past is retrospective, because it refers to a past event, but not retroactive, because the sentencing takes place in the present.[28] This definition is not universally accepted. For example, Pearce and Geddes, authors of *Statutory Interpretation in Australia*, consider that a law is only retrospective 'if it provides that rights and obligations are changed with effect prior to the commencement of the legislation'.[29] On this approach, retrospective is synonymous with retroactive. This approach to the definition is certainly well founded, as the High Court has said that 'interference with existing rights does not make a statute retrospective'.[30]

13.33 Laws that introduce legal consequences based on a person's history are retrospective (in Driedger's sense), but not retroactive. *Re a Solicitor's clerk* concerned a law that allowed an order to be made prohibiting a person convicted of larceny from being employed as a solicitor's clerk. The Lord Chief Justice held that the law was not retrospective as the prohibition was for the future only, even though it allowed the prohibition of a person because of a larceny conviction prior to the commencement of the law.[31] Such an approach has been taken in Australia, with the Victorian Supreme Court noting that where a statute relies upon past history as an indicator of present fitness, then the presumption against retrospectivity has no application.[32] However, it

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25 EA Driedger, 'Statutes: Retroactive Retrospective Reflections' (1978) 56 *Canadian Bar Review* 264, 268–269.

26 The amendment was introduced in response to the Bali Bombings which occurred on 12 October: Department of Parliamentary Services (Cth), *Bills Digest*, No 67 of 2002–03, 25 November 2002.

27 After 1975, grants of land that were incompatible with native title rights may have been invalid because of the *Racial Discrimination Act 1975* (Cth). See further Ch 18.

28 Waldron, above n 24, 634.

29 DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) [10.3] relying on Dixon J in *Maxwell v Murphy* (1957) 96 CLR 261.

30 *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, [26].

31 *Re a Solicitor's Clerk* [1957] 1 WLR 1219.

32 *Nicholas v Commissioner for Corporate Affairs* [1987] 1988 VR 289.

has been argued that laws that impose civil deprivations based on past behaviour—for example, the exclusion of communists from labour organisations—amounts to the infliction of punishment without a trial, thus eliding the civil-criminal distinction.[33]

13.34 The Senate Standing Committee on the Scrutiny of Bills (Scrutiny of Bills Committee) considers that a law has 'retrospective effect when it makes a law applicable to an act or omission that took place before the legislation was enacted'—it is concerned with both retroactive and retrospective laws.[34] This chapter uses 'retrospective' to refer generally to both types of laws, and 'retroactive' to refer specifically to a law that takes effect at a time prior to its enactment.

Protections from statutory encroachment

Australian Constitution

13.35 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.[35] 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.[36]

13.36 Similarly, in *Mutual Pools & Staff Pty Ltd v Commonwealth,* Mason CJ said:

> The power of the Parliament to pass retrospective criminal legislation is beyond doubt. Similarly, the federal Parliament can retrospectively validate unlawful conduct either absolutely or conditionally if that conduct is a matter falling within a federal head of power.[37]

13.37 The *Constitution* also permits retrospective laws that affect rights in issue in pending litigation.[38]

13.38 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

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33 Suri Ratnapala, 'Reason and Reach of the Objection to Ex Post Facto Law' [2007] *The Indian Journal of Constitutional Law* 140, 157.

34 Senate Standing Committee on Scrutiny of Bills, 'The Work of the Committee in 2014' (Parliament of Australia) 39.

35 *R v Kidman* (1915) 20 CLR 425.

36 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.

37 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1993) 179 CLR 155, [13] (Mason CJ). See also *Chevron Australia Holdings Pty Ltd v Commissioner of Taxation (No 4)* [2015] FCA 1092 (23 October 2015) [548].

38 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 96.

Polyukovich.[39] In that case, McHugh J said that '*Kidman* was correctly decided'[40] and that

> 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.[41]

13.39 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. A bill of attainder is a statute that finds 'a specific person or specific persons guilty of an offence constituted by past conduct and impos[es] punishment in respect of that offence'.[42] 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.[43] 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.[44]

13.40 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.[45]

13.41 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.[46] Again, the concern is not the retrospective nature of the law, but its interference with the judicial process.[47]

Principle of legality

13.42 The principle of legality provides some protection from retrospective laws.[48] When interpreting a statute, courts will presume that Parliament did not intend to create offences with retrospective application unless this intention was made unambiguously

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39 *Polyukhovich v Commonwealth* (1991) 172 CLR 501. See also *Millner v Raith* (1942) 66 CLR 1.

40 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 721 [30] (McHugh J).

41 Ibid 718 [23] (McHugh J).

42 Ibid [30].

43 Ibid 539, 649, 686, 721.

44 Ratnapala, above n 33.

45 Ibid 539, 649, 686, 721.

46 *Liyanage v The Queen* [1967] AC 259; approved in *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 96. In *Liyanage*, a retroactive law was passed after an attempted coup against the Ceylon Government. The law was expressed to come into effect at a date just prior to the coup and, while it did not name the accused, was clearly directed to them. It legalised their detention, allowed them to be tried by three judges nominated by the Minister and without a jury, created a minimum penalty of not less than ten years' imprisonment, and removed protections regarding the admissibility of confessions.

47 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 96.

48 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 2.

clear.[49] With regard to civil laws, courts will presume that Parliament did not intend to retrospectively change legal rights and obligations. For example, in *Maxwell v Murphy*, Dixon CJ said:

> 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.[50]

13.43 However, this presumption does not apply to procedural (as opposed to substantive) changes to the application of the law.[51]

International law

13.44 The principle that a person should not be prosecuted for conduct that was not an offence at the time the conduct was committed is a rule of customary international law.[52] It is embodied in the maxim *nullem crimen sine lege, nulla poena sine lege*.[53] It has been incorporated into art 15 of the *International Covenant on Civil and Political Rights* (ICCPR):

> 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.

13.45 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[54] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[55]

Bills of rights

13.46 In other countries, bills of rights or human rights statutes provide some protection from retrospective laws. There are prohibitions on the creation of offences

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49 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, [17] (Dawson J); *DPP (Cth) v Keating* (2013) 248 CLR 459, [48] per curiam; citing Francis Alan Roscoe Bennion, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 2008) 807.

50 *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ); See also *George Hudson Limited v Australian Timber Workers' Union* (1923) 32 CLR 413; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1993) 179 CLR 155.

51 *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].

52 See *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 574 (Brennan CJ).

53 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 3rd ed, 1889).

54 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

55 *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 2.

that apply retrospectively in the United States,[56] the United Kingdom,[57] Canada[58] and New Zealand.[59] 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.[60]

13.47 The right not to be charged with a retrospective offence is also protected in the Victorian and ACT human rights statutes.[61]

Justifications for encroachments

13.48 While laws should generally not be retrospective, there are circumstances where retrospective laws are justified. Isaacs J, after referring to the presumption against retrospective operation, 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.[62]

13.49 Similarly, Lon L Fuller said that, while laws should generally be prospective,

> situations can arise in which granting retroactive effect to legal rules not only becomes tolerable, but may actually be essential to advance the cause of legality … It is when things go wrong that the retroactive statute often becomes indispensable as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and turn about to pick up the pieces.[63]

13.50 Some more specific justifications for retrospective laws are suggested below.

Justifications for retrospective criminal laws

13.51 It is difficult to justify the creation of retrospective *criminal* offences. Article 15 of the ICCPR may not be derogated from, even in times of 'public emergency which threatens the life of the nation'. However art 15.2 contains one specific limitation:

> 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.

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56 *United States Constitution* art I § 9, 10. ('No Bill of Attainder or ex post facto Law shall be passed': § 9).
57 *Human Rights Act 1998* (UK)) c 42, sch 1 pt I, art 7.
58 *Canada Act 1982* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 11(g).
59 *New Zealand Bill of Rights Act 1990* (NZ) s 26(1).
60 *Canada Act 1982* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 11(g).
61 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 27; *Human Rights Act 2004* (ACT) s 25.
62 *George Hudson Limited v Australian Timber Workers' Union* (1923) 32 CLR 413, 434.
63 Lon L Fuller, *The Morality of Law* (Yale University Press, 2nd ed, 1972) 53.

13.52 For example, retrospective provisions criminalising war crimes might fall within the permissible limitation in art 15(2), if drafted appropriately.[64]

13.53 The Refugee Advice and Casework Service agreed that in ‘extreme circumstances, retrospective laws may be justified in order to prevent particularly grave injustices’.[65]

Justifications for laws that change rights and obligations

13.54 Retrospective laws in the civil arena have not been as energetically condemned by judicial officers as have those in the criminal sphere, and the burden of justification is not heavy. The Scrutiny of Bills Committee is required to report on laws that could ‘trespass unduly on personal rights and liberties’, and it expects the explanatory memorandum for a bill with retrospective effect to detail the reasons retrospectivity is sought.[66] The Committee has indicated that it will not comment adversely on bills that are for the benefit of those affected, that make technical amendments or correct drafting errors, or implement a tax measure that applies from the date it was announced.[67]

13.55 Retrospective laws create uncertainty and can disappoint the expectations of those who have relied on the known state of the law to plan their actions. However, it has often been pointed out that prospective laws (and many other decisions of governments) also create such uncertainty and disappointment.[68] It may not be rational to expect that laws will not change, or that Parliament will never pass retrospective laws.[69] Both retrospective and prospective laws that disappoint expectations may sometimes be justified on grounds that other public interests outweigh that inconvenience and disappointment. Retrospective laws are not an effective way of deterring behaviour, but may serve other policy objectives.

13.56 The following justifications have been offered for retrospective laws in the civil arena.

- The law operates retrospectively only from the date upon which it was announced by the Government that it intended to legislate, thereby fulfilling

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64 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’, retrospective liability may be justified: Australian Lawyers for Human Rights, *Submission 43*. Laws regarding marital rape are a state or territory responsibility and are not explored in this Inquiry.

65 Refugee Advice and Casework Service, *Submission 30*.

66 Senate Standing Committee on Scrutiny of Bills, above n 34, 40.

67 Senate Standing Committee for the Scrutiny of Bills *The Work of the Committee During the 41st Parliament November 2004–October 2007* (2008) 16.

68 Palmer and Sampford, above n 24, 221; AD Woozley, ‘What Is Wrong with Retrospective Law?’ (1968) 18 *The Philosophical Quarterly* 40, 46.

69 Palmer and Sampford, above n 24, 230; Bruce Cohen and Malcolm Abbott, ‘On Regulatory Change and “Retrospectivity”: Insights from the CPRS and the RSPT’ (2012) 227 *Australian Tax Forum* 815, 820.

Blackstone's call for laws to be 'notified to the public'.[70] Most retrospective taxation laws fall into this category.

- The retrospective law operates to restore an understanding of the law that existed before a court decision unsettled that understanding—see, for example, the transfer pricing laws discussed below.
- The retrospective law operates to address the consequences of a court decision that unsettled previous understandings of the law—see for example the validation provisions in the *Native Title Act* discussed below.
- The retrospective law operates to validate decisions that have been subsequently found to be invalid, in the interests of certainty—see the amendments to the *Environment Protection and Biodiversity Act* discussed below.
- The law addresses tax avoidance behaviour that was not foreseen and that poses a significant threat to revenue—see dividend washing, discussed below.

13.57 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.

Laws with retrospective operation

13.58 Retrospective laws are enacted quite frequently in Australia. Palmer and Sampford identified 99 retrospective laws (that is, either retroactive or retrospective) passed by the Commonwealth Parliament between 1982 and 1990, not including 'routine revision' statutes.[71]

13.59 This chapter will discuss four retroactive criminal laws, which may in fact be the only retroactive criminal laws passed by the Commonwealth.[72] It will also discuss some retrospective civil laws, chosen either because they have been criticised for having insufficient justification or because they are examples of laws that have relied on the justifications identified above.

Criminal laws

13.60 The *Guide to Framing Commonwealth Offences* states that 'an offence should be given retrospective effect only in rare circumstances and with strong justification'.

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70 William Blackstone, *Commentaries on the Laws of England*, (Clarendon Press reprinted by Legal Classics Library, first published 1765–1769, 1983 ed) 46.

71 Palmer and Sampford, above n 24, 234.

72 And there is some uncertainty about whether the fourth listed, people smuggling offences, belongs in this list, as it removes a defence rather than creating a new offence. It is also unclear whether the defence was available before the retrospective law was introduced, as there had been no judicial determination.

Further, if legislation is amended with retrospective effect, this should generally be 'accompanied by a caveat that no retrospective criminal liability is thereby created'.[73]

13.61 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'.[74]

War crimes

13.62 Perhaps the most well-known retroactive criminal law is the *War Crimes Act 1945* (Cth), which was amended by the *War Crimes (Amendment) Act 1988* (Cth). The original Act made provision for the trial and punishment of war crimes committed against anyone who was at any time resident in Australia, or against British subjects or citizens of Britain's allies.[75]

13.63 The amending Act repealed almost all of the original Act. It created an offence of committing a war crime in Europe between 1 September 1939 and 8 May 1945.[76] A person who is an Australian citizen or resident at the time of charge may be liable for the offence.[77]

13.64 Ivan Polyukhovich, an Australian citizen, was charged with crimes said to have been committed in the Ukraine in 1942 and 1943. At that time, there was no Australian legislation which criminalised the acts that Polukhovich was alleged to have done.[78] Polyukhovich challenged the constitutional validity of s 9 of the *War Crimes Act* on the ground that it usurped the judicial power of the Commonwealth by providing that past conduct shall constitute a criminal offence.[79] The validity of the provision was upheld in *Polyukhovich*. 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.[80]

13.65 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

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73 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 15.

74 Ibid.

75 *War Crimes Act 1945* (Cth) ss 7, 12.

76 Ibid ss 5, 9.

77 Ibid s 11.

78 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, [1].

79 Ibid [3].

80 Ibid [18].

principles of law recognised by the community of nations'.[81] 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'.[82]

Hoaxes using the postal service

13.66 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 retroactive operation from 16 October 2001.

13.67 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.[83] These had resulted in an announcement by the then Prime Minister on 16 October 2001 that new anti-hoax legislation would be introduced if the Coalition were returned to Government.

13.68 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'.[84] 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.[85] 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.[86]

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81 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.

82 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 15.

83 Explanatory Memorandum, Criminal Code Amendment (Anti-Hoax and Other Measures) Act (Cth) 2002.

84 Ibid.

85 Ibid.

86 Ibid.

13.69 Despite these justifications, the Scrutiny of Bills Committee expressed concern about these provisions, saying that 'declaring something "illegitimate", and then retrospectively declaring it to be a crime, would seem to establish an unfortunate and undesirable precedent'.[87]

Offences against Australians overseas

13.70 Sections 115.1 to 115.4 of sch 1 of the *Criminal Code Act 1993* (Cth) (*Criminal Code*) provide that any person may be prosecuted in Australia for the murder or manslaughter of, or for causing serious harm to, an Australian citizen or resident outside Australia.

13.71 These provisions were enacted in the *Criminal Code Amendment (Offences Against Australians) Act 2002* (Cth), assented to on 14 November 2002, with retroactive application from 1 October 2002.

13.72 The Attorney-General's Department advised the Parliamentary Joint Committee on Human Rights (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'.[88]

13.73 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 perceived as criminal, but the conduct is criminalised to achieve a particular outcome.[89]

Migration Act s 228B: people smuggling offences

13.74 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.[90]

13.75 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'.

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87 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Second Report of 2002* (March 2002) 99.

88 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.

89 Explanatory Memorandum, Criminal Code Amendment (Offences Against Australians) Bill 2002 (Cth).

90 *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.

13.76 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 retroactive 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.

13.77 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.[91]

13.78 A number of agencies and individuals raised concerns before the Senate Standing Committee on Legal and Constitutional Affairs about the retrospective nature of this provision.[92] 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.[93] Another submission to the 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’.[94] Adam Fletcher noted:

> 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.[95]

Proceeds of crime

13.79 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 for forfeiture and recovery of assets may involve consideration

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91 Explanatory Memorandum, Deterring People Smuggling Bill 2011 (Cth).

92 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.

93 Human Rights Law Centre, *Submission to the Senate Legal and Constitutional Affairs Committee Regarding the Deterring People Smuggling Bill 2011* (2011).

94 Thomas Bland and Others, Submission to Senate Legal and Constitutional Affairs Committee on the Deterring People Smuggling Bill 2011, 2011.

95 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.

of offences that were committed, or are suspected to have been committed, at any time in the past.[96] The statute is retrospective (but not retroactive).

13.80 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.

13.81 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'.[97]

13.82 For example, in determining 'unexplained wealth amounts' under the *Proceeds of Crime Act*,[98] 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.[99]

13.83 The Explanatory Memorandum for the amending Bill noted that orders under proceeds of crime legislation are 'civil asset confiscation orders that cannot create any criminal liability, do not result in any finding of criminal guilt and do not expose people to any criminal sanctions'.[100]

13.84 The Human Rights 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. In this context, it stated that a 'punitive and deterrent goal'—as intended by unexplained wealth proceedings—would generally suggest that the measure should be characterised as criminal. [101]

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96 Proceeds of crime legislation is also discussed in Ch 19.

97 Explanatory Memorandum, Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth).

98 *Proceeds of Crime Act 2002* (Cth) s 179G.

99 Explanatory Memorandum, Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth).

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, Sixth Report of 2013* (May 2014) 191. See also Ratnapala, above n 33, 155–159.

Social security law

13.85 A retroactive social security law was passed in response to the decision in *Poniatowska v Director of Public Prosecutions (Cth).*[102] Ms Poniatowska was charged with 17 counts of obtaining a financial advantage from the Commonwealth, contrary to s 1325.2 of the *Criminal Code*. She had failed to declare income from employment to the Department of Human Services while receiving a social security payment. However the Full Court of the Supreme Court of South Australia held that the *Social Security (Administration) Act 1999* (Cth) (*Administration Act*) did not impose any obligation on persons in receipt of social security payments to declare income. Noting the general principle that 'an omission will attract criminal liability only if the omission is a failure to perform a legal obligation', the Court set aside the convictions.

13.86 In response to this decision, an amending act inserted s 66A into the *Administration Act*. This section imposed a duty on social security claimants to inform the Department of a change of circumstances which might affect payments. The amendment received assent on 4 August 2011, and was described as having commenced on 20 March 2000—the date the *Administration Act* commenced.[103]

13.87 The Explanatory Memorandum noted that *Poniatowska v DPP (Cth)* had cast doubt on 'a large number of past convictions' for social security fraud.[104] The intention of Parliament in creating a provision with retrospective application was 'to ensure that certain criminal convictions … cannot be overturned on the basis that the physical element of the offence, being an omission, was not established'.[105]

13.88 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:

> 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.[106]

Taxation laws

13.89 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 much of the negative impact that arises from the retrospective application. Indeed, as Fuller noted, taxation legislation is never, strictly speaking, retroactive, because it does not create an obligation to pay tax in the past.

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102 *Poniatowska v Director of Public Prosecutions (Cth)* (2010) 107 SASR 578.

103 *Social Security and Other Legislation Amendment (Miscellaneous Measures) Act 2011* (Cth).

104 Explanatory Memorandum, Social Security and Other Legislation Amendment (Miscellaneous Measures) Bill 2011.

105 Ibid 6.

106 *DPP (Cth) v Keating* (2013) 248 CLR 459, [47] (footnote omitted).

Retrospective tax legislation refers to past acts, but imposes an obligation to pay tax in the present.[107]

13.90 There is wide acceptance that amendments to taxation law may apply retrospectively where the Government has announced, by press release, its intention to introduce such legislation, particularly when the announcement is sufficiently detailed. 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.

13.91 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.[108]

13.92 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.[109] However a taxpayer cannot enforce adherence to a practice statement.[110]

13.93 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).

13.94 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'.[111]

13.95 The review stated that while, ideally, tax measures imposing new obligations should apply prospectively, retrospective commencement dates may be appropriate where a provision:

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107 Fuller, above n 63, 59.

108 See Australian Taxation Office, 'Administrative Treatment of Taxpayers Affected by Announced but Unenacted Legislative Measures Which Will Apply Retrospectively When Enacted' (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'.

109 Australian Taxation Office, 'Matters the Commissioner Considers When Determining Whether the ATO View of the Law Should Only Be Applied Prospectively' (PS LA 2011/27). This statement addresses '[m]atters the Commissioner considers when determining whether the ATO view of the law should only be applied prospectively'.

110 *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119 (24 October 2013) [11].

111 Department of the Treasury (Cth), *Report on Aspects of Income Tax Self Assessment* (2004) 70.

- 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.[112]

Bottom of the harbour schemes

13.96 The *Taxation (Unpaid Company Tax) Assessment Act 1982* (Cth), which allowed for the recovery of tax avoided under 'bottom of the harbour' tax schemes entered into between 1 January 1972 and 4 December 1980,[113] was highly controversial. It was introduced in response to tax avoidance schemes that the Government described as 'pre-tax strips of company profits'.[114] Sampford and Crawford note that the schemes often 'required links with organised crime and the deliberate flouting of company and tax laws'.[115]

13.97 When these laws were introduced, the then Treasurer, the Hon John Howard MP, said:

> Our normal and general reluctance to introduce legislation having any retrospective element has, on this occasion, been tempered by the competing consideration of overall perceptions as to the equity and fairness of our taxation system and the distribution of the tax burden.[116]

13.98 The Treasurer also emphasised that the tax to be recovered had been illegally evaded,[117] and referred to revenue losses of 'hundreds of millions of dollars'.[118]

Tax offset for films

13.99 In 2011, the Administrative Appeals Tribunal (AAT) held that *Lush House*, a television program about household management hosted by 'domestic guru' Shannon Lush, was a documentary, and therefore eligible for a tax offset.[119]

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112 Ibid [7.3].

113 *Taxation (Unpaid Company Tax) Assessment Act 1982* (Cth) s 5.

114 Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 1982, 1866 (John Howard). The companies involved were stripped of assets, left with only tax liabilities, and transferred to someone with no capacity to pay the tax bill. The company records were often lost, or sent to 'the bottom of the harbour'.

115 Palmer and Sampford, above n 24, 256.

116 Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 1982, 1866 (John Howard).

117 Ibid.

118 Palmer and Sampford, above n 24, 260.

119 *EME Productions No 1 Pty Ltd and Screen Australia* [2011] AATA 439. The approach of the AAT to the term 'documentary' was upheld by the Full Federal Court: *Screen Australia v EME Productions No 1 Pty Ltd* (2012) 200 FCR 282.

13.100 According to the Government, the definition of 'documentary' adopted by the AAT

> represents a departure from both the ACMA Guidelines and the long-held understanding of the term in the context of government regulation of, and support for, documentaries. That has created uncertainty for Government and industry in relation to the film tax offsets.[120]

13.101 In response, an amendment to the *Income Tax Assessment Act 1997* (Cth) was made to alter the definition of 'documentary' in s 376-25 and limit the types of films eligible for tax offsets.[121] 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'.

13.102 The amendments were consistent with the guidelines previously used in offset applications prior to the AAT decision and were seen as restoring an original understanding of the term 'documentary' in the taxation context.

Dividend washing

13.103 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'. The then Assistant Treasurer, David Bradbury MP, announced the intention to close the loophole on 14 May 2013.[122] The Act was assented to on 30 June 2014 with application to distributions made on or after 1 July 2013.

13.104 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 limited 'the tax benefits that are available in respect of certain financial transactions without any wider impact'.[123]

13.105 While retrospective legislation may disadvantage individual taxpayers, this may 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.[124]

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120 Explanatory Memorandum, Tax and Superannuation Laws Amendment (2013 Measures No 2) Bill 2013 (Cth) 12.

121 *Tax and Superannuation Laws Amendment (2013 Measures No. 2) Act 2013* (Cth).

122 Assistant Treasurer David Bradbury, 'Protecting the Corporate Tax Base From Erosion and Loopholes - Measures and Consultation Arrangements' (Media Release, No 71, 14 May 2013).

123 Explanatory Memorandum, Tax and Superannuation Laws Amendment (2014 Measures No 2) Bill 2014 (Cth).

124 Australian Tax Office, 'Protecting the Corporate Tax Base from Erosion and Loopholes: Preventing. Dividend Washing' (Discussion Paper, 2013) 2.

13.106 The Tax Institute agreed that dividend washing 'threatens the integrity of the dividend imputation system'.[125]

Tax avoidance

13.107 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.

13.108 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.

13.109 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.[126]

Transfer pricing

13.110 An important example of retrospectivity in taxation law arose in relation to amendments to Australia's transfer pricing rules. Transfer pricing is the pricing of goods and services provided by one member of a multinational group of companies to another member of the group—for example, the price charged by a parent company for goods purchased by a subsidiary. Transfer pricing creates opportunities for companies to shift profits to lower tax jurisdictions. Australia's 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'.[127]

13.111 In 1982, transfer pricing rules were introduced into div 13 of the *Income Tax Assessment Act 1997* (Cth). They provide that if parties are not dealing with each other at arm's length with regard to a transfer, consideration equal to arm's length consideration shall be deemed to have been given.[128] There was no substantive judicial consideration of these rules until June 2011 when the Full Federal Court decided *Commissioner of Taxation v SNF (Australia) Pty Ltd*.[129] In this case, the Commissioner argued that the rules should be interpreted in light of the Organisation for Economic Cooperation and Development's Transfer Pricing Guidelines for Multinational

125 Tax Institute, Submission to ATO Consultation, *Protecting the Corporate Tax Base from Erosion and Loopholes: Preventing Dividend Washing*.

126 Explanatory Memorandum, Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013.

127 Explanatory Memorandum, Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No 1) 2012.

128 *Income Tax Assessment Act 1997* (Cth) s 136AD.

129 *Commissioner of Taxation v SNF (Australia) Pty Ltd* (2011) 193 FCR 149.

Enterprises and Tax Administrations (the OECD Guidelines), but the Court rejected this approach.[130]

13.112 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. 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'.[131] 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.[132]

13.113 The amending act commenced on the date of assent, but the provisions apply to income years starting on or after 1 July 2004.[133] 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. Emphasis is placed on evidence that, since 1982, Parliament has assumed that treaty pricing rules are available as an alternative to div 13, and the Commissioner has also publicly maintained this view.

13.114 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.[134]

13.115 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.[135]

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130 Ibid [116]–[118].

131 Explanatory Memorandum, Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No 1) 2012.

132 Ibid.

133 *Tax Laws Amendment (Cross-Border Transfer Pricing) Act (No 1) 2012* Sch 1.

134 Law Council of Australia, Submission to Senate Economics Legislation Committee, *Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No 1)*, 2012.

135 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?* (18 October 2012) <www.corrs.com.au/thinking/insights>.

13.116 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.[136] Any disadvantage to taxpayers needs to be balanced against concerns about protection of public revenue and the extent to which major multinational companies are contributing tax in Australia—a matter of concern to Australian governments and the current Senate inquiry into corporate tax avoidance.[137]

Concerns about retrospective taxation laws

13.117 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.[138]

13.118 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'.[139] Similar concerns were expressed in the Institute's submission to this ALRC Inquiry.[140]

13.119 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).[141]

13.120 The Tax Institute stressed that once an announcement has been made, legislation should be introduced promptly.

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136 Les Nielson, Department of Parliamentary Services (Cth), *Bills Digest*, No 91 of 2012–13, 15 March 2013 22.

137 Senate Economic References Committee, *Corporate Tax Avoidance*, due to report on 26 February 2016.

138 Tax Institute, *2012–13 Federal Budget Submission*, 2012 covering letter.

139 Ibid.

140 The Tax Institute, *Submission 68*.

141 Ibid.

Migration laws

13.121 Laws with retrospective operation are not uncommon in migration law. As noted in Chapter 2, the enjoyment of common law rights and freedoms is not confined to Australian citizens, and a non-citizen in Australia is entitled to the same protection of the law as a citizen.[142] 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. As noted above, the burden of justification for a retrospective civil law is not as high as for criminal laws. In considering whether a retrospective law is justified, the proportionality principle may be relevant—that is, laws should have a legitimate objective, and the means chosen to achieve that objective should be rationally connected with that objective.[143] Thus, a retrospective law is more likely to be justified if its retrospective nature is necessary to achieve its objective.

13.122 Two retrospective migration laws have been identified by stakeholders as raising concerns.

Migration Act s 45AA: unauthorised maritime arrivals

13.123 *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.[144] 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* (Cth) to convert all protection visas into temporary protection visas.[145] The amendment changes rights and obligations retroactively 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.[146]

13.124 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 to be in need of protection … will be eligible only for grant of temporary protection visas’.[147]

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142 *Bradley v Commonwealth* (1973) 128 CLR 557, 580.

143 See further Ch 2.

144 Section 45AA(8)(b) expressly excludes the operation of s 7(2) of the *Acts Interpretation Act 1901* (Cth).

145 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.

146 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*.

147 Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth).

13.125 The Explanatory Statement to the regulation emphasised that it was intended to remove the incentive to undertake a dangerous journey:

> The conversion of unfinalised PPV applications made by unauthorised arrivals into TPV applications is one of the many key measures for implementing the government's policy in combating people smuggling. The conversion ensures that applicants who are found to engage Australia's protection obligations will only be granted a TPV instead of a PPV, thereby removing an incentive for asylum seekers to use irregular channels including dangerous journey to Australia by sea to seek protection.[148]

13.126 Stakeholders commented critically on the effect of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* on protection visa applications.[149] 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 …[150]

13.127 The Refugee 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.[151]

13.128 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.[152] 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.[153]

13.129 The Australian National University Migration Law Program observed that the provisions converting visa applications are 'an attempt to give effect to the

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148 *Migration Amendment (Conversion of Protection Visa Applications) Regulation 2015*.

149 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*.

150 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.

151 Refugee Council of Australia, *Submission 41*. See also Human Rights Law Centre, *Submission 39* regarding the absence of a deterrent effect.

152 Refugee Advice and Casework Service, *Submission 30*.

153 Human Rights Law Centre, *Submission 39*.

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 rolling temporary protection visas, which in our view, may give rise to breaches of fundamental rights, including the right to freedom of movement.[154]

Migration Act ss 500A(3)(d), 501(6)(aa): the character test

13.130 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.

13.131 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.

13.132 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'.[155]

13.133 The Law Council submitted that these 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.[156] As noted above, there is a question over whether laws that change the present consequences of past acts can be correctly called retrospective.

Other laws

Native title law

13.134 The *Native Title Act 1993* (Cth) includes provisions that validate past acts that extinguished native title. These provisions are retroactive because they provide that certain acts are valid and are 'taken always to have been valid'.[157]

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154 ANU Migration Law Program, *Submission 59*.

155 Explanatory Memorandum, Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011 (Cth).

156 Law Council of Australia, *Submission 75*.

157 *Native Title Act 1993* (Cth) s 14.

13.135 These provisions were a 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.[158] By making clear that the common law recognises native title, *Mabo [No 2]* cast doubt on land tenures that had been granted since the passage of the *Racial Discrimination Act 1975* (Cth). Grants that purported to extinguish native title may have been invalid because of their inconsistency with the *Racial Discrimination Act*. They may also have been invalid because they were acquisitions of property other than on just terms, as required by s 51(xxxi) of the Constitution. The *Native Title Act* 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.[159]

Validating acts

13.136 Legislation with retroactive operation may be enacted to validate decisions that have been made, or powers exercised, by government agencies, the validity of which is in doubt. In *Statutory Interpretation in Australia,* Pearce and Geddes note that such statutes 'clearly must operate retrospectively and from their very nature refute the applicability of the presumption against retrospectivity'.[160]

13.137 One 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'.[161] The Senate Scrutiny of Bills Committee expressed concerns about this amendment. It noted that coercive powers are only available if expressly authorised by statute, and retrospective validation of such powers should only occur in 'exceptional circumstances where a compelling need can be demonstrated'. The Committee did not consider that such exceptional circumstances had been demonstrated.[162]

13.138 A second example is the *Environment Legislation Amendment Act 2013* (Cth) which retrospectively validated decisions that were made under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*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 consider certain conservation advice.[163] The Explanatory Memorandum

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158 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

159 *Native Title Act 1993* (Cth) div 2A. See also Ch 20.

160 Pearce and Geddes, above n 29, [10.14].

161 Explanatory Memorandum, Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 (Cth).

162 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *13th Report of 2014* (October 2014) 697–8.

163 *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694 (17 July 2013).

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'.[164]

Powers to make subordinate legislation

13.139 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.[165] 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 excise duties 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, concerning the operation of the scheme;
- *Petroleum Excise (Prices) Act 1987* (Cth) s 4(1C), concerning excise on condensate;
- *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.

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164 Explanatory Memorandum, Environment Legislation Amendment Bill 2013 (Cth).

165 *Legislative Instruments Act 2003* (Cth) s 12.

13.140 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

13.141 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'.[166] 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.[167] 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'.[168]

13.142 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'.[169]

13.143 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.[170] In *PGA v The Queen*, Heydon J said that to 'the extent that they may be changed retrospectively, uncertainty is inherent in common law rules'.[171] Fuller considers that the argument that judicial decisions should be retrospective is very strong.[172]

13.144 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 uncertain and require statutory interpretation. This chapter focuses on Commonwealth laws with declared retrospective operation, rather than those that may require clarification.

Conclusion

13.145 Commonwealth laws creating offences with retrospective operation are rare, and when such offences have been created, they have largely concerned conduct with such a high degree of moral culpability that no-one could consider them legitimate.

166 *Corporations Act 2001* (Cth) s1041A.
167 *Director of Public Prosecutions (Cth) v JM* (2013) 250 CLR 135.
168 J Gans, *Submission 2*.
169 Law Council of Australia, *Submission 75*.
170 Hugh Tomlinson, Richard Clayton and Victoria Butler-Cole, *The Law of Human Rights* (University Press, 2009) 822. See also Enid Campbell, 'The Retrospectivity of Judicial Decisions and the Legality of Governmental Acts' (2003) 29 *Monash University Law Review* 49.
171 *PGA v The Queen* (2012) 245 CLR 355, [126].
172 Fuller, above n 63, 57.

13.146 The ALRC considers that the *Deterring People Smuggling Act 2011* (Cth), which has retroactive operation for 11 years and may have enlarged the scope of the offence of people smuggling, should be further reviewed to determine whether the retroactive operation is justified.

13.147 Commonwealth laws that retrospectively change legal rights and obligations are common. The ALRC considers that the following could be further reviewed to determine whether their retrospective operation is justified:

- taxation laws that provide for lengthy periods of retrospectivity; and
- *Migration Act* s 45AA and *Migration Regulations* 2.08F, which converted applications for permanent protection visas into temporary protection visas.

14. Procedural Fairness

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Summary

14.1 A fair procedure for decision making is an important component of the rule of law. The common law recognises a duty to accord a person procedural fairness—a term often used interchangeably with natural justice—before a decision that affects them is made.[1]

14.2 Procedural fairness promotes sound decision making:

> A failure to give a person affected by a decision the right to be heard and to comment on adverse material creates a risk that not all relevant evidence will be before the decision-maker, who may thereby be led into factual or other error. Apparent or apprehended bias is likely to detract from the legitimacy of a decision and so undermine confidence in the administration of the relevant power.[2]

1 *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 (4 November 2015) [30] (Kiefel, Bell and Keane JJ); Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters Australia, 2013) 397.

2 Chief Justice Robert French, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 25, 47.

14.3 This chapter considers the duty to afford procedural fairness in administrative decision making. Procedural fairness in judicial proceedings is addressed when considering laws encroaching on the right to a fair trial.

14.4 A number of Commonwealth laws affect the common law duty to afford procedural fairness to persons affected by the exercise of public power. Excluding procedural fairness may be justified in some instances. In particular, it may be justified where urgent action needs to be taken in the public interest.

14.5 Migration laws that encroach on the duty to afford procedural fairness attracted the most comment and criticism in submissions to this Inquiry. Some of these laws would benefit from further review to consider whether the infringement of the duty to afford procedural fairness is proportionate, given the gravity of the consequences for those affected by the relevant decision. Migration laws that might be further scrutinised include those in the *Migration Act 1958* (Cth) (*Migration Act*) relating to:

- the mandatory cancellation of visas; and
- the fast track review process for decisions to refuse protection visas.

The common law

14.6 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'. He quoted Stanley de Smith, Harry Woolf and Jeffrey Jowell:

> 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.[3]

14.7 The common law required courts of law to observe the two basic requirements of natural justice: fair hearing and the avoidance of actual or apprehended bias. These rules were extended to administrative tribunals that have a 'duty to act judicially' in making decisions affecting vested rights and liberties of persons. Later, judges began to speak of a 'duty to act fairly' because the idea of acting judicially was not flexible enough to apply to administrative actions that were not strictly judicial but nevertheless affected vested rights and liberties.[4]

3 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, [140], quoting Stanley de Smith, Harry Woolf and Jeffrey Jowell, *Judicial Review of Administrative Action* (Sweet & Maxwell, 5th ed, 1995) 378–9. See also Chief Justice Robert French, 'Procedural Fairness—Indispensable to Justice?' (Sir Anthony Mason Lecture, University of Melbourne Law School Law Students' Society, 7 October 2010).

4 Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* (Penguin Books, 8th ed, 1998) 573.

14.8 Procedural fairness traditionally applied to decisions affecting rights and interests related to 'personal liberty, status, preservation of livelihood and property'.[5] 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.[6]

14.9 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 noted the continued evolution of the concept of procedural fairness. They remarked 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'.[7] It has more recently been said that the common law doctrine has a 'wide application and is presumed by the courts to apply to the exercise of virtually all statutory powers'.[8]

14.10 There has been some debate as to whether the duty to afford procedural fairness in the exercise of a statutory power derives from the common law or from construction of the relevant statute.[9] In *Plaintiff M61/2010E v Commonwealth,* the Full Bench of the High Court thought it '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'.[10] In 2012, the High Court considered that such a debate was unproductive and proceeded on a false dichotomy. The principles and presumptions of statutory construction are part of the common law, and as such

> 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.[11]

Procedural fairness: the duty and its content

14.11 'Procedural fairness' means acting fairly in administrative decision making. It relates to the fairness of the procedure by which a decision is made, and not the

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5 Westlaw AU, *The Laws of Australia* (at 1 March 2014) 2 Administrative Law, '2.5 Judicial Review of Administrative Action: Procedural Fairness' [2.5.170].

6 Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis Butterworths, 3rd ed, 2012) [10.1.9].

7 *Annetts v McCann* (1990) 170 CLR 596, 599.

8 Matthew Groves, 'Exclusion of the Rules of Natural Justice' (2013) 39 *Monash University Law Review* 285, 285.

9 Cf the judgments of Mason J and Brennan J in *Kioa v West* (1985) 159 CLR 550. Mason J considered this to be a 'fundamental rule of the common law doctrine of natural justice': 582. Brennan J reasoned that 'there is no free-standing common law right to be accorded natural justice by the repository of a statutory power': 610. See further Groves, above n 8.

10 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, [74].

11 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, [97] (Gummow, Hayne, Crennan and Bell JJ).

fairness in a substantive sense of that decision.[12] A person may seek judicial review of an administrative decision on the basis that procedural fairness has not been observed.[13] In *Re Refugee Tribunal; Ex parte Aala,* the High Court held that the denial of procedural fairness by an officer of the Commonwealth, where the duty to observe it has not been validly limited or extinguished by statute, will result in a decision made in excess of jurisdiction and thus attract the issue of prohibition under s 75(v) of the *Constitution*.[14]

14.12 In considering whether there has been a denial of procedural fairness, courts will examine two issues:

- whether a duty to afford procedural fairness exists; and
- if such a duty exists, the content of procedural fairness in the particular case.

Is there a duty?

14.13 In 2015, the High Court succinctly stated that, in 'the absence of a clear, contrary legislative intention, administrative decision-makers must accord procedural fairness to those affected by their decisions'.[15]

14.14 The manner in which a person's interests are affected is relevant to whether a duty to afford procedural fairness exists. There is less likely to be a duty to afford procedural fairness where a decision affects a person as a member of the public or a class, rather than in their individual capacity.[16] Procedural fairness may not apply where a decision 'affects so many people that it is really a legislative act; or where the range of public policy considerations that the deciding body can legitimately take into account is very wide'.[17]

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12 Aronson and Groves, above n 1, 399. However, a decision made without evidence, or contrary to evidence, will not generally be considered to have afforded procedural fairness: Bill Lane, 'The "No Evidence" Rule' in Matthew Groves and Hoong Phun Lee (eds), *Australian Administrative law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 233, 241–2.

13 Australian Constitution s 75; *Judiciary Act 1903* (Cth) s 39B; *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(a). Judicial review is considered further in Ch 15.

14 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, [17], [41] (Gaudron and Gummow JJ, Gleeson CJ agreeing); [132], [151]–[152] (Kirby J); [169]–[171] (Hayne J). Prohibition is a prerogative remedy issued by a court to prevent a tribunal or inferior court, which is acting or threatens to act in excess of its jurisdiction, from proceeding any further: Ray Finkelstein et al, *LexisNexis Concise Australian Legal Dictionary* (2015). Where there is a decision-making procedure that has been statutorily prescribed, failure to comply with it in making a decision may also amount to jurisdictional error, known as 'procedural ultra vires', and the decision will be invalid: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, [77] (McHugh J); [173] (Kirby J); [204]–[208] (Hayne J).

15 *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 (4 November 2015) [30] (Kiefel, Bell and Keane JJ). Procedural fairness will not be implied in relation to an exercise of legislative power by an administrator—that is, in the making of delegated legislation.

16 Westlaw AU, *The Laws of Australia* (at 1 March 2014) 2 Administrative Law, '2.5 Judicial Review of Administrative Action: Procedural Fairness' [2.5.150]. See also Aronson and Groves, above n 1, 428–36.

17 Smith and Brazier, above n 4, 570.

14.15 A duty to afford procedural fairness may be excluded by legislation. This is a matter of statutory construction, the key question being whether legislation, 'properly construed, limits or extinguishes the obligation to accord natural justice'.[18] Professors Mark Aronson and Matthew Groves have suggested that courts increasingly construe legislation so as to imply that a duty to afford procedural fairness exists, particularly since the statement by the High Court in *Saeed v Minister for Immigration and Citizenship* (*Saeed*) that procedural fairness is protected by the principle of legality.[19] This has made legislative exclusion 'very difficult in practice'.[20]

14.16 Courts have found that a duty to afford procedural fairness may be impliedly excluded where it would be inconsistent with the proper operation of the relevant statutory provisions.[21]

14.17 Express statutory provisions that set out procedural requirements to be followed in the making of a decision may not establish with the requisite clearness an intention to exclude natural justice.[22] Groves has observed that the 'weight of more recent cases suggests that the courts are very reluctant to accept that a legislative code is exhaustive and therefore intended to exclude the implication of further common law hearing rights'.[23] This may be the case even where the provisions are described as a 'procedural code'.[24] In *Saeed*, the High Court accepted that provisions stating that procedures contained in the *Migration Act* were 'exhaustive' statements of the natural justice hearing rule were effective to exclude the implication of natural justice, but only in relation to the matters to which the provisions referred.[25]

Content of procedural fairness

14.18 There is no fixed content to the duty to afford procedural fairness. The fairness of the procedure depends on the nature of the matters in issue, and what would be a reasonable opportunity for parties to present their cases in the relevant circumstances. Mason J stated in *Kioa v West* that 'the expression "procedural fairness" … conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case'.[26] In *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam,* Gleeson CJ emphasised that 'fairness is not an abstract concept' and that the 'concern of the law is to avoid practical injustice'.[27]

14.19 Aronson and Groves have noted that the willingness on the part of the courts to imply a duty to afford procedural fairness, and reluctance to find that it has been

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18 Aronson and Groves, above n 1, 454.
19 Ibid 455.
20 Ibid.
21 Ibid. See, eg, *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636.
22 Aronson and Groves, above n 1, 259–60.
23 Groves, above n 8, 310.
24 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, [90]–[95] (Gaudron J); [143] (McHugh J); [178] (Kirby J).
25 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252.
26 *Kioa v West* (1985) 159 CLR 550, 585.
27 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, [37]. For a more detailed discussion of practical justice, see Ch 8.

excluded by statute, has meant that the crucial question will usually be the content of procedural fairness rather than whether the duty exists.[28]

14.20 Procedural fairness traditionally involves two requirements: the fair hearing rule and the rule against bias.[29] The hearing rule requires a decision maker to afford a person an opportunity to be heard before making a decision affecting their interests.[30] In *Kioa v West*, Gibbs CJ said that the 'fundamental rule is that a statutory authority having power to affect the rights of a person is bound to hear him before exercising the power'.[31] The rule against bias ensures that the decision maker can be objectively considered to be impartial and not to have pre-judged a decision.[32]

14.21 The content of the rule against bias is flexible, and determined by reference to the standards of the hypothetical observer who is fair minded and informed of the circumstances.[33]

14.22 The specific content of the hearing rule will vary according to statutory context. However, a fair hearing will generally require the following:

- Prior notice that a decision that may affect a person's interests will be made.[34] This has been referred to as a 'fundamental' or 'cardinal' aspect of procedural fairness.[35]
- Disclosure of the 'critical issues' to be addressed, and of information that is credible, relevant and significant to the issues.[36]
- A substantive hearing—oral or written—with a reasonable opportunity to present a case.[37] Whether an oral hearing should be provided will depend on the circumstances. The 'crucial question is whether the issues can be presented and decided fairly by written submissions alone'.[38] In some circumstances, there may be a duty to allow a person to be legally represented at a hearing.[39]

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28 Aronson and Groves, above n 1, 491. This echoes the language used by Mason J in *Kioa v West*, who said that the 'critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?': *Kioa v West* (1985) 159 CLR 550, 585.

29 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [25] (Gleeson CJ); Aronson and Groves, above n 1, 398–9.

30 Aronson and Groves, above n 1, 398–9.

31 *Kioa v West* (1985) 159 CLR 550, 563, quoting Mason J in *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 360.

32 Aronson and Groves, above n 1, 399; Westlaw AU, *The Laws of Australia* (at 1 March 2014) 2 Administrative Law, '2.5 Judicial Review of Administrative Action: Procedural Fairness' [2.5.20].

33 Aronson and Groves, above n 1, 609.

34 Westlaw AU, *The Laws of Australia* (at 1 March 2014) 2 Administrative Law, '2.5 Judicial Review of Administrative Action: Procedural Fairness' [2.5.460].

35 Aronson and Groves, above n 1, 517.

36 *Kioa v West* (1985) 159 CLR 550, 587 (Mason J); Westlaw AU, *The Laws of Australia* (at 1 March 2014) 2 Administrative Law, '2.5 Judicial Review of Administrative Action: Procedural Fairness' [2.5.530]; Aronson and Groves, above n 1, 517.

37 Aronson and Groves, above n 1, 549; Westlaw AU, *The Laws of Australia* (at 1 March 2014) 2 Administrative Law, '2.5 Judicial Review of Administrative Action: Procedural Fairness' [2.5.630].

38 Aronson and Groves, above n 1, 564.

39 Ibid 567.

14.23 The balancing of issues to determine what fairness requires in a particular case may have the result that the content of procedural fairness is greatly reduced. This may be the case, for example, where issues related to national security arise. In *Leghaei v Director-General of Security*, the Federal Court considered the duty to afford procedural fairness in the making of an 'adverse security assessment' by the Australian Security Intelligence Organisation (ASIO).[40]

14.24 Adverse security assessments are relevant to administrative decisions related to visa status.[41] In *Leghaei*, the receipt of an adverse security assessment resulted in the cancellation of the plaintiff's residency visa.[42]

14.25 The primary judge found that there existed 'a duty to afford such degree of procedural fairness in the making of an adverse security assessment as the circumstances could bear, consistent with a lack of prejudice to national security'.[43] However, upon considering the balance to be struck between the public interest in national security and a duty to disclose the critical issues on which an administrative decision is likely to turn, the primary judge held that the content of procedural fairness was 'reduced, in practical terms, to nothingness'.[44]

14.26 On the other hand, it may be that, where a decision 'would have especially serious consequences upon a person affected, the hearing rule would require detailed procedural requirements'.[45]

Protections from statutory encroachment

Australian Constitution

14.27 The *Australian Constitution* does not prevent statutory encroachment upon the duty to afford procedural fairness in administrative decision making. It does not

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40 *Leghaei v Director General of Security* [2005] FCA 1576 (10 November 2005). An adverse security assessment is one that is prejudicial to the interests of the person, and contains a recommendation that prescribed administrative action, the implementation of which would be prejudicial to the interests of the person, be taken or not be taken: *Australian Security Intelligence Organisation Act 1979* (Cth) s 35.

41 The exercise of any power, or the performance of any function, in relation to a person under the *Migration Act* falls within the definition of 'prescribed administrative action': *Australian Security Intelligence Organisation Act 1979* (Cth) s 35(1).

42 *Leghaei v Director-General of Security* [2007] FCAFC 37 (23 March 2007) [14]. Additionally, a person who receives an adverse security assessment will not be eligible for a protection visa: *Migration Act 1958* (Cth) s 36(1B)

43 *Leghaei v Director General of Security* [2005] FCA 1576 (10 November 2005) [83].

44 Ibid [88]. On appeal, the Full Federal Court considered that the balance struck by the primary judge was correct: *Leghaei v Director-General of Security* [2007] FCAFC 37 (23 March 2007) [51]–[55]. See also *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1. The situation for a non-citizen affected by an adverse security assessment has been described as a 'legal black hole': the person is 'unable to know the case against them and thus unable to effectively challenge the unknown allegations; enjoying no right at all of merits review; and enjoying only a legal fiction of judicial review': Ben Saul, '"Fair Shake of the Sauce Bottle"' [2012] *Alternative Law Journal* 221, 222. A number of submissions addressed questions of procedural fairness in relation to the making of adverse security assessments: Councils for Civil Liberties, *Submission 142*; Legal Aid NSW, *Submission 137*; Refugee Council of Australia, *Submission 41*; Human Rights Law Centre, *Submission 39*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

45 Aronson and Groves, above n 1, 491, n 2.

prevent Parliament from modifying, by clear language, the rules of natural justice in their application to non-judicial decisions under Commonwealth law. However, as noted above, denial of procedural fairness in the exercise of a statutory power, where the duty to observe it has not been validly limited or extinguished by statute, will result in a decision made in excess of jurisdiction and attract the issue of prohibition under s 75(v) of the *Constitution*.[46]

Principle of legality

14.28 The principle of legality provides some protection from statutory encroachment upon the duty to observe procedural fairness.[47] When interpreting a statute, courts will presume that Parliament did not intend to exclude procedural fairness, unless this intention was made unambiguously clear.[48] The High Court has stated that exclusion of the principles of natural justice can only occur by 'plain words of necessary intendment'.[49] In *Saeed*, the High Court said that the 'presumption that it is highly improbable that Parliament would overthrow fundamental principles or depart from the general system of law, without expressing its intention with irresistible clearness, derives from the principle of legality'.[50]

14.29 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]

International law

14.30 Article 14.1 of the *International Covenant on Civil and Political Rights* (ICCPR)[53] 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 a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. The phrase 'suit at

46 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82. The original jurisdiction vested in the High Court by s 75 of the *Constitution* cannot be removed by Parliament: *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 36 (Brennan, Deane and Dawson JJ). See also Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 3rd ed, 2012) 196–197. See further Ch 15. For consideration of the constitutional protection of procedural fairness in the judicial process, see Ch 8.

47 The principle of statutory interpretation known as the 'principle of legality' is discussed more generally in Ch 2.

48 *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).

49 *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ).

50 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

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).

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

law' has been taken to include some administrative law matters, and this right extends to all individuals, including non-citizens.[54]

Bills of rights

14.31 In some countries, bills of rights or human rights statutes provide some protection of procedural fairness.

14.32 In the United States, persons enjoy a constitutional guarantee of due process in the administration of the law.[55] In New Zealand, human rights legislation requires any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law to observe natural justice.[56] In Canada, any deprivation of life, liberty and security of the person must be informed by principles of 'fundamental justice'.[57]

Justifications for laws that deny procedural fairness

14.33 Some have argued that no justification exists for excluding procedural fairness, given the scope that exists for flexibility in its content. For example, the Administrative Review Council has said that that 'procedural fairness should be an element in government decision making in all contexts, accepting that what is fair will vary with the circumstances'.[58]

Proportionality

14.34 Some stakeholders favoured the adoption of a proportionality test to determine if a law that excludes procedural fairness is justified.[59] The UNSW Law Society argued that applying a proportionality test to laws that exclude procedural fairness would involve assessing whether the laws are:

> (1) practically suitable for achieving a legitimate policy objective;
>
> (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.[60]

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54 United Nations Human Rights Committee, *General Comment No 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial* 90th Sess, UN Doc CCPR/C/GC/32 (23 August 2007) [16]–[17].

55 *United States Constitution* amend V.

56 *New Zealand Bill of Rights Act 1990* (NZ) s 27(1).

57 *Canada Act 1982* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 7.

58 Administrative Review Council, *The Scope of Judicial Review*, Report No 47 (2006) 52.

59 Human Rights Law Centre, *Submission 39*; UNSW Law Society, *Submission 19*. For further discussion of the use of proportionality to consider whether a law that limits rights is justified, see Ch 2. See also *McCloy v New South Wales* [2015] HCA 34 (7 October 2015).

60 UNSW Law Society, *Submission 19*.

Urgency

14.35 It may be justified to exclude procedural fairness where urgent decisions need to be made to prevent a pressing or serious harm. However, a distinction has been drawn between a statutory power which is, by its nature, inconsistent with an obligation to afford procedural fairness, and a power that may sometimes need to be exercised in urgent situations.[61] An example of the former might include a power to forcibly enter premises in case of fire or natural disaster.[62] In the latter case, it may not be justified to statutorily exclude procedural fairness. Instead, it may be more appropriate that procedural fairness be excluded only where urgency is established, or that the content of procedural fairness be limited in urgent circumstances.[63]

14.36 A related justification that is sometimes made for excluding procedural fairness is the need to reduce delay by streamlining administrative processes.[64] However, some have argued that the aim of quick decision making should not justify a denial of procedural fairness. For example, the ANU Migration Law Program argued, in the context of migration law, that 'the erosion of procedural fairness obligations should not be justified on the basis of efficiency or expediency in decision-making'.[65]

Laws that exclude procedural fairness

14.37 A number of Commonwealth laws purport to expressly exclude procedural fairness in the exercise of a statutory power, by providing, for example, that natural justice does not apply to a particular decision.[66]

14.38 Some of these laws are examined below, in relation to corporate and commercial regulation; migration law; and the exercise of maritime powers.

Corporate and commercial regulation

14.39 Procedural fairness is excluded in provisions of the *Corporations Act 2001* (Cth). The Australian Securities and Investments Commission (ASIC) highlighted a number of these, but noted that these provisions are the exception rather than the rule.[67] ASIC submitted that it may be appropriate in some circumstances to limit procedural fairness to 'prevent financial loss or to protect the integrity of financial markets'.[68]

14.40 Provisions of the *Corporations Act* that are designed to prevent financial loss caused by fraud or improper financial management contain limitations on procedural fairness to meet this policy objective. Section 739 empowers ASIC to issue interim 'stop orders' prohibiting offers of security where a disclosure document or associated

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61 *Marine Hull and Liability Insurance Co Ltd v Hurford* (1985) 10 FCR 234, 241.
62 Ibid.
63 Aronson and Groves, above n 1, 458.
64 See eg, Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) [729], [894], [941].
65 ANU Migration Law Program, *Submission 59*.
66 See further Aronson and Groves, above n 1, 452–5.
67 Australian Securities and Investments Commission, *Submission 74*.
68 Ibid.

advertisement is defective.[69] Such stop orders may be made without the holding of a hearing where ASIC considers any delay in making the order would be prejudicial to the public interest.[70]

14.41 The Law Council of Australia (Law Council) considered s 739 to be justified, arguing that it was a 'legitimate temporary measure', and that there exists a 'public interest in exercising such an emergency power in avoiding financial loss caused by fraud or improper management'.[71] Such arguments may suggest that the provision satisfies the kind of proportionality analysis set out above.

14.42 Section 915B enables ASIC to suspend or cancel an Australian Financial Services (AFS) licence by giving written notice, and without first providing procedural fairness by way of a hearing, in certain circumstances. These include where the licensee:

- becomes insolvent;[72]
- is convicted of serious fraud;[73]
- becomes incapable of managing their affairs because of mental or physical incapacity;[74] or
- is a body corporate and the body is a responsible entity of a registered investment where the scheme members have or are likely to suffer loss because of a breach of the *Corporations Act.*[75]

14.43 An ASIC regulatory guide outlines the factors taken into account when considering whether to suspend or cancel an AFS licence. It notes that, in general, suspension or cancellation of an AFS licence is likely where there exist serious concerns about the licensee: this is 'particularly so in instances where there is a need to protect the public and where conduct may result in investor detriment'.[76]

14.44 ASIC submitted that s 915B appropriately enables the exclusion of procedural fairness from a decision to suspend or cancel an AFS licence in specified exceptional circumstances.[77] In all other circumstances, ASIC is expressly required to afford procedural fairness before seeking to suspend or cancel a licence.[78]

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69 See also *Corporations Act 2001* (Cth) s 1020E.
70 Ibid s 739(3).
71 Law Council of Australia, *Submission 140*.
72 *Corporations Act 2001* (Cth) s 915B(1)(b).
73 Ibid s 915B(1)(c).
74 Ibid s 915B(1)(d).
75 Ibid s 915B(3)(c).
76 Australian Securities and Investments Commission, *Licensing: Administrative Action against Financial Service Providers* Regulatory Guide 98 (July 2013) 14.
77 Australian Securities and Investments Commission, *Submission 74*.
78 *Corporations Act 2001* (Cth) s 915C. See also Australian Securities and Investments Commission, *Submission 125*.

14.45 The Law Council agreed that there may be a public interest in suspending an AFS licence without a hearing in certain circumstances, but considered that cancellation of a licence without affording procedural fairness was not justified.[79]

Migration law

14.46 The ALRC received a number of submissions regarding provisions in migration law that exclude procedural fairness.[80] In particular, concerns about procedural fairness were raised in the following areas:

- decisions to refuse to grant or to cancel a visa, and the mandatory cancellation of visas; and
- the 'fast track' review process for decisions to refuse protection visas to some applicants.

14.47 The ALRC considers that the laws in relation to mandatory cancellation of visas on character grounds and the fast track review process would benefit from further review to consider whether the exclusion of the duty to afford procedural fairness is proportionate, given the gravity of the consequences for those affected by the relevant decision. The Law Council has suggested that the question of whether laws disproportionately encroach upon the duty to observe procedural fairness would most effectively be considered by an independent monitor of migration legislation, akin to the Independent National Security Legislation Monitor.[81] The Senate Legal and Constitutional Affairs Committee recommended that changes made to the *Migration Act* in 2014, including the establishment of the fast track review process, should be reviewed three years after their enactment.

Decisions to refuse to grant or to cancel a visa

14.48 A visa may, or in some circumstances, must, be cancelled or not granted if the visa holder does not satisfy the Minister that they pass a 'character test'.[82] A person does not pass the character test if, among other things, the person has a 'substantial' criminal record; has been convicted of certain offences; or is reasonably suspected of being a member of, or having an association with, a group or organisation involved in criminal conduct.[83]

79 Law Council of Australia, *Submission 140*.

80 National Association of Community Legal Centres, *Submission 143*; Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 140*; Legal Aid NSW, *Submission 137*; Andrew & Renata Kaldor Centre for International Refugee Law, *Submission 91*; 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*.

81 Law Council of Australia, *Submission 140*; *Independent National Security Legislation Monitor Act 2010* (Cth).

82 *Migration Act 1958* (Cth) s 501.

83 Ibid s 501(6).

14.49 Section 501(3) excludes natural justice from the Minister's discretionary power to refuse to grant or to cancel a visa if the Minister reasonably suspects that a person does not satisfy the character test and is satisfied that the decision is in the national interest. Decisions made under s 501(3) may only be made by the Minister personally.[84]

14.50 The rules of natural justice are excluded from a decision made under s 501(3A) of the *Migration Act*,[85] which compels the Minister to cancel a non-citizen's visa if the Minister is satisfied that:

- the person has been sentenced to death, or imprisonment for life or to a term of imprisonment of 12 months or more;[86] or
- an Australian or foreign court has convicted the person of one or more sexually-based offences involving a child, or found the person guilty of such an offence, or found a charge proved for such an offence, even if the person was discharged without conviction;[87] and
- the person is serving a sentence of imprisonment, on a full time basis in a custodial institution, for an offence against a law of the Commonwealth, a state or a territory.[88]

14.51 The mandatory visa cancellation power was introduced in 2014. The Explanatory Memorandum to the Bill containing the proposed amendment stated that the intention of the provision is that

> a decision to cancel a person's visa is made before the person is released from prison, to ensure that the non-citizen remains in criminal detention or, if released from criminal custody, in immigration detention while revocation is pursued.[89]

14.52 A number of submissions raised concerns about the Minister's visa cancellation powers.[90] There was particular concern about the mandatory visa cancellation under s 501(3A). Prior to 2014, visas were not subject to mandatory cancellation on character grounds. A decision maker was able to consider a range of factors when exercising the discretion to cancel a visa. Kingsford Legal Centre argued that, 'in removing the Minister's discretion to consider these factors, the person whose visa is to be cancelled is denied due process'.[91] Councils for Civil Liberties observed that the 'exclusion of

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84 Ibid s 501(4).

85 Ibid s 501(5). Section 501(3A) was introduced in 2014 by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth).

86 Ibid s 501(3A)(a)(i).

87 Ibid s 501(3A)(a)(ii).

88 Ibid s 501(3A)(b).

89 Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth).

90 National Association of Community Legal Centres, *Submission 143*; Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 140*; Kingsford Legal Centre, *Submission 110*; ANU Migration Law Program, *Submission 59*; Refugee Council of Australia, *Submission 41*; Refugee Advice and Casework Service, *Submission 30*; Kingsford Legal Centre, *Submission 21*. Concerns about the impact of these powers on freedom of association are considered in Ch 6.

91 Kingsford Legal Centre, *Submission 21*.

natural justice in these circumstances does not appear to serve any legitimate purpose'.[92]

14.53 Some stakeholders argued that the seriousness of a decision to cancel a visa necessitates the application of procedural fairness to the decision-making process.[93] Cancellation of a visa may have implications for a person's liberty: a non-citizen in Australia without a valid visa is subject to mandatory detention.[94] Where a person cannot be removed from Australia,[95] that person may be detained indefinitely.[96]

14.54 The Law Institute of Victoria argued, in relation to mandatory visa cancellation, that

> [t]he provision denies natural justice which can only be justified where a decision must be made urgently to preserve a position or prevent something happening. This clearly would not be the case when an individual is incarcerated for more than 12 months and a decision could be made earlier in their period of detention.[97]

14.55 They further argued that other existing provisions allowing for cancellation of a visa on character grounds were

> already sufficient to ensure that the visa of a person who poses a real risk of harm to the Australian community can be cancelled before their release from prison and to ensure that they are detained in immigration detention while merits appeals are being conducted. The mandatory cancellation provisions are, in our view, unnecessary to achieve the stated policy intention.[98]

14.56 A mandatory decision to cancel a visa is not reviewable by the Administrative Appeals Tribunal (AAT). However, a person is able to seek revocation of the decision,[99] and a decision of a delegate of the Minister not to revoke the visa cancellation will be reviewable by the AAT.[100]

14.57 The Minister, acting personally, is empowered to set aside a decision of the AAT to revoke the cancellation of a visa under s 501(3A), and the rules of natural justice do not apply to the Minister's decision.[101] The Explanatory Memorandum to the

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92 Councils for Civil Liberties, *Submission 142*.

93 ANU Migration Law Program, *Submission 59*; Institute of Public Affairs, *Submission 49*; Refugee Advice and Casework Service, *Submission 30*. The Institute of Public Affairs commented specifically on the refusal or cancellation of visas under s 500A of the *Migration Act*.

94 *Migration Act 1958* (Cth) s 189. The cancellation of a person's visa, in certain circumstances, may also affect the rights of others such as family members.

95 Because, for example, they are a refugee or a stateless person: *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1; *Al-Kateb v Godwin* (2004) 219 CLR 562.

96 *Migration Act 1958* (Cth) s 196. See also Refugee and Immigration Legal Centre Inc, Submission No 13 to the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Migration Amendment (Character and General Visa Cancellation) Bill 2014*, 15 October 2014.

97 Law Institute Victoria, Submission No 12 to the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Migration Amendment (Character and General Visa Cancellation) Bill 2014*, 3 November 2014.

98 Ibid.

99 *Migration Act 1958* (Cth) s 501CA. A person may also seek revocation of a decision to cancel a visa made under s 501(3): Ibid s 501C.

100 *Migration Act 1958* (Cth) s 500(1)(ba).

101 Ibid s 501BA(2)–(4).

Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) justified this by stating that 'natural justice will have already been provided to the non-citizen through the revocation process'.[102]

14.58 The Refugee and Immigration Legal Centre Inc (RILC) was concerned about the Minister's power to set aside AAT decisions regarding visa cancellations, considering that this was 'an unwarranted and unprecedented expansion of personal powers of the Minister [which] would also lead to persons being denied a real and meaningful opportunity to present and explain their case before a decision is made on it'.[103]

14.59 The *Migration Act* also makes provision for mandatory cancellation of a visa on security grounds. If ASIO makes an assessment containing advice that it suspects that the person might be, directly or indirectly, a risk to security, recommends that the person's visa be cancelled, and the person is outside Australia, the Minister must cancel that person's visa.[104] The rules of natural justice do not apply to this decision.[105]

14.60 Where a visa is cancelled under s 134B, the Minister must revoke the cancellation as soon as reasonably practicable after 28 days from the date of cancellation, or where ASIO makes an assessment recommending that the cancellation be revoked.[106] However, cancellation must not be revoked if ASIO makes an assessment containing advice that the former visa holder is a risk to security and recommending that the cancellation not be revoked.[107] These provisions were introduced into the *Migration Act* in 2014.[108]

14.61 The Explanatory Memorandum to the Bill containing the proposed amendments explained that the power to cancel a visa under s 134B 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 information or lacks time to furnish a security assessment in advance of the person's anticipated arrival in Australia.[109]

14.62 ASIO argued that the provisions were justified. It stated that the regime prior to the amending Act was

> effective where ASIO has the time and information available to conduct an assessment as to whether a person is directly or indirectly a risk to security, or a danger to the Australian community. However, scenarios can arise where the travel of a non-citizen to Australia is imminent, but assessing whether that person presents a direct or indirect risk to security on the basis of new information is not feasible before

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102 Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth).

103 Refugee and Immigration Legal Centre Inc, Submission No 13 to the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Migration Amendment (Character and General Visa Cancellation) Bill 2014*, 15 October 2014. See also Kingsford Legal Centre, *Submission 110*.

104 *Migration Act 1958* (Cth) s 134B.

105 Ibid s 134A.

106 Ibid s 134C(2), (4)–(5).

107 Ibid s 134C(3).

108 *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).

109 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).

> the person travels. … Depending on the gravity of the potential threat, it may be appropriate to delay that non-citizen's travel to Australia while further investigation is undertaken.[110]

14.63 The Inspector-General of Intelligence and Security (IGIS) noted that the Act provides 'no express provision allowing or preventing ASIO from making multiple temporary cancellation requests'.[111] It further noted that such cancellation requests are not subject to AAT review, and that such requests, particularly any cases of multiple requests, will be subject to IGIS scrutiny.[112]

14.64 A number of other provisions of the *Migration Act* explicitly provide that natural justice does not apply in decisions to revoke, not to grant or cancel a visa. The rules of natural justice are excluded from a decision of the Minister, acting personally:

- To cancel a visa when satisfied that information provided for the purpose of obtaining that visa was incorrect or bogus, and that it would be in the public interest.[113]
- To cancel a visa when satisfied that a ground for cancellation of the visa exists under s 116 and that it would be in the public interest.[114] Section 116 provides the Minister with a power to cancel visas for a range of reasons, including that the holder has not complied with a condition of the visa;[115] or that the presence of its holder in Australia is or may be, or would or might be, a risk to the health, safety or good order of the Australian community or a segment of the Australian community, or a risk to the health or safety of an individual or individuals.[116]
- To refuse to grant to a person a temporary safe haven visa, or to cancel a person's temporary safe haven visa.[117]

Fast track review process

14.65 In 2014, the *Migration Act* was amended[118] to create a new 'fast track' review process for decisions to refuse protection visas to some applicants, including 'unauthorised maritime arrivals'[119] who entered Australia between prescribed times.[120] Those applicants are described in the Act as 'fast track review applicants'.[121] Several

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110 ASIO, Submission No 11 to the Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters Bill 2014* (2014).

111 IGIS, Submission No 1 to the Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters Bill 2014* (2014).

112 Ibid.

113 *Migration Act 1958* (Cth) s 133A(3)–(4),(7), 101–109. See also Andrew & Renata Kaldor Centre for International Refugee Law, *Submission 91*.

114 *Migration Act 1958* (Cth) s 133C(3)–(4), (7).

115 Ibid s 116(1)(b).

116 Ibid s 116(1)(e).

117 Ibid s 500A(1), (3), (6), (11).

118 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

119 'Unauthorised maritime arrival' is defined in *Migration Act 1958* (Cth) s 5AA.

120 Ibid s 473BA.

121 Ibid s 5(1), 473BB.

stakeholders argued that this new process arbitrarily and unfairly excludes procedural fairness from protection visa application processes for those subject to it.[122]

14.66 Under pt 7AA of the *Migration Act*, the Minister must refer decisions to refuse protection visas to fast track review applicants to a new body, the Immigration Assessment Authority (IAA).[123] The fast track review process confines the obligation for the IAA to observe the rules of natural justice by way of an exhaustive statement of the natural justice hearing rule that applies to its reviews.[124]

14.67 The obligation to provide a visa applicant with a hearing is excluded in the fast track review process.[125] Unless there are exceptional circumstances, the IAA must review decisions referred to it without accepting or requesting new information and without interviewing the referred applicant.[126]

14.68 Additionally, some applicants for protection visas will not be eligible to have a refusal reviewed by the IAA. These applicants include persons who, in the opinion of the Minister, have made a claim for protection in another country that was refused; give or present a bogus document in support of their application; or make a claim that is manifestly unfounded.[127] The Minister may expand both the class of persons subject to the fast track review process, and the class of persons excluded from this process, by legislative instrument.[128]

14.69 The Explanatory Memorandum for the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) emphasised the importance of the fast resolution of the visa application process:

> The Government believes the faster a case can be finally determined, the better outcomes it can deliver for both the applicant and those who support them in the Australian community—eliminating long periods of uncertainty and allowing people to move on and make decisions about the next stage of their lives.
>
> …
>
> [The IAA] will deliver the Government's policy outcome of improving the efficiency and cost effectiveness of merits review currently experienced by refused protection visa applicants in Australia and ensure timely progress of their cases towards a final and accurate determination regarding their immigration status.[129]

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122 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*.

123 *Migration Act 1958* (Cth) s 473CA, 473JA.

124 Ibid pt 7AA, div 3; ss 473GA, 473GB.

125 Ibid s 473DB.

126 Ibid s 473DB, 473DC, 473DD.

127 Ibid s 5(1) (definition of 'excluded fast track review applicant').

128 Ibid s 5(1AA).

129 Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth). The *Tribunals Amalgamation Act 2015* (Cth) amalgamated the AAT with other tribunals including the Refugee Review Tribunal. The RRT's functions are now carried out by the Migration and Refugee Division of the AAT.

14.70 A number of criticisms of this process were made on procedural fairness grounds.[130] The Refugee Council of Australia (RCOA) 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'.[131]

14.71 The ANU Migration Law Program noted that 'there is no provision to require a fast track applicant to be notified that the primary decision has been referred by the minister to the IAA'.[132] The lack of provision for a hearing, except in exceptional circumstances, was also a cause of concern. The RCOA argued that:

> Through denying asylum seekers the opportunity to put forward or respond to information relevant to their claims and, in some cases, blocking access to review altogether, the fast-track process will create a much higher risk of inaccuracy in decision-making. This in turn increases the danger of asylum seekers being erroneously returned to situations where they could face persecution or other forms of serious harm.[133]

14.72 RACS queried the proportionality of the fast track process, 'in light of the gravity of what is at stake in the context of refugee status determination—not only the deprivation of a person's liberty under the Migration Act but potential for the exposure of a person to a risk of persecution'.[134] The Law Council similarly 'considered that the objective of administrative efficiency is not sufficient to deny procedural fairness'.[135] Councils for Civil Liberties said that

> while protecting the Australian community from threats posed to their safety and security is a laudable objective that is justified in a free and democratic society, the Fast Track Assessment Process has nothing to do with making Australians safer. … The real purpose of the Fast Track Assessment Process appears more clearly targeted at ensuring that those who have come to Australia by boat and remain in Australian detention centers are not granted protection by being processed quickly with limited access to review. Further, it is part of a broader aim to deter others from coming to Australia by boat. … [T]his purpose is not justified and should have no place in a free and democratic society.[136]

14.73 The ANU Migration Law Program suggested that the end of processing claims expeditiously could be met by other means with less impact on procedural fairness:

> There is no reason why the review of primary 'fast track' decisions of applicants who form part of the 'asylum legacy caseload' cannot and should not be undertaken by the RRT … and prioritised ahead of other on-shore protection cases. This would ensure that reviews of 'fast track' decisions are finalised efficiently and expeditiously in

130 Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 140*; Legal Aid NSW, *Submission 137*; Refugee Council of Australia, *Submission 109*; Andrew & Renata Kaldor Centre for International Refugee Law, *Submission 91*; 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*.

131 Refugee Council of Australia, *Submission 41*.

132 ANU Migration Law Program, *Submission 59*.

133 Refugee Council of Australia, *Submission 41*.

134 Refugee Advice and Casework Service, *Submission 30*.

135 Law Council of Australia, *Submission 75*.

136 Councils for Civil Liberties, *Submission 142*.

> accordance with Government policy, and without sacrificing the procedural fairness safeguards guaranteed by the RRT's statutory processes and procedures.[137]

14.74 In 2015, the England and Wales Court of Appeal found that a fast-track appeal process for review of applications for asylum in the United Kingdom was 'structurally unfair and unjust'.[138] Lord Dyson stated that

> in view of (i) the complex and difficult nature of the issues that are often raised; (ii) the problems faced by legal representatives of obtaining instructions from individuals who are in detention; and (iii) the considerable number of tasks that they have to perform … the timetable for the conduct of these appeals is so tight that it is inevitable that a significant number of appellants will be denied a fair opportunity to present their cases under the [Fast Track Rules] regime.[139]

Maritime Powers Act 2013 (Cth)

14.75 The *Maritime Powers Act* provides a broad set of enforcement powers, exercisable by maritime officers, for use in, and in relation to, maritime areas.[140] The Act was amended in 2014[141] to exclude the rules of natural justice as they relate to the exercise of a number of maritime powers:

- s 22B provides that the rules of natural justice do not apply to authorisations of the exercise of maritime powers made under pt 2 div 2 of the Act; and
- s 75B excludes the rules of natural justice from a number of provisions, which largely relate to maritime officers' powers to detain vessels and aircraft, as well as to place, detain and move persons aboard detained vessels or aircrafts.[142]

14.76 The Scrutiny of Bills Committee, when examining the amending Bill, was concerned by the proposed exclusion of natural justice:

> 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 … 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.[143]

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137 ANU Migration Law Program, *Submission 59*.

138 *Lord Chancellor v Detention Action* [2015] EWCA Civ 840 [45].

139 Ibid [38].

140 *Maritime Powers Act 2013* (Cth) s 7.

141 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

142 *Maritime Powers Act 2013* (Cth) ss 9, 69A, 71–72, 72A, 74, 75D, 75F, 75G, 75H.

143 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *15th Report of 2014* (November 2014) 909–10.

14.77 In light of these concerns, the Committee sought the Minister's advice as to why the exclusion of natural justice was considered reasonable.[144] The Minister replied that 'in the operational context in which these powers are to be exercised, any formal requirement for natural justice would not be practicable', and provided a detailed explanation of the effect of each new provision.[145] The Committee reiterated its concerns about the exclusion of the rules of procedural fairness and referred the provisions to the Senate for further consideration.[146]

14.78 In *CPCF v Minister for Immigration and Border Protection,* the High Court considered s 72(4) as it was prior to the 2014 amendments that specifically excluded the application of natural justice from the provision. The High Court found that the power under s 72(4) to take the plaintiff to a place outside Australia was not subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power.[147]

14.79 A number of submissions to this Inquiry raised concerns about the exclusion of natural justice from the *Maritime Powers Act*.[148]

14.80 The Human Rights Law Centre contested the claim that affording 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.[149]

14.81 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'.[150]

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144 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *14th Report of 2014* (October 2014) 910.

145 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *15th Report of 2014* (November 2014) 911–13.

146 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *14th Report of 2014* (October 2014) 914.

147 *CPCF v Minister for Immigration and Border Protection* (2015) 316 ALR 1, [52]–[53] (French CJ); [226]–[227] (Crennan J); [305]–[310] (Kiefel J); [366]–[372] (Gageler J); [497]–[503] (Keane J). The Court considered it unnecessary to answer whether the non-statutory executive power of the Commonwealth authorised a Commonwealth officer to detain the plaintiff for the purposes of taking him to India and to take steps associated with this. The Court also considered it unnecessary to answer whether any such non-statutory executive power was subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power. For consideration of the existence of any common law right of non-citizens to enter Australia, see Ch 7.

148 Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 140*; Law Council of Australia, *Submission 75*; Law Society of NSW Young Lawyers, *Submission 69*; Australian Lawyers for Human Rights, *Submission 43*; Human Rights Law Centre, *Submission 39*.

149 Human Rights Law Centre, *Submission 39*. See also Councils for Civil Liberties, *Submission 142*; Law Society of NSW Young Lawyers, *Submission 69*.

150 Law Council of Australia, *Submission 75*.

14.82 The Senate Legal and Constitutional Affairs Committee has recommended that changes made to the *Maritime Powers Act* in 2014 be reviewed three years after their enactment.[151]

Conclusion

14.83 A number of migration laws encroach on the duty to afford procedural fairness. The ALRC concludes that some of these laws would benefit from further review to consider whether they unjustifiably exclude the duty to afford procedural fairness, given the gravity of the consequences for those affected by the relevant decision. Migration laws that might be further scrutinised include those in the *Migration Act* relating to:

- the mandatory cancellation of visas; and
- the fast track review process for decisions to refuse protection visas.

151 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Provisions]* (2014).

15. Judicial Review

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Summary

15.1 Access to the courts to challenge administrative action is an important common law right. Judicial review of administrative action 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]

15.2 This chapter discusses access to the courts to challenge administrative action or decision making.[3] It is about judicial review, rather than merits review by administrators or tribunals. It does not focus on judicial review of primary legislation

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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 Not every administrative decision is subject to judicial review. Administrative action which does not affect an individual's liberties, vested rights or legitimate expectations is not subject to judicial review. Similarly, policy decisions of government are not subject to judicial review.

on constitutional grounds or judicial review of lower court decisions by way of appeal or prerogative writ.

15.3 At common law, superior courts of record have an inherent jurisdiction to conduct judicial review. In the 1970s, the government introduced the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) as part of wide-ranging reforms to federal administrative law in Australia. The Act seeks to simplify, codify, and in some cases, expand common law judicial review. However, limitations imposed on the *ADJR Act* have affected its capacity to operate as a simpler, more streamlined avenue for judicial review.

15.4 A number of stakeholders submitted that limits on access to the *ADJR Act* in the form of the list of decisions exempted from review under the Act should be considered as part of this Inquiry. While consideration has been given to this issue, it is important to note that under s 39B(1A)(c) of the *Judiciary Act 1901* (Cth) (*Judiciary Act)* a person still has access to the courts to review a decision exempted under sch 1 of the *ADJR Act*. Accordingly, this chapter does not focus on decisions exempted from review under the *ADJR Act*.

15.5 This chapter is focused on privative clauses, which are 'essentially a legislative attempt to limit or exclude judicial intervention in a certain field'.[4] However, statutory attempts to oust the jurisdiction of the court have largely failed. Section 75(v) of the *Constitution* protects access to the courts, as it includes an 'entrenched minimum provision of judicial review'.[5] Further, the principle of legality operates to protect access to the courts by construing privative clauses so narrowly that they have little to no effect.

15.6 The Australian Government should consider a review of privative clauses in Commonwealth laws. Where the underlying policy rationale is considered warranted, the Australian Government should explore whether alternative solutions, which do not restrict access to the courts, and are more targeted and effective in addressing the underlying policy issue, may be implemented.

A common law principle

15.7 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'.[6]

15.8 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

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4 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.

5 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [103].

6 Sir William Wade, above n 3.

> exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.[7]

15.9 In his *Introduction to Australian Public Law*, Professor 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 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.[8]

15.10 It is widely recognised that the right to judicial review is not absolute. Judicial review is available to test the legality of a decision, and not its merits—the courts are not authorised to ask whether a decision was a 'good' decision. It asks only whether the decision has been properly made, in accordance with the law.

15.11 At common law, the availability and scope of judicial review is a consequence of the judicial remedy sought. These remedies are the prerogative writs of habeas corpus,[9] quo warranto,[10] mandamus,[11] certiorari,[12] and prohibition,[13] as well as the equitable remedies of injunction and declaration. The standing rules relating to the availability of common law remedies and time limits which apply in relation to each of these differ.[14] While some of these requirements have relaxed over time,[15] access to

7 *Church of Scientology v Woodward* (1982) 154 CLR 25, 70 (Brennan J).

8 David Clark, *Introduction to Australian Public Law* (Lexis Nexis Butterworths, 4th ed, 2013) 247.

9 The writ of habeas corpus demands that a person incarcerated be brought before the court to determine whether there is lawful authority to detain the person.

10 The writ of quo warranto requires the decision maker to show by what authority they exercise a power.

11 Mandamus is an order compelling or directing a lower court or administrative decision maker to perform mandatory duties correctly. A writ of procedendo sends a case to a lower court with an order to proceed to judgment.

12 A writ of certiorari sets aside a decision made contrary to the law.

13 A writ of prohibition forbids a decision maker from commencing or continuing to perform an unlawful act.

14 Matthew Groves and Janina Boughey, 'Administrative Law in the Australian Environment' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 3, 6.

15 The tests for standing to sue at common law are converging: Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters Australia, 2013) 723.

judicial review at common law remains technical and complex. The Kerr Committee[16] recognised that the rules that apply to judicial review at common law were 'both unwieldy and unnecessary'.[17] It noted that 'a case can be lost or won on the basis of choice of remedy'.[18]

15.12 At common law, the following are subject to judicial review: a rule-maker's power to make delegated legislation;[19] decisions of the Governor-General; recommendations and findings contained in coronial reports; Royal Commission reports; and the reports of other formal advisory bodies. Judicial review is also available in relation to decisions made in exercise of a prerogative or executive power, intermediate decisions, and some contractual decisions.[20]

Judicial review in Australia

15.13 In addition to the common law, s 75(v) of the *Constitution* provides for an 'entrenched minimum provision' of judicial review.[21] Section 39B(1) of the *Judiciary Act 1903* (Cth) (*Judiciary Act*) extends the original jurisdiction of the High Court of Australia (High Court) to the Federal Court of Australia (Federal Court).[22] Section 39B(1A)(c) vests the Federal Court with jurisdiction over 'any matter arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter'.

15.14 In 1977, the *ADJR Act* was introduced as part of wide-ranging reforms to federal administrative law in Australia.[23] The Act seeks to simplify, codify and, in some cases,

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16 In 1968, the Commonwealth Administrative Review Committee, chaired by Sir John Kerr was established to consider reform of administrative law in Australia. This committee is referred to in this chapter as the 'Kerr Committee'.

17 Commonwealth, *Report of the Administrative Review Committee*, Parliamentary Paper No 133 (1971) [58]. This report is referred to in this chapter as the *Kerr Committee Report*.

18 Ibid.

19 It is rare that an application for judicial review of delegated legislation will be successful. The courts tend to adopt a presumption of validity, and 'a reluctance to substitute judicial opinion for that of the legislation-maker':Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 3rd ed, 2005) [14.1]. However, the principles of ultra vires that apply to administrative decision making also apply to delegated legislation: Stephen Argument, 'Delegated Legislation' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 141. For an example of a successful challenge to delegated legislation, see: *Paradise Projects Pty Ltd v Gold Coast City Council* [1994] 1 Qd R 314, 321. For a more in-depth discussion of inappropriate delegations of legislative power, see Chapter 17.

20 For an example of review at common law of a decision to enter a contract, see *Cubic Transportation Systems Inc v New South Wales* [2002] NSWSC 656 (26 July 2002). Further, the High Court has held that injunctive and declaratory relief were available for legal errors made by contractors in written advice to the Minister, even where the Minister had no obligation to consider the advice: *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, [51]–[53], [99]–[104].

21 This is discussed further below. The 'entrenched minimum provision' of judicial review extends to State Supreme Courts, and thus, the decisions of state administrative bodies: *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531. Section 75(iii) of the *Constitution* also protects access to the courts. It states that the High Court shall have original jurisdiction in any matter in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party.

22 This jurisdiction is modified to exclude the justiciability of certain criminal justice process decisions before the High Court.

23 In addition to introducing the *Administrative Decisions (Judicial Review) Act 1977*, the government established the Administrative Appeals Tribunal as a general merits review body, introduced freedom of

expand common law judicial review. It established: a single, simple procedure for review, which applies regardless of the grounds argued, or the remedy sought; codified the grounds for review; and established a right to reasons for a decision where a person has standing to seek review, with certain exceptions. However, limitations imposed on the *ADJR Act* have affected its capacity to operate as a simpler, more streamlined avenue for judicial review.[24]

15.15 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.[25] However, judicial review has been characterised as 'inevitably sporadic and peripheral'.[26] The availability of merits review has been described as 'in a way more important than judicial review because it can offer a complete answer, not available through the courts, to a person affected by a decision'.[27]

Protections from statutory encroachment

Australian Constitution

15.16 The *Constitution* has an 'entrenched minimum provision of judicial review',[28] which cannot be removed by statute, even where it may purport to do so. Section 75(v) of the *Constitution* provides that the High Court shall have original jurisdiction in all

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information legislation, and established the Commonwealth Ombudsman: John McMillan, 'Parliament and Administrative Law' (Research Paper 13 2000-01, 7 November 2000).

24 Decisions of the *Governor-General*, and findings and recommendations in official reports are excluded from review under the ADJR Act. Reviews under the ADJR Act are only available for decisions made under an enactment, thus, excluding challenges to delegated legislation, decisions made in exercise of executive or pregorative power and contractual decisions. The courts have interpreted the term "decision" in the ADJR Act to generally mean a 'final, or operative and determinative' decision. An intermediate step does not ordinarily constitute a decision. Intermediate decisions were considered to be a decision in their own right if a statute made separate provision for it, and it was substantive: *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531.

25 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 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. However, where the tribunal conducting merits review makes a legal or procedural error, that decision may be subject to judicial review.

26 *Re McBain; Ex Parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, [471]–[472]; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [522]–[523].

27 Justice Robert French, 'Administrative Law in Australia: Themes and Values' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 22. See also Justice Janine Pritchard, 'The Rise and Rise of Merits Review: Implications for Judicial Review and for Administrative Law' (2015) 79 *Australian Institute of Administrative Law Forum* 14; Commonwealth, *Report of the Administrative Review Committee*, Parliamentary Paper No 133 (1971) [58].

28 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [103]. This was extended to review by state Supreme Courts, and thus, in relation to decisions by State administrative bodies in *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531. The High Court has long held that the original jurisdiction granted under s 75(v) of the *Constitution* is unalienable. See: *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Co Ltd (No 1) (Tramways Case No 1)* (1914) 18 CLR 54.

matters ‘in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth’. 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.[29]

15.17 The High Court defined its entrenched minimum provision of judicial review in the following terms:

> First, the jurisdiction of this Court to grant relief under s 75(v) of the Constitution cannot be removed by or under a law made by the Parliament. Specifically, the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed. Secondly, the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Ch III. The Parliament cannot confer a non-judicial body the power to conclusively determine the limits of its own jurisdiction.[30]

15.18 What constitutes jurisdictional error is uncertain. It depends on the statutory context.[31] Drawing from the leading cases, Professors Mark Aronson and Matthew Groves list some examples of instances of jurisdictional error:

- a mistaken assertion or denial of the existence of jurisdiction;
- a misapprehension or disregard of the nature or limits of the functions and powers of a decision maker;
- entertaining issues or making the types of decisions or orders which are forbidden under any circumstances (for example, a civil court trying a criminal charge);
- mistakes as to the existence of a jurisdictional fact or other requirement—that is, the relevant Act treats the fact or requirement as a condition precedent to the validity of the challenged decision.

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29 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [5] (Gleeson CJ).

30 Ibid [98]. However, it is important to note that the government retains, in large part, the power to define what constitutes jurisdictional error. A key example is the statutory removal of procedural fairness obligations (discussed in Ch 14). No invalidity clauses are another example, as are provisions which provide that there are no irrelevant considerations.

31 What is jurisdictional error in one statutory context may not be so in another: Mark Aronson, ‘Jurisdictional Error and Beyond’ in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 248, 250.

- disregarding relevant considerations;
- taking into account irrelevant considerations;
- some, but not all errors of law;
- acting in bad faith;
- acting extremely unreasonably.[32]

15.19 Helen Robertson provides a useful survey of Federal Court cases that identified additional examples of jurisdictional error. These include a failure to:

- ask the correct question;
- consider all elements of a claim;
- properly undertake the jurisdictional task of review;
- correctly address the prescribed criteria for a decision;
- afford procedural fairness.[33]

15.20 In *Plaintiff S157*, the High Court made it clear that where there is a jurisdictional error, a privative clause is ineffective to oust judicial review. In light of this constitutional jurisdiction, courts may construe privative clauses much more narrowly than the text of the provision suggests, to the point that such clauses may sometimes be largely or even entirely deprived of effect.[34] A number of commentators have therefore expressed the view that such clauses are of little value. Professor Mary Crock and Edward Santow state that jurisdictional error is 'fatal to the effectiveness of most privative clauses'.[35] Aronson and Groves comment that courts 'have long responded to legislative attempts to limit or completely exclude the scope of judicial review of administrative action with a mixture of incredulity, hostility, and thinly disguised disobedience'.[36]

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32 Ibid 256. The High Court has said that 'it is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error': *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531, 573.

33 Helen Robertson, 'Truth, Justice and the Australian Way—*Plaintiff S157 of 2002 v Commonwealth*' (2003) 31 *Federal Law Review* 373, 390.

34 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.

35 Mary Crock and Edward Santow, 'Privative Clauses and the Limits of the Law' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 347.

36 Aronson and Groves, above n 15, 940.

15.21 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.[37]

15.22 Additionally, a separate constitutional mechanism which protects access to the courts is s 75(iii) of the *Constitution*. It vests original jurisdiction in the High Court in all matters ‘in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party’.

Principle of legality

15.23 The principle of legality provides some protection to judicial review.[38] 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.[39] 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.[40]

15.24 The usual mechanism for restricting access to the courts is a ‘privative clause’—‘essentially a legislative attempt to limit or exclude judicial intervention in a certain field’.[41] Some examples include clauses that make orders, awards or other determinations final, clauses forbidding courts from granting remedies traditionally used in judicial review, ‘no invalidity’ or ‘conclusive evidence’ provisions, and clauses prescribing time limits.[42] Another, blunter technique is stipulates that anything a body does shall have effect as if enacted by Parliament, and vests exclusive jurisdiction in that body. However, privative clauses are read narrowly by the courts.

15.25 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.[43]

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37 The long history of authority to this effect was noted in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [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.

38 The principle of statutory interpretation known as the ‘principle of legality’ is discussed more generally in Ch 2.

39 *Momcilovic v The Queen* (2011) 245 CLR 1, [43]–[44] (French CJ).

40 *Magrath v Goldsbrough Mort & Co Ltd* (1932) 47 CLR 121, 134.

41 Young, above n 6, 277.

42 Administrative Review Council, *The Scope of Judicial Review* (Report 47, Australian Government, 2006), Appendix 2.

43 *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).

15.26 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.[44]

15.27 Using this approach, the courts have held that a privative clause has no impact on remedies not named in that clause.[45] This includes constructions that, for instance, conclusions that protecting a tribunal's orders or directions did not protect a tribunal's rejection of a submission that there was insufficient evidence of a certain fact.[46] Similarly, the courts have held that protecting a decision did not extend to protecting unstated assumptions.[47]

15.28 A 'no appeal' clause modifies or repeals an earlier statutory grant of appeal rights, and has no effect on the availability of judicial review.[48] For example, in *Hockey v Yelland*, the High Court held that 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'[49] did not 'oust the jurisdiction of the Supreme Court to issue writs of certiorari'. Gibbs CJ said:

> 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.[50]

15.29 Provisions which prescribe time limits for bringing an action, or include alternative processes for bringing an appeal or challenging a decision have generally been accepted by courts, as they still provide for judicial oversight.[51] In *Commissioner*

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44 *Public Service Association (SA) v Federated Clerks' Union of Australia* (1991) 173 CLR 132, [18] (Dawson and Gaudron JJ).

45 See, eg, *Palmer Tube Mills (Aust) Pty v Ltd v Semi* [1998] 4 VR 439, 459; *Barnard v National Dock Labour Board* [1953] 2 QB 18; *Woodward v Loadman (No 2)* 216 FLR 114. For example it was held that a clause ousting 'jurisdiction to grant relief or a remedy in the nature of certiorari, mandamus, prohibition or *quo warranto*' did not oust declaratory relief: *Woodward v Loadman (No 2)* 216 FLR 114.

46 *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100, 119.

47 *R v Commonwealth Industrial Court Judges; Ex parte Cocks* (1968) 121 CLR 313, 321. A similar decision is *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531.

48 *R v McMillan; Ex Parte Metropolitan Milk Board* (1939) 41 WALR 110, 116; *R v Industrial Appeals Court; Ex Parte Henry Berry & Co (Australasia) Ltd* [1955] VLR 156, 163–4; *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 271; *Bignell v Casino Control Authority (NSW)* (2000) 48 NSWLR 462, 480.

49 *Workers' Compensation Act 1916* (Qld) (repealed), quoted in *Hockey v Yelland* (1984) 157 CLR 124, 128 (Gibbs CJ).

50 Ibid.

51 Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis Butterworths, 3rd ed, 2012), [15.3.6]. However, given the constitutionally entrenched minimum provision of judicial review, (discussed below), it is unclear whether any time limits can set an absolute deadline for access to judicial review: *Hoxton Park Residents Action Group Inc v*

of Taxation v Futuris Corporation Ltd, the High Court held that conclusive evidence and no invalidity clauses do not constitute privative clauses where full appeal rights are available.[52]

International law

15.30 Article 14.1 of the *International Covenant on Civil and Political Rights* (ICCPR) provides that in the determination of a person's 'rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.[53] The phrase 'suit at law' has been taken to include some administrative law matters, and this right extends to all individuals, including non-citizens.[54]

Bills of rights

15.31 In some countries, bills of rights or human rights statutes provide some protection of procedural fairness.

15.32 In the United States, persons enjoy a constitutional guarantee of due process in the administration of the law.[55] Any person who alleges a deprivation of due process or equal protection, may bring an application for review of the constitutionality of the action (or failure to act). In New Zealand, art 27(2) of the *New Zealand Bill of Rights Act 1990* (NZ) grants a right to judicial review to a person affected by a decision by a public authority or tribunal.

Justifications for limits on judicial review

15.33 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.[56]

15.34 However, stakeholders expressed concerns about current restrictions on access to the courts. They emphasised that restrictions should only be imposed in exceptional circumstances.

Liverpool City Council [2010] NSWLEC 242 (26 November 2010) [53]. A deadline cannot exclude access to judicial review by way of the constitutional writs set out in s 75(v) of the *Constitution*: *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 672.

52 *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 167.

53 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.1.

54 United Nations Human Rights Committee, *General Comment No 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial* 90th Sess, UN Doc CCPR/C/GC/32 (23 August 2007) [16]–[17].

55 *United States Constitution* amend V.

56 Young, above n 6, 277.

15.35 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’.[57] The Public Interest Advocacy Centre suggested that any limits on judicial review should be ‘strict, limited and exceptional, closely tied to legitimate purpose and justifiable on public interest grounds’.[58] 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’.[59]

Laws that restrict access to the courts

15.36 Set out below is a short discussion of three areas of Commonwealth law which have sought to exclude judicial review by way of privative clauses, some of which have already been considered by the courts.

Migration Act 1958 (Cth)

15.37 Restrictions on access to the courts under the *Migration Act 1958* (Cth) (*Migration Act*) were introduced in 1992, with limits imposed on grounds for review, and stricter time limits to bring an application for review.[60] A mandatory requirement to seek merits review before accessing judicial review was also introduced.[61] Following that, additional attempts were made to impose absolute time limits,[62] include a no invalidity clause, and most controversially, to exclude judicial review for any administrative decisions under the *Migration Act*.

Time limits

15.38 The *Migration Act* stipulates a 35-day time limit for an application in the Federal Circuit Court for judicial review.[63] The Federal Circuit Court has the power to extend that time limit, upon application, if it considers that it is necessary in the interests of the administration of justice to make the order.[64] However, the High Court has held that the time limit, relating as it does to ‘migration decisions’, does not apply to an application for review before a decision is made.[65]

No invalidity clauses

15.39 Section 69(1) of the *Migration Act* provides that

> non-compliance by the Minister with Subdivision AA or AB or section 494D in relation to a visa application does not mean that a decision to grant or refuse to grant

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57 Refugee Advice and Casework Service, *Submission 30*.

58 Public Interest Advocacy Centre, *Submission 55*.

59 Human Rights Law Centre, *Submission 39*.

60 Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998* (April 1999), [1.11].

61 Ibid.

62 The High Court held that an attempt to impose a maximum 84-day limit on the time to bring an application for judicial review was constitutionally invalid: *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.

63 *Migration Act 1958* (Cth) s 477(1).

64 Ibid s 477(2).

65 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319.

the visa is not a valid decision but only means that the decision might have been the wrong one and might be set aside if reviewed.

15.40 The High Court held that this provision does not affect the ability to test the validity of the decision in court. It provides temporary efficacy to visa decisions unless and until they are reviewed.[66]

15.41 Under s 501G, a failure to provide reasons for a decision to cancel a visa does not affect the validity of the decision. However, the High Court held that mandamus could compel the decision maker to provide reasons. If the reasons demonstrate that a reviewable error was made, the applicant may bring an application for judicial review of that decision. The provision simply operates to ensure that a failure to give reasons, in and of itself, does not give rise to invalidity.[67]

Ouster clause

15.42 In 2001, s 474 of the *Migration Act* was inserted by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth), seeking to oust the judicial review jurisdiction of the courts in migration decision. It states that a privative clause decision:

(a) is final and conclusive; and

(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.[68]

15.43 As discussed above, in *Plaintiff S157 v Commonwealth*, the High Court read down this provision, stating that it does not apply to any decision involving jurisdictional error.[69] 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'.[70] 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 affected by jurisdictional error—and thus not protected by a privative clause—is now very wide; so wide that it may be that an ouster clause offers no real protection against any legal error. It appears that there is little value in including such a clause in legislation.[71]

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66 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 88, 98; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Palme* (2003) 216 CLR 212, 223, 228.

67 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Palme* (2003) 216 CLR 212.

68 *Migration Act 1958* (Cth) s 474(1).

69 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

70 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, [163].

71 See, eg, Aronson and Groves, above n 15, 940; Nicholas Gouliaditis, 'Privative Clauses: Epic Fail' (2010) 34 *Melbourne Univeristy Law Review* 870, 883; Crock and Santow, above n 35, 347.

15.44 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.[72]

15.45 The Legal and Constitutional Affairs Committee considered this issue during its Inquiry into the Migration Legislation (Judicial Review) Bill 1998. Submissions to that Inquiry stated that the large volume of litigation may also be due to the limited availability of lawyers to assist applicants and the complexity of migration litigation.[73] Further, high rates of withdrawal are the norm in all areas of litigation,[74] and 'mischief is not indicated by leaving at the door of the court'.[75]

15.46 Based on evidence given by the Federal Court in 1999, that 72.3% of migration cases were disposed of within nine months,[76] the Legal and Constitutional Affairs 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'.[77]

15.47 While the Legal and Constitutional Affairs Committee ultimately supported the use of a privative clause,[78] 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.[79] It also concluded that case management measures were the solution to dealing with abuse of process issues.[80]

15.48 The Administrative Review Council (ARC), in its 2012 consideration of the separate statutory scheme for review of migration decisions, concluded that case management measures and assistance to applicants are more appropriate than excluding judicial review to reduce the volume and cost of litigation in the context of migration proceedings.[81]

15.49 Under s 494AA, judicial review is excluded (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

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72 Commonwealth, *Parliamentary Debates*, House of Representatives, Migration Legislation Amendment Bill (No. 4) 1997 Second Reading Speech, 25 July 2007 (Philip Ruddock, Minister for Immigration and Multicultural Affairs).

73 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].

74 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.

75 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.

76 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.

77 Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998* (April 1999), [1.70].

78 Ibid rec 4.

79 Ibid rec 1.

80 Ibid [3.40].

81 Administrative Review Council, *Federal Judicial Review in Australia*, Report No 50 (2012), [6.16]; Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998* (April 1999), rec 2, [3.40].

that this bar on proceedings sought to 'limit the potential for future abuse of legal proceedings'.[82] The Senate Standing Committee for the Scrutiny of Bills 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'.[83]

15.50 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*,[84] and sought to ensure that 'all arrivals in Australia by irregular maritime means will have the same legal status regardless of where they arrive'.[85]

15.51 Similar restrictions apply in relation to transitory persons.[86] Additionally, such a person cannot challenge, other than under the *Constitution*, any actions taken to bring them to Australia,[87] including for example the safety of vessels used for such transportation, or the use of reasonable and necessary force.[88]

15.52 While these provisions explicitly do not seek to affect the constitutionally entrenched judicial review, they are drafted in a manner that appear to exclude a wide range of decisions under the *Migration Act* from review.

General corporate regulation

15.53 The Australian Securities and Investments Commission (ASIC) submitted that ss 1274(7A) and 659B of the *Corporations Act 2001* (Cth) are examples of provisions which restrict access to the courts.[89]

15.54 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.[90]

15.55 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 undertake merits review of ASIC decisions while the bid is ongoing. ASIC submitted

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82 Explanatory Memorandum, Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001.

83 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2002* (February 2002), 46.

84 Angus Houston, Paris Aristotle, Michael L'Estrange, 'Report of the Expert Panel on Asylum Seekers' (August 2012).

85 Revised Explanatory Memorandum, Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012.

86 *Migration Act 1958* (Cth) s 494AB.

87 Ibid.

88 Ibid s 198B(2).

89 Australian Securities and Investments Commission, *Submission 74*.

90 Ibid.

that the potential harm from delays arising from a review process outweigh the public interest in the proper exercise of the power.[91]

Taxation

15.56 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.[92] 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.[93]

15.57 This reflects a general approach by the courts that, where adequate provision is made by statute for review by a court or tribunal, the court should, in its discretion, decline to exercise its judicial review jurisdiction.[94]

15.58 The different approaches to no invalidity clauses[95] in the migration and taxation contexts emphasise that, in considering a privative clause, the question for the court is whether the applicant has access to the courts for redress, whether by way of appeal rights or judicial review.

Other issues

Decisions exempt from review under the ADJR Act

15.59 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.[96] The Institute of Public Affairs noted that a large number of Acts are excluded from review under the *ADJR Act*.[97]

15.60 The ADJR Act is a statutory expansion of the common law right to access to the courts. It is subject to a number of limits, some of which result in review under the *ADJR Act* being narrower than available at common law. However, the *ADJR Act* does not preclude judicial review in the areas it does not cover.

15.61 This is because, in addition to extending the High Court's original jurisdiction to the Federal Court, s 39B(1A)(c) vests the Federal Court with jurisdiction over 'any matter arising under any laws made by the Parliament, other than a matter in respect of

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91 Ibid.
92 The Tax Institute, *Submission 68*.
93 *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 [25].
94 See, eg, *Vanmeld Pty Limited v Fairfield City Council* (1999) 46 NSWLR 78, 106, 114; *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707, 722–4.
95 Compare the treatment of: *Income Tax Assessment Act 1997* (Cth) s 175; *Migration Act 1958* (Cth) s 69(1).
96 Law Council of Australia, *Submission 75*.
97 Institute of Public Affairs, *Submission 49*.

which a criminal prosecution is instituted or any other criminal matter'. This has the effect—where other legislation does not override it—of allowing the Federal Court to undertake judicial review, even where the *ADJR Act* does not apply. The Administrative Review Council noted that 'there are fewer apparent limitations on the right to commence proceedings under s 39B(1) than under the *ADJR Act*'.[98]

Standing

15.62 Standing refers to 'the set of rules that determine whether a person is entitled to commence proceedings'.[99] A number of 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.[100]

15.63 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
- 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.[101]

Conclusion

15.64 In light of the High Court's approach to privative clauses in *Plaintiff S157*, it appears that such clauses have little to no effect in limiting access to the courts. The ARC, in its 2012 consideration of the scope of judicial review, stated that privative clauses which attempt to 'restrict or exclude judicial review entirely will not be successful'.[102]

15.65 The Australian Government should consider a review of privative clauses in Commonwealth laws. Where the underlying policy rationale is considered warranted, consideration should be given to whether alternative solutions which do not restrict access to the courts, and are more targeted and effective in addressing the underlying policy issue, may be implemented.

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98 Administrative Review Council, *Federal Judicial Review in Australia*, Report No 50 (2012), [4.9].

99 Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, Report No 78 (1996) [1.1].

100 Public Interest Advocacy Centre, *Submission 55*; Law Council of Australia, *Submission 75*.

101 Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, Report No 78 (1996) Rec 2.

102 Administrative Review Council, *Federal Judicial Review in Australia*, Report No 50 (2012), [6.15].

16. Immunity from Civil Liability

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Summary

16.1 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 would otherwise be a tort can limit individual rights and require careful justification.[1]

16.2 Laws that give executive immunities a wide application and laws that authorise what would otherwise be a tort are closely related.[2] Notably, an executive immunity may essentially authorise the executive or part of the executive to commit what would

1 The Terms of Reference refer to laws that authorise the commission of a tort, but it is more appropriate to refer to laws that authorise what would *otherwise* be a tort. The fact that conduct is authorised by statute or other lawful authority will usually prevent the conduct amounting to a tort at all.

2 Both are listed in the Terms of Reference. Executive immunities from statute and from criminal prosecution are outside the scope of this chapter, for reasons set out below.

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.

16.3 This topic is closely related to some of the other rights, freedoms and privileges considered in this Inquiry. 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]

16.4 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 powers of arrest and detention to enforce the law. This is also recognised by the common law.

16.5 This chapter identifies many Commonwealth statutes that give some immunity not only to the federal police, but to other law enforcement agencies, customs officials, defence personnel, immigration officials, security agencies and others. The immunities protect these agencies from liability that might otherwise arise from the exercise of their statutory powers, including powers to arrest or detain people, to seize or retain property, and to carry out intrusive investigations. Such powers and associated immunities are commonly justified on the grounds that they are necessary to prevent crime, protect national security and otherwise enforce the law.

16.6 Although often necessary, executive immunities 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.

16.7 Where government immunities from civil liability are necessary, consideration should be given to their appropriate scope—to the limitations and conditions attaching to the immunities. For example, an immunity provision might make clear that it does not protect a government agency from oversight by the Ombudsman, if this is intended. An immunity provision might also explicitly exclude conduct not done in good faith.

16.8 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[6] and for amendments to the *Judiciary Act 1903* (Cth) to state expressly that the Commonwealth is subject to the same substantive

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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 18–20.

5 See Ch 7.

6 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.

obligations at common law and in equity as apply to people of full age and capacity, except as specifically provided by a Commonwealth Act.[7]

16.9 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;[8] 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.[9]

A common law principle

16.10 Historically, the executive had the benefit of the broad common law immunity of 'the Crown'.[10] 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:

> 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.[11]

16.11 However, 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.[12]

16.12 In general, the government, and those acting on its behalf, should be subject to the same liabilities, civil and criminal, as any individual.

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7 Ibid rec 25–3.

8 Ibid rec 25–2.

9 Ibid rec 25–3.

10 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. 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.

11 *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.

12 AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1985) 202.

16.13 Historically, Australia has shown a 'healthy concern for the rule of law'[13] by limiting this type of immunity by statute—in South Australia as early as 1853.[14] 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.[15]

16.14 The Law Council of Australia (the Law Council) submitted that, in general, 'the whole course of the development of Australian law … points to removal of executive immunity'.[16]

16.15 The general immunity is now abrogated by statute in all Australian states and territories and in the Commonwealth. For the federal government, Crown immunity from suit was abolished by the *Judiciary Act 1903* (Cth),[17] and arguably under s 75(iii) of the *Australian Constitution,*[18] 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.[19]

16.16 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'.[20] In its submissions, the Law Council supported this and other related recommendations in the ALRC's 2001 report.[21]

16.17 The Commonwealth of Australia therefore 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.[22] 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.[23]

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13 Nick Seddon, 'The Crown' (2000) 28 *Federal Law Review* 245, 257.
14 See *Claimants' Relief Act 1853* (SA).
15 Seddon, above n 13, 257.
16 Law Council of Australia, *Submission 75*.
17 *Judiciary Act 1903* (Cth) ss 56, 64.
18 Cf *Commonwealth v Mewett* (1997) 191 CLR 471.
19 Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 4th ed, 2009) 176.
20 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.
21 Law Council of Australia, *Submission 140*; Law Council of Australia, *Submission 75*.
22 *Maguire v Simpson* (1977) 139 CLR 362. See further Aronson and Whitmore, above n 10, 7.
23 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 10, 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.

16.18 A 2002 review of the law of negligence, chaired by the Hon David Ipp QC,[24] considered many aspects of public liability and made recommendations that have greatly reshaped the liability of public authorities in many Australian 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.[25]

16.19 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.[26]

Immunity from statute

16.20 Immunity from statute is a related but distinct type of executive immunity. Although this government immunity from statutory obligations is not the subject of this chapter,[27] there have been calls for reform to limit and clarify these immunities. There is a general presumption of statutory interpretation that statutes are not intended to bind the Crown,[28] in the absence of clear words or necessary implication.[29] In 1990, the High Court in *Bropho v Western 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.[30] However, the law with respect to immunities from statute remains unclear and uncertain. To remove such uncertainty, the ALRC in 2001 recommended that the *Judiciary Act* be amended to provide that the

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24 Commonwealth of Australia, 'Review of the Law of Negligence: Final Report' (2002).

25 Ibid 185, rec 39.

26 *Civil Liability Act 2002* (WA) ss 5U, 5X.

27 The Terms of Reference suggest that laws that give executive immunities a wide application encroach on a traditional principle. But laws that provide for an immunity from statute would be consistent with a traditional Crown immunity, rather than an encroachment upon it. This is not to suggest that such immunities are therefore justified, but only that they are outside the scope of this chapter.

28 '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).

29 *Province of Bombay v The Municipal Corporation of Bombay* [1947] AC 58; *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].

30 *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, [64]–[68] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

Commonwealth is bound by every Commonwealth Act enacted after the amendment unless the relevant Act expressly states otherwise.[31]

What is a tort?

16.21 Executive immunity from civil liability most commonly arises in the context of potential tort liability. 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.[32]

16.22 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.

16.23 Torts are generally created by the common law,[33] although there are statutory wrongs which are analogous to torts.[34] In addition, many statutes extend[35] or limit[36] tort remedies, while statutory duties and powers may provide a basis for duties or liability in tort, either in the common law tort of breach of statutory duty, or the common law tort of negligence.[37] Many common law torts have a long history, some dating as far back as the 13th century,[38] although others were created more recently.[39]

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31 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 26–1. In its submission to this Inquiry, the Law Council similarly recommended that the *Acts Interpretation Act 1901* (Cth) be amended 'to provide that all Acts are to be taken to bind the Crown in all its capacities, unless expressly stated otherwise': Law Council of Australia, *Submission 140*.

32 Tony Honoré, 'The Morality of Tort Law' in David Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press, 1995) 75.

33 William Blackstone, *Commentaries on the Laws of England*, (Clarendon Press reprinted by Legal Classics Library, first published 1765–1769, 1983 ed) 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.

34 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.

35 See, eg, *Compensation to Relatives Act 1987* (NSW). See also equivalent acts in other states and territories that extend tort liability to fatal accidents.

36 See, 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.

37 Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 2012) 583; Sappideen and Vines, above n 10, 149–50; 215–22.

38 SFC Milsom, *Historical Foundations of the Common Law* (Lexis Nexis Butterworths, 2nd ed, 1981) 283; Pollock and Maitland, above n 33; 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,

16.24 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).

16.25 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.

16.26 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 person may seek an injunction from the courts to prevent the tort happening or continuing.[40]

Protections from statutory encroachment

Australian Constitution

16.27 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.

16.28 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.[41]

16.29 However, this provision may be superseded or overridden by legislation providing for a specific immunity to a person or entity.

16.30 The *Constitution* does not create rights in tort, however, as discussed throughout this Report, it does to some extent protect many traditional rights from statutory encroachment.

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provide limitation periods, cap or exclude awards of damages, and provide for survival of actions. The Uniform Defamation Acts in all states and territories modify the common law action of defamation.

39 B 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.

40 For example, to prevent a trespass or a nuisance: Sappideen and Vines, above n 10, 58; 522–3.

41 See also *Judiciary Act 1903* (Cth) s 56; *Australian Constitution* s 78.

Principle of legality

16.31 The principle of legality provides some protection for the principle that executive immunities should be only as wide as necessary to achieve the legislative purpose, and should not unduly derogate from individual rights.[42] 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.[43] In the absence of clear language, courts will narrowly construe any legislative provision to this effect.

16.32 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.

16.33 The High Court case, *Board of Fire Commissioners v Ardouin*,[44] concerned a claim in negligence—an infant riding his bike in the street was injured when 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.[45]

16.34 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.[46]

16.35 Further High Court authority may be found in *Puntoriero v Water Administration Ministerial Corporation.*[47] 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

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42 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 2.

43 *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.

44 *Board of Fire Commissioners v Ardouin* (1961) 109 CLR 105.

45 Ibid.

46 Ibid 110.

47 *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575.

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 said:

> 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 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.[48]

16.36 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.[49]

16.37 In *Coco v The Queen*,[50] 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.[51]

International law

16.38 International covenants typically do not refer to the right of an individual not to be subject to tortious conduct in such terms, nor do they explicitly prohibit broad executive immunities. But they do set out fundamental rights which might be infringed by tortious conduct. Imprisoning a person without lawful authority, for example, would constitute the tort of false imprisonment and may breach art 9 of the *International Covenant on Civil and Political Rights*. Defaming a person would constitute the tort of defamation and breach art 17. Torture would constitute the torts of assault or battery and breach art 7. 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, and invasions of privacy may breach art 17.[52]

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48 Ibid [59].
49 Ibid [34] (McHugh J).
50 *Coco v The Queen* (1994) 179 CLR 427.
51 Ibid [8] (Mason CJ, Brennan, Gaudron and McHugh JJ) (citations omitted).
52 See Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014) ch 13.

Justifications for encroachments

16.39 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.[53] It is therefore generally accepted that executive immunities from civil liability will at least sometimes be justified.

16.40 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.[54]

16.41 However, as Emeritus 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'.[55] 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'.[56] Where a statute provides an immunity to a claim in negligence, the statute may amount to a 'permission to be careless'.[57] Concerning government liability in negligence, Aronson concludes:

> 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

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53 An example is the immunity given to the Commonwealth against liability for defamation where access is given to records required to be made available for public purposes: *Archives Act 1983* (Cth) s 57.

54 *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.

55 Mark Aronson, 'Government Liability in Negligence' (2008) 32 *Melbourne University Law Review* 44, 46.

56 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 considered the liability of police officers in negligence in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2.

57 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': Aronson, above n 55, 82.

> analogues equally deserving of special consideration. The search for categorical exemptions from government liability has proved elusive.[58]

16.42 The same caution may be applied to government immunities more broadly, for example with respect to other torts.

16.43 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.[59]

16.44 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.

16.45 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.

Laws that give immunity from civil liability

16.46 A statute may restrict a person's right to sue in tort in several ways, for example: by authorising conduct that would otherwise be a tort; by providing a defence of statutory authority to conduct that may constitute a tort, particularly if reasonable care is not taken;[60] and by giving a person an exemption or immunity from civil liability in tort.

16.47 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;[61]
- the torts of trespass to person and false imprisonment are discussed in the freedom of movement chapter;[62] and
- the tort of trespass to property is discussed in the chapters about property rights.[63]

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58 Ibid 81.

59 Proportionality is discussed in Ch 2. Parliamentary committee scrutiny is discussed in Ch 3.

60 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 37, [4.1.6.3]; *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* (2012) 42 WAR 287, [121]–[123].

61 Ch 4.

62 Ch 7.

63 Chs 18–20.

16.48 Some of these laws are also noted briefly below, although most are examples of more general statutory immunities from civil liability.

Authorising torts—police, customs and tax office powers

16.49 There are many examples of Commonwealth statutes that give 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.

16.50 For example, powers to arrest without a 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.[64]

16.51 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.

16.52 Statutes may also authorise an arresting officer to search a person to find hidden weapons or prevent the loss of evidence[65] and to use some limited level of force when arresting a person.[66] Without such authority—whether at common law or in statute—such physical interference might amount to the tort of trespass to the person.

16.53 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'.[67] This authorises what would otherwise be the tort of trespass to property.[68]

Other public authorities

16.54 Section 246 of the *Australian Securities and Investments Commission Act 2001* (Cth) is typical of the immunity from civil suit (for example, 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

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64 See, eg, *Holgate-Mohammed v Duke* (1984) AC 437.

65 See, eg, *Australian Federal Police Act 1979* (Cth) s 14D.

66 Eg, Ibid s 14B.

67 *Taxation Administration Act 1953* (Cth) sch 1, s 353–15.

68 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).

> 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 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.[69]

16.55 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.

16.56 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.

16.57 In *Little v Commonwealth,*[70] 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.[71]

16.58 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.[72]

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69 *Australian Securities and Investments Commission Act 2001* (Cth) s 246(1).

70 *Little v Commonwealth* (1947) 75 CLR 94.

71 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).

72 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* (Cth) r 5.

16.59 Some statutes expressly give an immunity not only from civil proceedings, but from criminal proceedings, 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.[73]

16.60 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 (in relation to defamation); and
- *Trade Marks Act 1995* (Cth) s 226B.

16.61 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. It also only applies to authorised conduct that is engaged in as part of a special intelligence operation under div 4, pt III of the *Australian Security Intelligence Organisation Act 1979* (Cth). Nevertheless, the Law Council submitted that the immunity '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*.[74]

16.62 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.

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73 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 86.

74 *Crimes Act 1914* (Cth) pt 1AB. The Law Council also criticised the provision in relation to its effect on property rights: see Ch 19 and Law Council of Australia, *Submission 75*. The Law Council submitted that the immunity should be reviewed by the Independent National Security Legislation Monitor 'with particular focus on whether immunity from civil liability is appropriate in light of the need for an effective remedy under international law': Law Council of Australia, *Submission 140*. The NSW Bar Association has called the provision 'quite extraordinary' and said it 'leaves considerable room for violence to be lawfully inflicted': New South Wales Bar Association, Submission 28 to the Independent National Security Legislation Monitor, *Inquiry into Section 35P of the ASIO Act*, 2014. The Explanatory Memorandum for the relevant Bill states that the provision was 'necessary and appropriate'; 'does not deem lawful special intelligence conduct which would otherwise be unlawful'; and has a number of conditions and safeguards: Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).

16.63 Sections 494AA and 494AB of the *Migration Act 1958* (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,[75] the exercise of which, without authority, may amount to a tort.

16.64 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,[76] or a civil right of action for breach of statutory duty. However, there are cases where a public authority has been held liable for negligent misstatement[77] or negligent conduct in operational matters.[78]

Giving evidence and making complaints

16.65 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.[79]

16.66 Examples of similar provisions include:

- *Enhancing Online Safety for Children Act 2015* (Cth) s 89;
- *Freedom of Information Act 1982* (Cth) ss 55Z, 84; and
- *Interactive Gambling Act 2001* (Cth) s 23.

Public interest disclosures

16.67 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.[80]

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75 *Migration Act 1958* (Cth) s 198B.

76 See, eg, *Graham Barclays Oysters v Ryan* (2002) 211 CLR 540; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1.

77 *Shaddock & Associates v Parramatta City Council (No 1)* (1981) 150 CLR 225.

78 *Pyrenees Shire Council v Day* (1998) 192 CLR 330.

79 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.

80 For the immunity provisions, see in particular *Public Interest Disclosure Act 2013* (Cth) pt 2 div 1.

Consular and diplomatic immunities

16.68 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).

Industrial action

16.69 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.

16.70 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'.[81] Relevant torts might include trespass, private nuisance, conspiracy and intentional interference with a contract.

16.71 Creighton and Stewart note that, unlike the United Kingdom, Australia has 'little history of legislative protection against common law liability for industrial action'.[82] However, there is now some protection. An immunity provision for protected industrial action, subject to prescribed limitations, is in s 415 of the *Fair Work Act 2009* (Cth). It is not a 'blanket' immunity and it applies to those taking or organising industrial action in relation to a new single-enterprise agreement.[83] 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.

16.72 The immunity in Australia originally had the object of encouraging parties to bring their disputes within the 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',[84] an essential element of which is said to be 'the capacity of the participants in the process to elect to take industrial action in

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81 Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) [22.08].

82 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].

83 B Creighton and Others, *Submission 24*.

84 Ibid.

order to exert pressure upon the other parties'.[85] This in turn called for legislative protection against common law liability.[86] The overall object of the scheme was that disputes proceed in an orderly, safe and fair way, without duress; that parties be properly and efficiently represented; and that risks to those caught up in the dispute be minimised.[87]

16.73 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.[88]

16.74 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.

Vicarious immunity

16.75 Executive liability is limited by the operation of the 'independent discretion rule', also known as the *Enever* principle,[89] which limits the vicarious liability of government for certain wrongs committed by government employees.

> The basic idea behind this rule is that, if powers are conferred by law directly upon an employee, such a person is considered to be executing an independent discretion or original authority for the consequences of which the employer is not vicariously responsible. Of course, the corollary of this rule is that the individual officer may bear a personal liability.[90]

16.76 This principle has been abrogated by statute in New South Wales[91] and, to the extent that it applies to police officers, in other jurisdictions, including the Commonwealth.[92]

16.77 The independent discretion rule has been widely criticised and in 2001, despite finding the rule had relatively little practical effect, the ALRC recommended it be abolished.[93]

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85 Ibid.

86 Ibid. See also Australian Council of Trade Unions, *Submission 44*.

87 See, for example, *Industrial Relations Reform Act 1993* (Cth) s 4.

88 See Ch 6.

89 *Enever v The King* (1906) 3 CLR 969.

90 *Cubillo v Commonwealth (No 2)* (2000) 174 ALR 97, [1089] (O'Loughlin J). The independent discretion rule therefore limits the basic principle in tort law that 'an employer is liable for the damage caused by the negligent acts or omissions of its servants when they are acting within the scope of their employment': Ibid [1088].

91 *Law Reform (Vicarious Liability) Act* 1983 (NSW) s 8.

92 See, eg, *Australian Federal Police Act 1979* (Cth) s 64B(1). 'The Commonwealth is liable in respect of a tort committed by a member or a protective service officer in the performance or purported performance of his or her duties … in like manner as a person is liable in respect of a tort committed by his or her employee in the course of his or her employment'.

93 'The principle in *Enever v The King* (1906) 3 CLR 969, namely, that the Commonwealth is not vicariously liable for the tortious conduct of Commonwealth officers who act with independent discretion pursuant to statute, should be expressly abolished in relation to the Commonwealth': 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 25–1.

New cause of action for public law wrongs

16.78 Some have called for the creation of a new cause of action for so-called public law wrongs. Aronson explains that because 'government's tort liability is usually judged by private law principles, there is no generalised common law right of action for damages for loss caused by invalid administrative action'.[94] Discussing non-judicial review remedies in the UK, Maurice Sunkin concluded:

> The absence of a right of damages for losses sustained as a consequence of public law wrongs is widely recognized as being one of the most serious of the remaining gaps in our remedial system. It is a gap that does not exist in more developed systems. This gap has been widely criticised over the years by judges, by legal commentators, and by the Law Commission. This is an issue that now cries out for reform.[95]

16.79 This chapter is largely about statutes that limit executive liability to private law torts. It is another question whether a new cause of action might be needed to allow for the recovery of damages for certain wrongful government conduct for which there is no private law action. Although some have called for the introduction of such an action, others have been critical of the idea.[96]

16.80 In 2001, the ALRC recommended that there be a review of the law relating to claims for compensation for loss arising from wrongful federal administrative action.[97]

Conclusion

16.81 As noted above, many of the issues discussed in this chapter were reviewed more fully in the ALRC's 2001 report, *The Judicial Power of the Commonwealth*. Although in this current Inquiry few stakeholders commented on the matters discussed in this chapter, the ALRC's 2001 report contains a number of recommendations broadly aimed at, among other things, ensuring that executive immunities from civil liability are only available when justified. These recommendations may warrant further consideration.

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94 Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1, 2.

95 Maurice Sunkin, 'Remedies Available in Judicial Review Proceedings' in David Feldman (ed), *English Public Law* (Oxford University Press, 2nd ed, 2009) 820.

96 The UK Law Commission said the response to its proposed reforms in this area was 'almost universally negative' and the Government in particular was 'firmly opposed' to its proposals: The Law Commission, *Administrative Redress: Public Bodies and Citizen* (The Stationery Office, 2010).

97 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 25–2.

17. Delegating Legislative Power

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Summary

17.1 Under the constitutional doctrine of the separation of powers, parliaments make law, the executive administers and enforces the law, and the judiciary adjudicates disputes about the law. The doctrine is reflected in the structure of the *Australian Constitution*.[1] But the separation between legislative and executive power is 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.

17.2 From the separation of powers doctrine, and from the principle that it is Parliament's role to make laws on important matters of policy, may be derived the principle that legislative power should not be inappropriately delegated to the executive.

17.3 Laws that have a significant impact on rights and liberties, and laws creating offences with high penalties, should usually be in primary, not delegated, legislation. More generally, wide and vague delegations of legislative power undermine the separation of powers doctrine by allowing those who enforce the law to also make the law.

17.4 Delegating legislative power to the executive is now commonplace and is said to be essential for an efficient and effective government.[2] Parliament delegates such power not only to government ministers, but also government agencies such as the Australian Taxation Office and the Australian Securities and Investments Commission (ASIC).

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1 Chapter I of the *Constitution* is entitled 'The Parliament'; Chapter II, 'The Executive Government'; and Chapter III, 'The Judicature'.

2 There are many types of delegated legislation, including regulations, ordinances, rules, public notices, proclamations, local authority by-laws and specific decrees.

17.5 Given the quantity of delegated law in Australia, careful and ongoing scrutiny—built into the law making process—may be the most suitable way to limit inappropriate delegations of legislative power. This chapter includes various examples of delegations of legislative power, but does not single out particular delegations as inappropriate.

17.6 There are various guides and 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.[3] There are also procedures that enable either House of Parliament to 'disallow' (repeal) most delegated legislation soon after it has been passed.

17.7 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'.[4] Creating new rules of law of general application is traditionally the role of Parliament.

Constitutional limits

17.8 The *Australian Constitution* does not expressly authorise the Commonwealth Parliament to delegate power to make laws, nor is it expressly prohibited. The High Court's decisions in *Baxter v Ah Way*[5] and *Roche v Kronheimer*[6] are authority for Parliament's power to delegate certain legislative powers to the executive. In *Victorian Stevedoring and General Contracting Company v Dignan* ('*Dignan's case*'), 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.[7]

17.9 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'.[8]

17.10 However, there are two constitutional limits on the power to delegate legislative power. First, Dixon J said that in some cases, there may be 'such a width or such an

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3 See Ch 3.

4 *Minister of Industry and Commerce v Tooheys Ltd* (1982) 60 FLR 325, 331. In the *Legislative Instruments Act 2003* (Cth), an instrument is taken to be of a 'legislative character' if: '(a) it determines the law or alters the content of the law, *rather than applying the law in a particular case*; and (b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right': *Legislative Instruments Act 2003* (Cth) s 5(2) (emphasis added).

5 *Baxter v Ah Way* (1910) 8 CLR 626, 637–8.

6 *Roche v Kronheimer* (1921) 29 CLR 329.

7 *The Victorian Stevedoring and General Contracting Company Proprietary Limited v Dignan* (1931) 46 CLR 73, 101.

8 Ibid 91.

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'.[9]

17.11 Second, Parliament cannot entirely abdicate its legislative power, for example, by delegating an entire head of legislative power. Evatt J offered an example of such a law: 'The Executive Government may make regulations having the force of law upon the subject of trade and commerce with other countries or among the States'.[10] Abdication is more likely to be found where the legislative power is delegated to a person or body that is not subject to ministerial responsibility or is not a public authority created by Parliament.[11] The rule that a sovereign legislature cannot abdicate its legislative power has also been recognised at common law in Canada and Australia.[12]

17.12 In many countries, enforceable bills of rights create grounds for challenging the validity of delegated legislation that in Australia are unavailable.

17.13 As discussed below, whether constitutionally valid or not, a wide and uncertain delegation of legislative power may not be appropriate.

Justifications for delegating legislative power

17.14 Parliaments have been delegating powers to the executive for some time—in England, possibly for as long as 650 years.[13] In Australia, delegated legislation has been a major part of the law since colonisation.[14] Today, far more laws are made under delegation than directly by parliaments.[15]

17.15 Practical necessity is perhaps the overriding justification for delegated legislation. The 'modern state depends on reams of delegated legislation'[16] and therefore the ability of a legislature to empower others to make legislation has been

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9 Ibid 101.

10 Ibid 119. This limitation does not seem to apply in wartime in respect of defence regulations. In *Wishart v Fraser*, the High Court approved *National Security Act 1939* (Cth) s 5, transferring in wartime virtually all the legislative power on defence to the Governor-General in Council: *Wishart v Fraser* (1941) 64 CLR 470.

11 The fact that 'the grant of power is made to the Executive Government rather than to an authority which is not responsible to Parliament' was treated by Evatt J as a 'circumstance which assists the validity of the legislation': Ibid 120.

12 In *Hodge v The Queen* (1883) 9 App Cas 117, the Privy Council, while upholding the Ontario legislature's power to delegate law making power to the executive, was careful not to authorise the abdication of legislative power. In the legislation considered in *Commonwealth Aluminium Corporation Pty Ltd v Attorney-General (Qld) (Comalco Case)* [1976] Qd R 231 and *West Lakes Ltd v South Australia* (1980) 25 SASR 389, the State legislatures granted concessions to private companies that, according to the Acts, could not be withdrawn without the agreement of the beneficiary companies. In each case, the State Supreme Court considered the reservations as ineffective for being abdications of legislative power. See discussion of these cases in Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 3rd ed, 2012) 448–49.

13 See Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4th ed, 2012) 5; VCRAC Crabbe, *Legislative Drafting* (Routledge, 2012) 213.

14 Pearce and Argument, above n 13, 5.

15 Ibid.

16 George Winterton, *Winterton's Australian Federal Constitutional Law: Commentary and Materials* (Lawbook Company, 2013) [3.500].

described as 'an essential adjunct to the practice of government'.[17] The Public Interest Advocacy Centre (PIAC) 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'.[18]

17.16 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.[19]

17.17 Sir Stanley de Smith notes several related reasons to delegate legislative power. 'Torturous and cumbersome legislation, bulging with minutiae, disfigures the statute book and tends to detract from the prestige of Parliament'.[20] Where the changes to the law require administrative reorganisation and detailed consultations with affected sectors of the community, the commencement of particular parts of the Act may have to be postponed and left to executive discretion.[21] Furthermore, it is sensible to allow the responsible minister to amplify the Act by regulations when it is 'reasonable to suppose that new contingencies (such as special hardship or technological developments) will arise although their exact form cannot be predicted at the date of enactment'.[22]

17.18 ASIC highlighted the need for delegated legislation in the regulation of corporations and financial services. These sectors are 'complex and subject to constant innovation', ASIC submitted, and without delegated legislation, 'primary legislation would be unable to anticipate and respond in a timely way'.[23]

17.19 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'.[24] 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.[25]

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17 Pearce and Argument, above n 13, 170.

18 Public Interest Advocacy Centre, *Submission 55*.

19 Pearce and Argument, above n 9, [1.9]. Similar and other reasons justifying delegated legislation were set out in: United Kingdom Parliament, *Report of the Committee on Ministers' Powers'* ('Donoughmore Report'), Cmd 4060 (1936). See also Caroline Morris and Ryan Malone, 'Regulations Review in the New Zealand Parliament' (2004) 4 *Macquarie Law Journal* 7, 9.

20 Stanley de Smith, *Constitutional and Administrative Law* (Penguin Books, 3rd ed, 1977) 325.

21 Ibid.

22 Ibid 326.

23 Australian Securities and Investments Commission, *Submission 74*.

24 Pearce and Argument, above n 13, 118.

25 Ibid 119.

17.20 It might also be argued that parliamentary sovereignty would be limited to some degree if Parliament could not choose to delegate part of its legislative power.

17.21 In practice, members of Parliament rely heavily on the executive to prepare, draft and scrutinise new laws. The quantity of law made each year alone makes it impossible for individual members of Parliament to read and scrutinise every bill, much less every draft legislative instrument. Discussing delegated legislation in the United Kingdom, Professor P S Atiyah wrote:

> For practical purposes statutory instruments are an example of law made by civil servants subject to ministerial control, in much the same way that Acts of Parliament are laws largely made by civil servants subject to parliamentary control.[26]

17.22 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.

Criticisms

17.23 Despite the fact that Parliament commonly delegates legislative power to the executive, some laws are more properly made by Parliament. 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.[27]

17.24 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.[28]

17.25 The rule against wide delegations of legislative power has been called a major component of the separation of powers doctrine:

> When officials can legislate, interpret and execute their legislation, they have the potential to place themselves above the law—for the law becomes in effect whatever they say is the law in the particular case.[29]

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26 PS Atiyah, *Law and Modern Society* (Oxford University Press, 1983) 130.

27 Pearce and Argument, above n 13, 11.

28 Denise Meyerson, 'Rethinking the Constitutionality of Delegated Legislation' (2003) 11 *Australian Journal of Administrative Law* 45, 52.

29 Ratnapala and Crowe, above n 12, 124.

17.26 This can threaten many individual rights, freedoms and privileges, such as those considered in this Report. The separation of powers doctrine has been said to be 'essential for the establishment and maintenance of political liberty'.[30]

17.27 The Law Council of Australia (Law Council) submitted that it should not be 'left to the executive to determine for itself what powers it has and when and how they may be used'.[31] The rule of law requires that

> the law must be readily known, available, certain and clear; and where legislation allows for the Executive to issue regulations, the scope of that delegated authority should be carefully confined and subject to Parliamentary supervision.[32]

17.28 The executive has been said to 'lack the democratic credentials of Parliament'.[33] 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'.[34]

17.29 The process of executive law making also 'lacks the transparency and publicity of the parliamentary process'.[35] Delegation therefore 'reduces the accountability of the exercise of legislative power'.[36]

17.30 In the United States Supreme Court, Rehnquist J explained three functions of the rule against excessive delegation as follows:

> First and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent that Congress finds it necessary to delegate authority, it provides the recipient of that authority with an 'intelligible principle' to guide the exercise of the delegated discretion. Third, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.[37]

17.31 Justice Rehnquist's third point is that wide delegation diminishes the capacity of courts to limit the misuse of power.

17.32 Some criticism of delegated legislation appears to concern the quality and quantity and law of regulation more broadly, rather than the narrower question of whether such laws belong in primary legislation.[38] David Hamer, for example, has said that delegated legislation is a 'fertile field for government despotism and bossy

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30 MJC Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, 1998) 14.
31 Law Council of Australia, *Submission 140*.
32 Ibid.
33 Meyerson, above n 28, 53.
34 Ibid.
35 Judith Bannister et al, *Government Accountability* (Cambridge University Press, 2014) 112.
36 Ibid.
37 *Industrial Union Department, AFL-CIO v American Petroleum Institute* 448 US 607 at 685–686 (1980). See also *Panama Refining Co v Ryan* 293 US 388 at 418, *ALA Schechter Poultry Corp v United States* 295 US 495 at 537 (1935) and *Opp Cotton Mills Inc v Administrator* 312 US 126 at 144 (1941).
38 The 'proliferation' of delegated legislation is discussed in Pearce and Argument, above n 13, 16.

interference by bureaucrats'.[39] In any event, this chapter is not about the quality or quantity of regulation, but rather about whether particular types of delegated law should more properly be made directly by Parliament.

17.33 Some of the types of delegation considered less appropriate are highlighted among the examples that follow.

Examples of laws that delegate legislative power

17.34 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.

17.35 Acts that include delegations of legislative power 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.[40]

17.36 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 relevant regulations may do in s 63 of the *Therapeutic Goods Act 1989* (Cth).

17.37 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.[41] This arrangement has often been criticised.[42] 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.[43] The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) said in 2012 that 'framework' bills were becoming increasingly prevalent[44] and that 'important information' should be included in the primary legislation, 'unless there is a principled reason for including it in delegated legislation'.[45]

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39 David Hamer, 'Can Responsible Government Survive in Australia?' (Department of the Senate, 2001) 148.

40 *Atomic Energy Act 1953* (Cth) s 65.

41 This is also called 'coat-hanger' or 'framework' legislation.

42 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 13, 121–123.

43 Pearce and Argument, above n 13, 122.

44 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.

45 Ibid 34.

17.38 Important questions of policy, particularly when they affect individual rights, are often considered inappropriate subject matter for delegated legislation. The Law Council expressed concern about a new provision to be inserted into the *Migration Act 1958* (Cth), under which a person may be required to provide 'personal identifiers' for any purposes under the Act or the *Migration Regulations 1994* (Cth).[46] The Law Council said that significant matters such as this should instead be set out in primary legislation, not in regulations:

> the power to prescribe both a purpose for which personal identifiers may be collected and the collection of biometric data via regulation raises the potential for the scheme to go beyond the initial intention of the Bill and the Migration Act, without adequate parliamentary scrutiny. Permitting changes to the purposes of collection of biometric data by regulation can result in significant incursions into privacy, while escaping general public awareness.[47]

17.39 Offence provisions 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.[48] 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'.[49]

17.40 'Henry VIII clauses' are another type of delegation of legislative power that is considered inappropriate.[50] These allow delegated legislation to amend the primary 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'.[51] 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

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46 The *Migration Amendment (Strengthening Biometrics Integrity) Act 2015* (Cth) inserts s 257A into the *Migration Act 1958* (Cth). At November 2015, the relevant provision of the amending Act had not commenced.

47 Law Council of Australia, *Submission 140*.

48 *National Consumer Credit Protection Act 2009* (Cth) sch 1 s 30B(2).

49 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest* No 4 of 2011 47.

50 The first Henry VIII clause was in the *Statute of Proclamations 1539*: '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.' This in effect authorised the King to make law on any subject by proclamation without the consent of Parliament. Legislation by proclamation was one of the main issues of contention that led to the Revolution of 1688 and the enactment of the Bill of Rights 1689, which denied the remaining royal claims to legislative prerogatives to suspend laws, grant dispensation from law and to impose taxes.

51 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *10th Report of 2009* (September 2009) 370.

transition to a national credit regime'.[52] Section 35A of the *Fair Work Act 2009* (Cth), which relates to the geographical application of the Act, is another example.[53]

17.41 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.[54] 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 Goods and Services Tax is payable on taxable importations.[55]

17.42 ASIC also has the power to make delegated legislation, and this includes the power to modify certain provisions in the *Corporations Act 2001* (Cth), including as they apply to specified classes of people—until recently, called 'Class Orders'.[56] Although these are not strictly speaking Henry VIII clauses, it has been said that ASIC can essentially re-write parts of the Act.[57] Professor Stephen Bottomley has noted that corporate regulators need discretionary powers, given that the 'financial and commercial context in which corporations operate is complex and fast-changing',[58] and statutory modifications via Class Orders are 'beneficial to the flexible regulation of the corporate and finance sector'.[59]

17.43 However, ASIC's law making powers may be unique among Australian federal regulatory agencies and corporate regulatory agencies elsewhere.[60] One danger of giving ASIC powers to modify the law, with relatively little specific legislative guidance, Bottomley writes, is that it may reinforce 'the appearance of a system in which the regulator can make rules of wide application that bypass the process of substantive public scrutiny and accountability that can be applied to statutory rules'.[61] For example, there appears to be no legal requirement that ASIC must consult stakeholders before making a Class Order.[62] Bottomley discusses these dangers and proposes some improvements to the way laws can be changed by ASIC Class Orders.[63] The principle underlying these proposals is that 'legislative change should be done by

52 Ibid 371.
53 Bannister et al, above n 35, 116.
54 *Income Tax Assessment Act 1936* (Cth) s 161.
55 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ss 13–20(3).
56 See, eg, *Corporations Act 2001* (Cth) ss 283GA(1)(b), 601QA(1)(b), 601YAA(1)(b). For a complete list, see Stephen Bottomley, 'The Notional Legislator: The Australian Securities and Investments Commission's Role as a Law-Maker' (2011) 39 *Federal Law Review* 1, 6. Not all Class Orders modify the Act.
57 Bottomley, above n 56, 2.
58 Ibid 1.
59 Ibid 31.
60 Ibid 2.
61 Ibid 8.
62 Ibid 25.
63 Ibid 28–30.

and through Parliament', largely because Parliament is 'visible and publicly accountable'.[64]

Safeguards

17.44 Some concerns about delegated legislation may be addressed by the procedures that must be followed in making the legislation, 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.[65]

17.45 The requirement that legislative instruments be published on a public register was a major development introduced by the *Legislative Instruments Act*, and helps make the process of making delegated legislation more open and accountable.[66] Another important safeguard is the automatic repeal or 'sunsetting' of legislative instruments, usually after ten years.[67]

17.46 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.[68]

17.47 Parliamentary scrutiny, particularly by committees, is also an important safeguard.[69] The 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.[70] Established in 1932, the Regulations and Ordinances Committee in particular scrutinises delegated legislation to ensure 'that it does not contain matter more appropriate for parliamentary enactment'.[71] The legislative scrutiny process and the role of the parliamentary committees have been called the 'key mechanisms for ensuring that the Executive does the right thing'.[72]

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64 Ibid 30.

65 See *Legislative Instruments Act 2003* (Cth); Office of Parliamentary Counsel, *Legislative Instruments Handbook* (2014). These safeguards are in addition to the judicial review of delegated legislation, which essentially considers whether the legislation was validly made and within power. There are different standards by which the superior courts may determine the validity of statutory instruments. For example, a local authority by-law may be invalidated on the ground that it is unreasonable whereas a regulation within power cannot be so challenged. Different judicial considerations will also apply to a general rule enacted by regulation and a specific order that affects the rights and duties of parties in the particular case. On judicial review more broadly, see Ch 15.

66 *Legislative Instruments Act 2003* (Cth) pt 4.

67 Ibid pt 6.

68 Ibid s 14.

69 For an overview of parliamentary scrutiny, see Ch 3.

70 Parliamentary committees are discussed in Ch 3.

71 Senate Standing Order 23(3)(d).

72 Stephen Argument, 'Delegated Legislation' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 142.

17.48 Common law principles may also provide additional safeguards. For example, unless the statute provides for the sub-delegation of legislative power,[73] a delegate generally cannot sub-delegate power.[74]

17.49 Further guidance on what are appropriate matters for primary and delegated legislation may be found in the *Legislation Handbook*.[75] 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;
>
> (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

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73 Although a statute may validly provide for sub-delegation: '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 Pearce and Argument, above n 19, [23.4].

74 '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.

75 Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (1999). This is a guide to making legislation for government departments. See Ch 3.

(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).[76]

17.50 It will generally not be appropriate for such laws to be made in delegated legislation. Further, it may also not be appropriate for Parliament to authorise the making of regulations that impose liabilities with retroactive effect.[77] Parliament should also clearly identify the recipient of the delegated power and should generally not authorise sub-delegation.[78]

17.51 Grants of delegated power ought not to be so expressed that it becomes impossible in practice for courts to review the limits of the power. For example, provisions should not give ministers powers to do that which is, in their opinion, 'requisite or expedient for a broadly framed statutory purpose'.[79]

17.52 The tabling, disallowance, and committee scrutiny of delegated legislation are important safeguards and practical ways for Parliament to control executive law making. If it were thought that legislative power were being inappropriately delegated, consideration might be given to the adequacy of these safeguards, and perhaps to whether the safeguards are ever inappropriately avoided. For example, some statutes exempt legislative instruments from the disallowance or sunsetting provisions in the *Legislative Instruments Act 2003* (Cth).

17.53 Further measures designed to limit inappropriate delegations of legislative power were suggested by PIAC, which described parliamentary scrutiny of delegated legislation as, in practice, minimal.[80] For example, it recommended that the Regulations and Ordinances Committee should have a stronger role and 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.[81]

Conclusion

17.54 Although delegating legislative power to the executive is necessary for an efficient and effective government, some laws are more properly made by Parliament—for example, laws that have a significant impact on individual rights and laws creating serious criminal offences. Given the quantity of delegated law in Australia, robust safeguards and ongoing scrutiny appear to be suitable ways to limit inappropriate delegations of legislative power.

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76 Ibid 3. See also de Smith, above n 20, 325–28.

77 de Smith, above n 20, 328. On retrospective laws, see Ch 13.

78 Ibid.

79 Ibid 327.

80 Public Interest Advocacy Centre, *Submission 55*. PIAC submitted that much depends on the 'individual will of parliamentarians to make themselves aware of the potential impact of tabled delegated legislation': Ibid.

81 For these and other recommendations, see Public Interest Advocacy Centre, *Submission 55*; Public Interest Advocacy Centre, *Submission 133*.

18. Property Rights

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Summary

18.1 The common law has long regarded a person's property rights as fundamental. Jeremy Bentham said that '[p]roperty and law are born together, and die together'.[1] At common law, property rights could be encroached upon 'by the law of the land',[2] so long as any deprivation was not arbitrary and only where reasonable compensation was given.[3]

18.2 This chapter and Chapters 19 and 20 are about the common law protection of vested property rights. This chapter provides the foundation for the two chapters that follow. It considers what is comprised in the concept of 'property' rights and how vested property rights are protected from statutory encroachment. Chapter 19 focuses upon interferences with personal property rights. Chapter 20 considers interferences with real property and the rights of landowners.

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1 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.

2 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) vol I, bk I, ch 1, 134.

3 Ibid vol I, bk I, ch 1, 135. This passage is cited often in Australian courts, eg, *R & R Fazzolari Ltd v Parramatta City Council* (2009) 237 CLR 603, [41] (French CJ).

18.3 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. The *Australian Constitution* protects property from one type of interference: acquisitions by the Commonwealth other than 'on just terms'.[4] 'Interference' is a wider notion than 'acquisition' for this purpose: while actions through Commonwealth laws may not amount to an acquisition, so as to come within s 51(xxxi), they may nonetheless be regarded by property owners as an 'interference'.

The common law and private property

18.4 Blackstone observed, in 1773, that the 'right of property' was a deeply rooted idea.[5] In the national consultation on 'Rights and Responsibilities', conducted by the Australian Human Rights Commission (AHRC) in 2014, the recognition and protection of 'property rights' was one of the four areas identified as being of key concern.[6]

18.5 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.[7] John Locke (1632–1704) celebrated property as a 'natural' right, advocating the protection of a citizen in 'his Life, Health, Liberty, or Possessions'.[8] Jeremy Bentham (1748–1832) continued the philosophical argument about property, arguing that rights of 'property' are a matter of law:

> Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.[9]

18.6 Concern with protection of citizens from arbitrary interference by the Crown was reflected, in relation to property, as concerns about the taking of property by government.

18.7 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

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4 *Australian Constitution* s 51(xxxi).

5 Blackstone, above n 2, vol II, bk II, ch 1, 2.

6 Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015) 8.

7 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.

8 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*.

9 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.

rights, the *Universal Declaration of Human Rights* (UDHR) in 1948,[10] which provided that '[n]o one shall be arbitrarily deprived of his property'.[11]

18.8 In his *Commentaries on the Laws of England,* while calling the right of property an absolute right,[12] Blackstone described the power of the legislature to encroach upon property rights 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.[13]

18.9 Property rights could be encroached upon, in the sense of being taken away,[14] 'by the law of the land', but only when it was not done arbitrarily, and 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.[15]

18.10 Property rights could be affected by law, controlled or diminished by 'the laws of the land', but an 'alienation' or 'divesting' had to be exercised 'with caution', and in return for a 'reasonable price'. 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 as unjustified.

18.11 Some protections of property and possessory rights are found in the law of torts and criminal law and in principles of statutory construction, discussed below. The tort of trespass was the principal action against a person who came upon the land of another without authorisation. 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

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10 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948).

11 Ibid art 17(2).

12 Blackstone named two other absolute rights: the right of personal security and the right of personal liberty.

13 Blackstone, above n 2, vol I, bk I, ch 1, 134.

14 The quoted passage refers to the declaration of the *Magna Carta* ('great charter', as Blackstone named it) against a person's being 'disseised' or 'divested' of 'freehold', which implies a taking away—of the 'seisin', the evidence of ownership, or vested rights. See D Farrier, *Submission 126*.

15 Blackstone, above n 2, 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).

> 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.[16]

18.12 The tort of nuisance may avail one landowner against another in relation to some enjoyment of land, which in turn may restrict what another may do with neighbouring land.[17]

18.13 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*[18] set out enduring common law principles against unauthorised search and seizure, later reflected in the Fourth Amendment to the *United States Constitution.*

18.14 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:

> at 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'.[19]

Definitions of property

What is 'property'?

18.15 The idea of property is multi-faceted. The term 'property' is commonly used to describe types of property, 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, like a car or a table. It also includes certain intangible or 'incorporeal' legal rights, 'choses in action', such as copyright and other intellectual property rights, shares in a corporation, beneficial rights in trust property, rights in superannuation[20] and some contractual rights, including, for example, many debts.[21] Intangible rights are *created* by law. Tangible

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16 *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.

17 Interferences with real property are considered in Ch 20.

18 *Wilkes v Wood* [1763] 2 Wilson 203; 98 ER 489.

19 *National Crime Authority v Flack* (1998) 86 FCR 16, 27. Heerey J continued: 'Section 3ZV of the *Crimes Act* … 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.

20 *Greville v Williams* (1906) 4 CLR 694.

21 *City of Swan v Lehman Bros Australia Ltd* (2009) 179 FCR 243.

things exist independently of law, but law governs rights of ownership and possession in them—including whether they can be ‘owned’ at all.[22]

Bundle of rights

18.16 In law, the term ‘property’ is 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’.[23]

18.17 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 owner as lessor and a tenant as lessee. Equitable interests may further be subdivided to include ‘mere equities’.[24]

18.18 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.[25]

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22 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); 80–1 (Gummow J). See also Blackstone, above n 2, vol II, bk II, ch 1, 14.

23 *Yanner v Eaton* (1999) 201 CLR 351, 365–6 (Gleeson CJ, Gaudron, Kirby and Hayne JJ). Citations omitted. ‘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.

24 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.

25 *Yanner v Eaton* (1999) 201 CLR 351, 388–9. Gummow J referred to Wesley Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 *Yale Law Journal* 16.

18.19 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.[26]

18.20 A 'property right' may take different forms depending on the type of property. When the term 'property' appears in legislation, without further definition, its content 'then becomes a question of statutory or constitutional interpretation'.[27] Implicit in a property right, generally, are all or some of the following characteristics: the right to use or enjoy the property, the right to exclude others, and the right to sell or give away.[28]

18.21 For land and goods, property rights in the sense of ownership must be distinguished from mere possession, even though the latter may give rise to qualified legal rights, and from mere contractual rights affecting the property. The particular 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.

18.22 The 'bundle of rights' approach has presented some contemporary challenges, particularly in relation to land holding—and in the context of native title.[29] 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' or 'acquisition' of that land in constitutional terms? This is considered later and in Chapters 19 and 20.

Recognising new forms of property

18.23 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 18th century as a new form of intangible personal property created by statute. Trade marks and registered designs have a similar genesis, as statutory creations.[30]

18.24 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.[31]

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26 See, eg, Edgeworth et al, above n 24, 94–110.

27 *Yanner v Eaton* (1999) 201 CLR 351, 339.

28 *Milirrpum v Nabalco* (1971) 17 FLR 141, 171 (Blackburn J). See discussion in Edgeworth et al, above n 24. 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 24, 6.

29 See, eg, *Western Australia v Ward* (2002) 213 CLR 1, [95].

30 Patent rights were held to be property rights that attracted the presumption against divesting by legislation or delegated regulations: *University of Western Australia v Gray (No 20)* (2008) 246 ALR 603, [89].

31 Environmental Justice Australia, *Submission 65*.

18.25 Arguments concerning rights over one's person, for example claims over bodies and body parts, including reproductive material, often involve lively contests over the recognition of new forms of intangible property.[32] There is also the assertion of a new wave of property rights generated by information technology.[33]

18.26 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'.[34]

18.27 The recognition and classification of Aboriginal and Torres Strait Islander rights and interests in land and waters has proved a challenge for the common law of Australia. In the first claim for customary rights to land, the 1971 case of *Milirrpum v Nabalco*, Blackburn J found that 'there is so little resemblance between property, as our law … understands that term, and the claims of the plaintiffs for their clans, that I must hold that these claims are not in the nature of proprietary interests'.[35]

18.28 However, in *Mabo v Queensland [No 2]*, the High Court found that pre-existing rights and interests in land held by Aboriginal and Torres Strait Islander peoples—native title—survived the assertion of sovereignty by the Crown.[36] Such rights and interests were not of the common law, but could be recognised by it. In *Fejo v Northern Territory*, the High Court stated:

> Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title. Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law.[37]

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32 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. See also *D'Arcy v Myriad Genetics Inc* (2015) 89 ALJR 924. In this case, the High Court considered whether the genetic coding for the BRCA1 protein was patentable.

33 Philip Catania and Sarah Lenthall, 'Facebook: Emerging Intellectual Property Issues' (2011) 87 *Journal of the Intellectual Property Society of Australia and New Zealand* 39, [35].

34 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).

35 *Milirrpum v Nabalco* (1971) 17 FLR 141, 273. See Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) Chs 4, 6.

36 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 57, 69 (Brennan J, Mason CJ, McHugh J agreeing); 100–01 (Deane and Gaudron JJ); 184 (Toohey J). The history of the recognition of native title in Australia is discussed in Ch 2.

37 *Fejo v Northern Territory* (1998) 195 CLR 96, [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

18.29 Because its content is defined by the traditional laws and customs of the relevant Aboriginal or Torres Strait Islander peoples, native title rights and interests 'may not, and often will not, correspond with rights and interests in land familiar to the Anglo-Australian property lawyer'.[38]

18.30 Some have argued that the 'traditional knowledge and traditional cultural expressions' of Aboriginal and Torres Strait Islander people should be recognised as a form of intellectual property. 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.[39] Similar intellectual property issues were raised in the AHRC Rights and Responsibilities consultation.[40]

18.31 The significance of acknowledging 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 incompletely addresses the protection of Aboriginal and Torres Strait Islander peoples' cultural knowledge.[41]

'Vested' property rights

18.32 The ALRC's Terms of Reference refer to 'vested property rights'. In property law 'vested' is primarily a technical legal term used to differentiate a presently existing interest from a contingent interest.[42] In this Inquiry the ALRC uses the phrase 'vested property rights' in a broad sense, not a technical one.[43]

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38 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [40] (Gleeson CJ, Gummow and Hayne JJ). For further discussion, see Ch 20.

39 Arts Law Centre of Australia, *Submission 50*.

40 Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015) 44–5.

41 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>.

42 That is, contingent on any other person's exercising their 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: *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

43 For example: 'vested in interest', 'vested in possession'. See, eg, Peter Butt, *Land Law* (Lawbook Co, 5th ed, 2006) [612]. In the United 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 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 they desire: 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

The reach of property rights

Priorities

18.33 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;[44]
- the indefeasibility of registered interests under Torrens title land systems;[45]
- the effect of registration on priority of registered security interests in personal property;[46] 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.[47]

Limitations

18.34 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 acquisition of title by possession in the limitation of actions legislation.[48] Under such legislation, the claim of a person may be barred after a designated period, generally between 12 and 15 years.[49] There is authority that even under Torrens title systems, title may be gained by adverse possession.[50] In the context

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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.

44 See, eg, Edgeworth et al, above n 24, ch 4.

45 See, eg, Ibid ch 5.

46 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/>.

47 See, eg, Edgeworth et al, above n 24, [1.79].

48 See, eg, Ibid 139–72. 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. 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). Possession may, in effect, give the possessor rights akin to proprietary rights. It has been noted that, 'Not only is a right to possession a 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).

49 See, eg, Edgeworth et al, above n 24, 144–5.

50 See, eg, Ibid 517–20.

of personal property, the right of the possessor may be defended against all but the rightful owner—expressed in the adage, 'finders keepers'.[51]

Airspace and subterranean rights

18.35 The extent of property rights of a landowner includes how far the title extends in the air above and the earth below. The early common law doctrine is expressed in the maxim '*cujus est solum ejus est usque ad coelum et ad inferos*': 'to whom belongs the soil, his is also that which is above it to heaven and below it to hell'.[52] As Sir William Blackstone explained:

> no man may erect any building, or the like, to overhang another's land: and downwards, whatever is in a direct line between the surface of any land, and the center of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word 'land' includes not only the face of the earth, but every thing under it, or over it.[53]

18.36 If a landowner 'owned' land in this extended sense, intrusions upon it may amount to a trespass. Such a simplified approach was readily modified in the modern era, where cases involving scaffolding, overflying and cranes, have tested airspace rights.[54] Professor Adrian Bradbrook commented that, '[w]hile the maxim correctly indicates that the ownership of land is not confined to the land surface; its accuracy beyond this is highly questionable';[55] and Young CJ in Eq stated that 'the old adage … is not to be taken literally'.[56]

18.37 The modern common law doctrine is expressed in the principle that the rights of a land owner in the air space above the land are limited 'to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it'.[57] Cases involving intrusions on privacy have also raised questions concerning the extent of land owners' rights: for example concerning unmanned surveillance devices flying over land and cameras overlooking land.[58]

18.38 Cases involving subterranean caves, treasures and minerals have tested the limits below the surface of land.[59] In *Di Napoli v New Beach Apartments Pty Ltd*, a case involving whether rock anchors projecting into the plaintiff's land constituted a

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51 This is expressed as the defence of *jus tertii*. See, eg, Ibid [2.3]–[2.45].

52 Adrian Bradbrook suggests that the origin of the maxim may be in Roman or Jewish law. Its earliest appearance in English law was in *Bury v Pope* in 1586: 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, 462.

53 Blackstone, above n 2, vol II, bk II, ch 2, 18.

54 See, eg, Edgeworth et al, above n 24, 66–7. See also LexisNexis, *Halsbury's Laws of Australia*, Vol 22 (at 2 December 2013) 355 Real Property, '14115 Trespass to Airspace'.

55 Bradbrook, above n 52, 462.

56 *Di Napoli v New Beach Apartments Pty Ltd* (2004) 11 BPR 21,493, [17].

57 *Baron Bernstein of Leigh v Skyviews & General Ltd* [1978] QB 479, 488; [1977] 2 All ER 902, 907 (Griffiths J).

58 The ALRC touched on some of these issues in: Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014) [3.39]–[3.44], [3.49]. Ch 14 of that report, for example, considers surveillance devices.

59 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 Bradbrook, above n 52.

trespass, Young J stated that, with respect to subterranean rights, 'a person has substantial control over land underneath his or her soil for considerable depth'.[60]

18.39 The examples of water and minerals involve both classification issues: is it property and, if so, whose is it? They also involve constitutional issues: is the property owner entitled to compensation if property rights are affected by government action? Both aspects are considered below.

The example of water

18.40 Water is an example of something that is regarded as common (*publici juris*),[61] or a 'public asset',[62] like air or light, not itself the subject of ownership,[63] but in which certain rights may exist. The nature of those rights has changed over time: from common law to statutory rights. In Australia, those statutory rights have involved an increasing shift towards Commonwealth involvement, particularly in relation to waterways that cross state boundaries, as in the Murray-Darling Basin.

18.41 Blackstone said that 'water is a moveable, wandering thing, and must of necessity continue common by the law of nature'; and any rights to water are only 'temporary, transient, usufructuary'.[64] At common law, while the water itself was not capable of ownership, a landowner had certain rights in relation to it, depending on whether the water was under the land ('percolating' water), or in a watercourse that flowed through or adjoined the property.

18.42 In the case of percolating water, the landowner was permitted to draw any or all of it without regard to the claims of neighbouring owners.[65] It was treated 'as a feature of the land itself and the landowner was entitled to appropriate the resource without limitation'.[66] In the case of water flowing through land, the 'riparian' owner had certain valuable, but limited, rights: to fish; to the flow of water, subject to ordinary and reasonable use by upper riparian owners and to a corresponding obligation to lower riparian owners;[67] and to take and use ('abstract') all water necessary for ordinary purposes and other reasonable uses.

18.43 In *Embrey v Owen*, Parke B explained that 'each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it … [I]t is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the

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60 *Di Napoli v New Beach Apartments Pty Ltd* (2004) 11 BPR 21,493, [178]. Young CJ in Eq held that the placing of the rock anchors did amount to a trespass and should be removed within a specified time, such entry not to amount to a trespass.

61 *Embrey v Owen* (1851) 6 Exch 353.

62 Australian Government Solicitor, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No 90 (July 2009).

63 *Chasemore v Richards* (1859) 7 HLC 349, 379; 11 ER 140, 152 (Lord Cranworth).

64 Blackstone, vol II, bk II, ch 2, 18. Roman law origins of the doctrines in relation to water are described in *Mason v Hill* (1833) 5 B & Ad 1, 24; 110 ER 692, 700–1 (Denman CJ).

65 *Bradford Corporation v Pickles* [1895] AC 587.

66 Samantha Hepburn, 'Statutory Verification of Water Rights: The "Insuperable" Difficulties of Propertising Water Entitlements' (2010) 19 *Australian Property Law Journal* 1, 4.

67 *Embrey v Owen* (1851) 6 Exch 353, 369; 155 ER 579, 585–6 (Parke B).

proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence'.[68]

18.44 The common law principles applied to Australia at colonisation, but from an early stage it was clear that 'the driest inhabited Continent'[69] needed a different approach.[70] Water management regimes based on the assertion of state control and the grant of a range of licences were introduced.[71] Limits were also set on the amount of water that may lawfully be taken.[72]

18.45 Where the common law focused on individual rights in water, which was otherwise *publici juris*, the statutory regimes 'saw the re-emergence of the recognition of water as a "public responsibility"'.[73] All levels of government 'now recognise that water must be managed in a manner which allocates water to users without compromising the environment'.[74]

> Consequently, the introduction of statutory schemes which set up regulatory bodies capable of distributing water resources in a more equalised and efficient manner became a crucial step in the trajectory of Australian water management.[75]

18.46 The control of water, through statutory intervention, is traditionally a state responsibility in Australia.[76] The Commonwealth has more limited scope to legislate in relation to water.[77] There is also the constraint in s 100 of the *Constitution*:

> 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.

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68 Ibid. See also *Mason v Hill* (1833) 5 B & Ad 1, 24; 110 ER 692, 700–1 (Denman CJ).

69 Thomas Garry, 'Water Markets and Water Rights in the United States: Lessons from Australia' (2007) 4 *Macquarie Journal of International and Comparative Environmental Law* 23, 28. Garry describes the variations in flowing and percolating water: at 28–30. See also Lee Godden, 'Water Law Reform in Australia and South Africa: Sustainability, Efficiency and Social Justice' (2005) 17 *Journal of Environmental Law* 181, 182–4.

70 In relation to the history of water rights in Australia, see: Michael McKenzie, 'Water Rights in NSW: Properly Property?' (2009) 31 *Sydney Law Review* 443; *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [50]–[80] (French CJ, Gummow and Crennan JJ). A summary of reforms as of July 2009 is provided in: Australian Government Solicitor, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No 90 (July 2009).

71 In relation to the application of the principle of legality to the question of extinguishment of common law rights, see Alex Gardner et al, *Water Resources Law* (LexisNexis Butterworths, 2009) [9.22], citing *Commonwealth v Hazeldell* (1918) 25 CLR 552, 556–7, 562–3 (Griffith CJ and Rich J), 567–8 (Gavan Duffy J). See also Bradbrook, above n 52, 469–72.

72 See, eg, the description of the licensing regimes in Australian Government Solicitor, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No 90 (July 2009).

73 Godden, above n 69, 187. The effect of the crown vesting is considered in Penny Carruthers and Sharon Mascher, 'The Story of Water Management in Australia: Balancing Public and Private Property Rights To Achieve a Sustainable Future' (2011) 1 *Property Law Review* 97, 105.

74 Carruthers and Mascher, above n 73, 99.

75 Hepburn, above n 66, 4.

76 Pursuant to the power to enact laws for the peace, welfare (or order) and good government of the respective state: see discussion in Gardner et al, above n 71, [5.11]–[5.20].

77 Gardner et al refer to a range of possible heads of power: eg, as an aspect of interstate trade and commerce (s 51(i)), including the power in relation to navigation and shipping (s 98); the corporations power (s 51(xx)); the external affairs power (s 51 (xxix)); and defence (s 51 (vi)). See Ibid [5.21]–[5.46].

18.47 Since 1915, a cooperative approach to water resource management in the Murray-Darling Basin has prevailed between the Commonwealth government and the governments of New South Wales, Victoria and South Australia.[78]

18.48 A combination of provisions has been relied upon to support Commonwealth intervention in water management, particularly the *Water Act 2007* (Cth), including a referral of power by New South Wales, Queensland, South Australia and Victoria.[79] The *Water Act* was designed 'to enable the Commonwealth, in conjunction with the Basin States, to manage the [Murray-Darling] Basin water resources in the national interest'.[80] This had been 'the primary focus of both Commonwealth and interstate attention to management of the water resources for decades'.[81]

18.49 The *Water Act* puts into place a framework that 'ensures continuity in Basin States' existing roles and responsibilities in Basin water management'. Water entitlements continue to be defined and managed under Basin State laws; and state agencies continue to manage storages, river flows and water deliveries.[82]

18.50 The *Water Act* was preceded by the agreement, in 1994, of the Council of Australian Governments to a framework to achieve the efficient and sustainable use of water. This was based on the 'separation of water property rights from land title and clear specification of entitlements in terms of ownership, volume, reliability, transferability and, if appropriate, quality'.[83] It also made explicit provision for environmental water.[84]

18.51 In 2004 this approach informed the National Water Initiative (NWI). Pursuant to this initiative, all governments in Australia made a number of commitments, including to:

- return over-allocated water systems to sustainable levels of use
- improve water planning, including through providing water to meet environmental outcomes
- expand permanent trade in water
- introduce better and more compatible registers of water rights and standards for water accounting

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78 Department of Agriculture and Water Resources (Cth), *Submission 144*. See also Australian Government Solicitor, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No 90 (July 2009).

79 The *Water (Commonwealth Powers) Act 2008* was enacted by NSW, Qld, SA and Vic: Carruthers and Mascher, above n 73, 111. See also: Australian Government Solicitor, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No 90 (July 2009).

80 *Water Act 2007* (Cth) s 3(a), objects clause.

81 Gardner et al, above n 71, [3.2].

82 Department of Agriculture and Water Resources (Cth), *Submission 144*.

83 Council of Australian Governments, *Communiqué, Attachment A: Water Resource Policy* (Hobart, 25 February 1994) 21. Garry states that the framework 'marked a major national shift away from decades of administrative water allocation. It focused on the economic development of increasing water supplies towards market-based allocation based on limited supplies and principles of sustainability and resource management': Garry, above n 69, 26. See Carruthers and Mascher, above n 73, 107–8.

84 Carruthers and Mascher, above n 73, 108.

- improve the management of urban water.[85]

18.52 A key aspect of the NWI was to provide statutory access entitlements, which have a number of features that are characteristic of 'property' rights: exclusivity, alienability, and enforceability.[86] However, commentators express uncertainty as to the precise nature of statutory water rights. As Michael McKenzie remarked:

> Looking at all the characteristics together, there is probably enough to suggest that the water rights under access licences do amount to rights of property. However, depending on the context and the type of access licence, it would not be such a surprise if a court found otherwise.[87]

18.53 In *ICM Agriculture Pty Ltd v Commonwealth* (*ICM Case*) the High Court had to construe whether certain licences were caught by the constitutional provision concerning acquisition of property on just terms, in s 51(xxxi). This is considered below.

The example of minerals

18.54 In 1568 the *Case of Mines* established that all mines of gold and silver—the 'royal minerals'—belonged to the Crownwith the power to enter, dig and remove them.[88] The common law position with respect to gold and silver also became the law in the Australian colonies.[89] How far below the surface the *cujus est solum* doctrine went with respect to the surface land owner's land at common law was unclear, although, as Bradbrook noted,

> it is beyond doubt that at common law minerals are under the effective control of the landowner in that access to the resource can only be obtained by the surface landowner or by developers allowed entry onto the land with the landowner's consent. Thus, minerals may be said to be effectively, it not legally, in the ownership of the surface owner.[90]

18.55 In Australia, land granted from the Crown has always been subject to reservations in the Crown grant; and, from the late 19th century, such grants reserved all minerals to the Crown.[91] This amounted 'to a complete rejection of the operation of the *cujus est solum* doctrine'.[92] The limitations in the grants necessarily constrain the extent of the relevant property rights of the landowner in question. Where substances lie beneath the surface of the land the key issues in the Australian context are: the extent of reservations in the Crown grant, apart from gold and silver; and the effect of statutory intervention. With respect to the grant, if the relevant minerals were reserved,

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85 Australian Government Solicitor, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No 90 (July 2009).

86 Carruthers and Mascher, above n 73, 110. One commentator suggests that, through the NWI, Australia 'radically reformed its water entitlement system'; Garry, above n 72, 53.

87 McKenzie, above n 70, 463. As noted above, certain rights may have a 'proprietary' character, but not be regarded as property: *Yanner v Eaton* (1999) 201 CLR 351, 388–9 (Gummow J).

88 *The Case of Mines* (1568) 1 Plowd 310, 336; 75 ER 472, 510.

89 *Woolley v A-G (Vic)* (1877) 2 App Cas 163. See also *Wade v NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177.

90 Bradbrook, above n 52, 464.

91 Ibid. See later discussion of minerals.

92 Ibid.

the landowner does not 'own' them. Where the relevant minerals were not reserved, a later intervention to claim them for the Crown may give rise to a question of whether such taking is compensable and what control over access to the land the surface owner may have with respect to those granted licences for minerals.

18.56 In the Australian colonies the general pattern in each jurisdiction was 'to progressively reserve various minerals from Crown grants by legislation'.[93] What amounts to 'minerals' is a matter of construction and the legislation in each state and territory differs significantly.[94] Where some early legislation simply reserved 'minerals', later legislation was more specific in defining what was meant by the term. However, as Butt noted:

> These statutory definitions are very wide—so wide that one writer has commented that modern landowners may not even own the soil on their land.[95]

18.57 This has meant that to determine the extent of a surface owner's interest in minerals below the surface, 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'.[96]

18.58 In addition, governments in several states have resumed mineral rights that may have remained in private ownership under the relevant Crown grant applicable to that land. Crown ownership of minerals has been made universal in Victoria and South Australia by legislative expropriation of all minerals;[97] in Tasmania of specified minerals;[98] and, in New South Wales, of coal.[99] State ownership of minerals 'has the important result that governments, rather than private landholders, determine the legal regimes governing mineral exploration and production'.[100] With respect to petroleum, a similar outcome has been achieved.[101]

18.59 The position in Australia is in contrast to that in the US, where landowners own the minerals and mining companies deal directly with them over access, extraction and royalties. This difference has major implications in relation to extraction of minerals from private property.[102]

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93 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).

94 Bradbrook, above n 52, 465–8. For New South Wales see Butt, above n 43, [217].

95 Butt, above n 43, [218].

96 Bradbrook, MacCallum and Moore, above n 93, [15.18]. See also Bradbrook, above n 52.

97 *Mining Act 1971* (SA) s 16; *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 9.

98 *Mineral Resources Development Act 1995* (Tas) s 6.

99 *Coal Acquisition Act 1981* (NSW) s 5.

100 LexisNexis, *Halsbury's Laws of Australia*, Vol 11 (at 15 July 2010) 170 Energy and Resources, '60 Statutory Abolition of Private Mineral Ownership'.

101 Michael Hunt, 'Government Policy and Legislation Regarding Mineral and Petroleum Resources' (1988) 62 *Australian Law Journal* 841, 844.

102 Ibid 843.

18.60 The surface landowner's ability to control access, for the purpose of mineral exploration, is limited.[103] For example, a mining lease or mineral claim may not be granted over the surface of land in New South Wales which is on or within 200 metres of a dwelling house,[104] on or within 50 metres of a garden,[105] or over the surface of land on which there is a 'significant improvement',[106] without the written consent of the owner of the house, garden or improvement (and that of the occupant of the dwelling house, if applicable).[107] A mining lease or claim may be granted without consent below the surface 'at such depths, and subject to such conditions, as the [Minister] considers sufficient to minimise damage to that surface'.[108] A party who wishes to dispute whether such consent is required may apply to the Land and Environment Court for determination.[109] This was the course of action taken, for example, by a group of landholders in Sutton Forest in New South Wales, in opposition to Hume Coal drilling test bore holes on their property.[110] The Court granted Hume Coal access to the land, holding that an equestrian course, car park and improved pastures did not amount to 'significant improvements' under the legislation.[111]

18.61 The holder of a mining licence or lease must reach an access arrangement with the landowner, or have one determined by an arbitrator, to enter and conduct activities on a property.[112] However, the landowner has no power of veto over access to their land, and must comply with the statutory procedure for determining access arrangements.[113] The landholder is entitled to compensation for loss suffered or likely to be suffered as a result of the exercise of the rights conferred by the access arrangements.[114]

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103 See LexisNexis, *Halsbury's Laws of Australia*, Vol 11 (at 15 July 2010) 170 Energy and Resources, '220 All Land Open for Exploration and Mining'; LexisNexis, *Halsbury's Laws of Australia*, Vol 11 (at 15 July 2010) 170 Energy and Resources, '235 Land Subject to an Authority or Mineral Claim'.

104 *Mining Act 1992* (NSW) ss 62(1)(a), 62(2)(a) (mining lease), 188(1)(a), 188(2)(a) (mineral claim).

105 Ibid ss 62(1)(b) (mining lease), 62(2)(b), 188(1)(b), 188(2)(b) (mineral claim).

106 Ibid ss 62(1)(c) (mining lease), 188(1)(c) (mineral claim), sch 1 cl 23A.

107 Ibid ss 62(1), 188(1).

108 Ibid ss 62(7), 188(6).

109 Ibid ss 62(6A), 188(5). See generally LexisNexis, *Halsbury's Laws of Australia*, Vol 11 (at 15 July 2010) 170 Energy and Resources, '250 Residences and Significant Improvements'.

110 Anne Davies, 'Decision in Favour of Bore Drilling "Appalling"' *The Sydney Morning Herald* (Sydney), 2 December 2015, 11.

111 *Martin v Hume Coal Pty Ltd* [2015] NSWLEC 1461 (13 November 2015).

112 *Mining Act 1992* (NSW) s 140.

113 Ibid s 142. See further LexisNexis, *Halsbury's Laws of Australia*, Vol 11 (at 15 July 2010) 170 Energy and Resources, '275 Requirement of Access Arrangements for Prospecting Titles'.

114 *Mining Act 1992* (NSW) ss 263(1) (exploration licence), 264(1) (assessment lease), 265(1) (mining lease), 266(1) (small-scale title). See further LexisNexis, *Halsbury's Laws of Australia*, Vol 11 (at 15 July 2010) 170 Energy and Resources, '2845 Compensation for Prospecting and Mining'. Grassroots organisations such as the Lock the Gate Alliance continue to oppose and protest against what they consider to be 'unsafe coal and gas mining activities' which are

18.62 The impact of the *Coal Acquisition Act 1981* (NSW) was considered in *Durham Holdings Pty Ltd v New South Wales* (*Durham Holdings*).[115] 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.[116] By virtue of the legislation, the private owners would no longer obtain the anticipated extent of royalties. There was provision in the legislation for compensation to private owners, but the rate of compensation was capped.[117]

18.63 The plaintiffs argued that the capping of compensation amounted to the denial of 'just' or 'adequate' compensation and as such was invalid. As is pointed out in *Blackshield and Williams*, '[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 acquisitions be made on "just terms"'.[118] 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'[119]—in this case that the taking of the coal required just compensation.

18.64 The Court of Appeal rejected this argument and the High Court refused special leave to appeal. Gaudron, McHugh, Gummow and Hayne JJ said that

> 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.[120]

18.65 The legal result was that the states could acquire property without having to pay just compensation. Emeritus Professor David Farrier submitted that the High Court specifically rejected the idea of an implicit constitutional limit on state power founded on 'rights deeply rooted in our democratic system of government *and the common law*':[121]

> While the Court was concerned with the interpretation of the NSW Constitution, the argument that a just terms provision should be implied was based on the common law. The High Court rejected the suggestion that there was a doctrine of vested property

currently permitted under such state legislation: see, eg, Lock the Gate Alliance, *About Us* <www.lockthegate.org.au/about_us>.

115 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.

116 Tony Wassaf, 'Implications of *Durham Holdings Case* and Coal Compensation Discrimination' (2001) 20 *Australian Mining and Property Law Journal* 10, 10.

117 Wassaf commented that 'The Government decided that it would be better for the State if the Crown received those royalties rather than the private owners': Ibid. He remarked that the specific cap on 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.

118 George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory* (Federation Press, 6th ed, 2014) [16.24].

119 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10 (The Court).

120 *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.

121 D Farrier, *Submission 126*. Emphasis in the submission.

> rights under the common law. While this decision was primarily concerned with the right to exclude others (the government) from enjoyment, it necessarily has implications for any right to use: the effect of the acquisition was that this was completely removed.[122]

18.66 The Law Council of Australia (Law Council) expressed some disquiet, about the result in *Durham Holdings*, which, it said, 'may accord inadequate protection for so fundamental a right'.[123]

18.67 A further question concerns the relationship between native title and mineral rights. Following the High Court decision in *Mabo v Queensland [No 2]*[124] and the *Native Title Act 1993* (Cth), native title lies in *recognition*: it does not lie in Crown grant.[125] Professor Richard Bartlett notes that minerals and petroleum have been excluded from all determinations of native title by consent.[126] Other questions focus on whether native title has been extinguished by inconsistent grant and by legislation in relation to minerals.[127] However, as Bartlett states:

> it must be concluded that [*Western Australia v Ward*] dictates the general conclusion that native title rights to minerals and petroleum, even if they could be established, have been extinguished throughout Australia.[128]

18.68 The position with respect to land held by Indigenous groups under state laws may be different. For example, s 45(2) of the *Aboriginal Land Rights Act 1983* (NSW) provides that any transfer of lands to an Aboriginal Land Council under the Act 'includes the transfer of mineral resources or other natural resources contained in those lands'. This is qualified by later subsections with respect to gold, silver, coal, petroleum and uranium.[129]

18.69 The position with respect to other land rights legislation is that minerals occurring on land owned or held by Aboriginal groups under land rights legislation are owned by the Crown, not the Aboriginal group. This position is consistent with other non-Indigenous landowners.[130]

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122 Ibid. Wassaf concludes that '[t]he fact that divested coal owners can be treated in this way is quite extraordinary but it is within the power of a state government to do so and the Courts have declined to limit that power. Ultimately … under the Australian constitutional framework the complaints of discrimination and injustice in this instance are complaints of a political and not of a legal character': Tony Wassaf, 'Implications of *Durham Holdings Case* and Coal Compensation Discrimination' (2001) 20 *Australian Mining and Property Law Journal* 10, 12.

123 Law Council of Australia, *Submission 140*.

124 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

125 See Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) Ch 2, 60–1.

126 Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) [30.1]. Bartlett refers to determinations of native title under the *Native Title Act 1993* (Cth).

127 See, eg, Sean Brennan, 'Native Title and the Acquisition of Property under the Australian Constitution' (2004) 28 *Melbourne University Law Review* 28, 44–7.

128 Bartlett, above n 126, [30.4]. See *Western Australia v Ward* (2002) 213 CLR 1, which has been followed in subsequent native title determinations.

129 *Aboriginal Land Rights Act 1983* (NSW) s 45(11), (12).

130 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 12; *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) s 14; *Minerals (Acquisition) Act* (NT) s 3; *Mineral Resources Act 1989* (Qld) s 8; *Land Act 1994* (Qld) s 21; *Aboriginal and Torres Strait Islander Communities (Justice, Land and*

Protections from statutory encroachment

Australian Constitution

18.70 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.

18.71 There is no broader constitutional prohibition on the making of laws that interfere with property rights.

18.72 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'[131]—to acquire property.[132] Nevertheless, this constitutional protection is significant and is regarded as a constitutional guarantee of property rights,[133] to the extent it assures just terms for property acquired by the Commonwealth. Barwick CJ described s 51(xxxi) as 'a very great constitutional safeguard'.[134]

18.73 Because of the potential for invalidity of legislation that may offend s 51(xxxi), express provisions for compensation have been included in Commonwealth laws. In addition to a general statute—the *Lands Acquisition Act 1989* (Cth)—specific compensatory provisions have been included in many statutes.[135] There are also 'fail safe' provisions,[136] collectively described as 'historic shipwrecks clauses', that provide that, if the legislation does acquire property other than on just terms, within the

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Other Matters) Act 1984 (Qld) ss 62–3; *Aboriginal Lands Trust Act 2013* (SA) ss 52–5; *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) ss 20–3; *Maralinga Tjarutja Land Rights Act 1984* (SA) ss 21–6; *Mining Act 1971* (SA) s 16; *Aboriginal Lands Act 1995* (Tas) s 27; *Mineral Resources Development Act 1995* (Tas) s 6; *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 9; *Mining Act 1978* (WA) s 9. In the ACT, since 1 January 1911, only leasehold interests in land, which confer no rights to minerals, have been granted: *Seat of Government Acceptance Act 1909* (Cth) ss 6–7; *Leases Act 1918* (ACT) (repealed). See LexisNexis, *Halsbury's Laws of Australia*, Vol 11 (at 15 July 2010) 170 Energy and Resources, '60 Statutory Abolition of Private Mineral Ownership'.

131 Anthony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Federation Press, 4th ed, 2006) 1274.

132 In a 1980 report, the ALRC commented that the express power granted by s 51(xxxi) is, '[f]or practical purposes … the only power to authorise compulsory acquisition', with respect to the issue of whether the Crown in right of Australia retained a prerogative power to requisition property: Australian Law Reform Commission, *Lands Acquisition and Compensation*, Report No 14 (1980) [74].

133 *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 20.

134 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, 403.

135 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.

136 A description by Kirby J in *Wurridjal v Commonwealth* (2009) 237 CLR 309, 424.

meaning of s 51(xxxi), the person from whom the property is acquired is entitled to compensation.[137]

18.74 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? 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—an issue of characterisation of the relevant law.[138]

'Property'

18.75 The High Court has taken a wide view of the concept of 'property' in interpreting s 51(xxxi), reading it as 'a general term': '[i]t means any tangible or intangible thing which the law protects under the name of property'.[139]

18.76 Claimants seeking to argue the invalidity of laws under s 51(xxxi) may fail because it is held that there was no property right. In *Health Insurance Commission v Peverill* (*Peverill*),[140] the High Court considered a statutory change in a Medicare benefit that reduced the amount per item payable. A challenge was brought by a doctor to whom the benefits had been assigned through the practice of 'bulk billing'. The Court held that the benefit entitlement of the doctor did not amount to 'property'. Brennan J, for example, stated:

> The right so conferred on assignee practitioners is not property: not only because the right is not assignable … but, more fundamentally, because 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. On analysis, such a right is susceptible of enjoyment only at the moment the duty to pay is discharged. It does not have any degree of permanence or stability. That is not a right of a proprietary nature …[141]

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137 *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. The validity of such clauses was upheld in *Wurridjal v Commonwealth* (2009) 237 CLR 309.

138 *Airservices Australia v Canadian Airlines International* (1999) 202 CLR 133, [340]–[341] (McHugh J).

139 *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. It clearly extends to some rights created by statute: eg, *JT International SA v Commonwealth* (2012) 250 CLR 1, [29] (French CJ). The *Bank Nationalisation Case* considered acquisition of shares; *Dalziel* involved the commandeering of the possessory rights of a weekly tenancy; *Australasian United Steam Navigation Co Ltd v Shipping Control Board* (1945) 71 CLR 508 involved a ship, also requisitioned during wartime. 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 Australian and Overseas Telecommunications Corporation* (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 131, 1280.

140 *Health Insurance Commission v Peverill* (1994) 179 CLR 226.

141 Ibid [243]–[244]. Brennan J drew upon the description of property by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, 1247–8.

18.77 The characterisation of rights in water was considered in the *ICM Case*.[142] Three landowners conducted farming enterprises near the Lachlan River in New South Wales on land that was within the area known as the Lower Lachlan Groundwater System.[143] The landowners held bore licences under New South Wales legislation to access groundwater.[144] These licences were replaced with aquifer access licences,[145] which reduced the amount of groundwater to which the plaintiffs were entitled—for two plaintiffs by about 70%.[146] The State of New South Wales offered the plaintiffs 'structural adjustment payments' that the landowners considered inadequate.[147] 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 such payments.[148]

18.78 The plaintiffs argued that the replacement of the bore licences with the aquifer licences involved an acquisition of property otherwise than on just terms in contravention of s 51(xxxi) of the *Constitution* and that the power of the Commonwealth under ss 96 and 51(xxxvi) of the *Constitution* to grant and to make laws with respect to granting financial assistance to a state, was subject to the just terms requirement of s 51(xxxi).

18.79 There were several aspects to the constitutional argument: that the licenses were 'property'; that they were 'acquired' for the purposes of s 51(xxxi) other than on 'just terms'; and the legislation involved was state law.[149] They failed: a majority of the Court found that the replacement of the bore licences did not constitute an acquisition of property within the meaning of s 51(xxxi).[150]

18.80 With respect to the argument about 'property', the members of the Court revealed different approaches in the analysis of the groundwater licences. An initial point was to conclude that the combined effect of the state legislation was to extinguish any common law rights (to 'percolating' water, as discussed above).[151]

18.81 French CJ, Gummow and Crennan JJ considered that the licences were not proprietary, in language that was similar to *Peverill*:

> where a licensing system is subject to Ministerial or similar control with powers of forfeiture, the licence, although transferable with Ministerial consent, nevertheless may have an insufficient degree of permanence or stability to merit classification as proprietary in nature.[152]

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142 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140.
143 Ibid [91].
144 Under the *Water Act 1912* (NSW).
145 Under the *Water Management Act 2000* (NSW).
146 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [6].
147 Ibid [7].
148 Ibid [10]–[11].
149 The engagement of the state legislation in the constitutional argument is considered in Ch 20.
150 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [89] (French CJ, Gummow and Crennan JJ); [155] (Hayne, Kiefel and Bell JJ).
151 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [72] (French CJ, Gummow and Crennan JJ); [144] (Hayne, Kiefel and Bell JJ).
152 Ibid [76].

18.82 Hayne, Kiefel and Bell JJ, in contrast, considered that it 'may readily be accepted that the bore licences that were cancelled were a species of property'.[153]

> That the entitlements attaching to the licences could be traded or used as security amply demonstrates that to be so. It must also be accepted, as the fundamental premise for consideration of whether there has been an acquisition of property, that, until the cancellation of their bore licences, the plantiffs had 'entitlements' to a certain volume of water and that after cancellation their 'entitlements' were less.[154]

18.83 The constitutional question, however, was not simply whether the subject matter was 'property', but whether there had been an 'acquisition' of that property by the Commonwealth.[155] This is the principal question in most cases considering s 51(xxxi).[156]

'Acquisition'

18.84 Arguments concerning s 51(xxxi) often focus on whether a particular action is an 'acquisition' ('taking') or a 'regulation': the former being amenable to compensation, the latter within the 'allowance of laws' acknowledged as the province of government and not compensable. In the Australian context, the key question is 'acquisition' and this is a narrower one than, for example, the arguments concerning the scope of 'taking' in North American case law.[157] The American jurisprudence may nonetheless be helpful. In *Trade Practices Commission v Tooth & Co Ltd*, Toohey J commented:

> On the one hand, many measures which in one way or another impair an owner's exercise of his proprietary rights will involve no 'acquisition' such as pl (xxxi) speaks of. On the other hand, far reaching restrictions upon the use of property may in appropriate circumstances be seen to involve such an acquisition. That the American experience should provide guidance in this area is testimony to the universality of the problem sooner or later encountered wherever constitutional regulation of compulsory acquisition is sought to be applied to restraints, short of actual acquisition, imposed upon the free enjoyment of proprietary rights. In each case the particular circumstances must be ascertained and weighted and, as in all questions of degree, it will be idle to seek to draw precise lines in advance.[158]

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153 Ibid [147].

154 Ibid. Heydon J also concluded that the bore licences were a form of property: Ibid [197].

155 Samantha Hepburn argued that the majority judgments in *ICM* 'do not effectively distinguish between verification analysis [of the subject matter as 'property'] and constitutional guarantee analysis' and suggests that 'the judgment of Heydon J which supports a strong and balanced verification analysis provides a clearer and in many ways preferable foundation for the future development of statutory verification methodology': Hepburn, above n 66, 21.

156 Sean Brennan comments that as the focus of the High Court is on the other s 51(xxxi) questions, 'it is difficult to discern principles governing what is and what is not property, beyond the basic proposition that the term must be liberally construed': Brennan, above n 127, 42–3.

157 See, eg, O'Connor, above n 23, 53–63; Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 3rd ed, 2012) [15.4.2.2]. See also *Pennsylvania Coal Co v Mahon*, 260 US 393, 415 (Holmes J) (1922): 'The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking'.

158 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, 415.

18.85 Emeritus Professor Suri Ratnapala observed that

> the High Court has employed the term 'acquisition' to exclude the regulation of property in ways that diminish the exchange value of property without actual transfer of title to the state or some other person. Thus export restrictions, land zoning, price controls and the like do not attract compensation.[159]

18.86 In *JT International SA v Commonwealth*, French CJ expanded on the meaning of 'acquisition':

> 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.[160]

18.87 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.[161]

18.88 Particular difficulty with the phrase 'acquisition of property' has arisen where Commonwealth law affects rights and interests that exist not at common law but under other Commonwealth laws. 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.[162] 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.[163]

18.89 In considering the significance of the source of the right in statute, Crennan J commented:

> 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

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159 Ratnapala and Crowe, above n 157, [15.4.2.2]. In the first edition of this work, Ratnapala commented: '[t]he fact that property regulation often transfers wealth from the owner to others has not been a significant issue for the Court. Indeed the Court regards such transfers not to be subject to the just terms clause where they are authorised by the very nature of the power conferred on the Parliament': Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 1st ed, 2002) 266.

160 *JT International SA v Commonwealth* (2012) 250 CLR 1, [42]. This case is considered further in Ch 19. The impact of the analysis in the context of rights in land is considered in Ch 20.

161 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1993) 179 CLR 155, 184–5.

162 *Northern Territory National Emergency Response Act 2007* (Cth) s 31(1).

163 *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 the *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.

> 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).[164]

18.90 Where there is a modification of a statutory right by subsequent legislation, the question of whether this amounts to an 'acquisition' within 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.[165]

18.91 The question of 'acquisition' was central to the High Court's analysis in the *ICM Case*, noted above, in which a majority of the High Court decided that the replacement of the bore licences with aquifer licences did not constitute an 'acquisition' of property within the meaning of s 51(xxxi).

18.92 French CJ, Gummow and Crennan JJ concluded that

> in the present case, and contrary to the plaintiff's submissions, the groundwater in the [Lower Lachlan Groundwater System] 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).[166]

18.93 Hayne, Kiefel and Bell JJ concluded that

> [n]either 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.[167]

18.94 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)'.[168]

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164 Ibid [363].
165 Ibid [364]. References omitted.
166 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [84].
167 Ibid [153].
168 Ibid [235]. See [232]–[235]. See also Hepburn, above n 66; Carruthers and Mascher, above n 73. Other arguments in the case are considered in Chapter 20.

'Just terms'

18.95 The third question is about 'just terms'. In *Blackshield and Williams*, s 51(xxxi) is contrasted with the US constitutional provision:

> 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.[169]

18.96 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.[170]

18.97 With respect to what amounts to 'just terms', Ratnapala explains:

> A property that is under threat of acquisition loses market value. Therefore, in determining just terms the tribunal must so far as possible disregard the impact of the intended acquisition. The acquiring authority must be treated as a potential purchaser rather than a potentate. As Williams J explained in *Nelungaloo*, 'in the absence of a market, the value of the property taken must be ascertained by estimating the sum which a reasonably willing vendor would have been prepared to accept and a reasonably willing purchaser would have been prepared to pay for the property at the date of the acquisition'. The Court has consistently held that just terms also entail the observance of the two cardinal demands of natural justice: an unbiased arbiter and a fair chance to present the owner's case.[171]

Characterisation

18.98 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'.[172] 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

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169 Williams, Brennan and Lynch, above n 118, [27.130].

170 Kirby J, in dissent, accepted the plaintiffs' argument that in the context of traditional Aboriginal 'property', the 'just terms' requirement 'is not met by a statutory obligation to pay monetary compensation': *Wurridjal v Commonwealth* (2009) 237 CLR 309, [308].

171 Ratnapala and Crowe, above n 157, [15.4.3]. Citations omitted.

172 Williams, Brennan and Lynch, above n 118, [27.90].

> 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).[173]

18.99 Apart from taxation, 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*, 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.[174]

Racial Discrimination Act

18.100 The *Racial Discrimination Act 1975* (Cth) provides some protection for property rights. This became central to issues of extinguishment of native title. Section 10(1) provides:

> **Rights to equality before the law**
>
> If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

18.101 This provision was crucial in the determination of the High Court in *Mabo v Queensland [No 1]* in which the Court held that the purported extinguishment of native title, without compensation, by the *Queensland Coast Islands Declaratory Act 1985* (Qld) was inconsistent with s 10 and invalid under s 109 of the *Australian Constitution.* The object of the Queensland legislation was the extinguishment of any native title on annexation by the State of Queensland.[175]

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173 Ibid [27.92]. See also the discussion of taxation in Ratnapala and Crowe, above n 157, [13.1]. That taxation is not considered a taking of property is based on the principle of representation or consent. This rule goes back to ancient common law principles recognised in cls 12 and 14 of the *Magna Carta* 1215. This cardinal rule of constitutional government is strongly enforced by the Commonwealth Constitution under which, taxes can only be imposed by law enacted by federal or state parliament, duties of excise and custom being exclusive to the federal Parliament (ss 51(ii), 53, 55 and 90); revenue raised from tax becomes part of the Consolidated Revenue Fund (CRF) (s 81); no funds can be withdrawn from the CRF without parliamentary authorisation (s 83); and according to constitutional convention, a government that is denied supply by the House of Representatives cannot continue.

174 *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; *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134. See discussion in Williams, Brennan and Lynch, above n 118, 1232–58.

175 *Mabo v Queensland [No 1]* (1988) 166 CLR 186, 214 (Brennan, Toohey and Gaudron JJ). However the Court held that, subject to the *Constitution* and paramount Commonwealth laws, including the *Racial Discrimination Act*, it was not beyond the power of the Queensland Parliament to extinguish native title without compensation. See discussion in Bartlett, above n 126, [2.1]–[2.15].

18.102 Similarly, in *Western Australia v Commonwealth*, the High Court held that the *Land (Titles and Traditional Usage) Act 1993* (WA), which extinguished native title in that state and replaced it with lesser statutory rights, was inconsistent with s 10 of the *Racial Discrimination Act*.[176] As explained by the Court:

> If a law of a State provides that property held by members of the community generally may not be expropriated except for prescribed purposes or on prescribed conditions (including the payment of compensation), a State law which purports to authorize expropriation of property characteristically held by the 'persons of a particular race' for purposes additional to those generally justifying expropriation or on less stringent conditions including lesser compensation) is inconsistent with s 10(1) of the *Racial Discrimination Act*.[177]

18.103 The *Native Title Act 1993* (Cth) expressly states that it is to be read and construed subject to the provisions of the *Racial Discrimination Act*.[178] The *Native Title Act* also provides a scheme for managing the past and future extinguishment of native title, which may involve the payment of compensation for extinguishing acts.[179]

Principle of legality

18.104 The principle of legality provides some protection for vested property rights.[180] 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'.[181]

18.105 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'.[182]

18.106 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.[183] The presumption is also described as even stronger as it applies to delegated

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176 *Western Australia v Commonwealth* (1995) 183 CLR 373.

177 Ibid [41] (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). See discussion in, eg, Bartlett, above n 126, [3.26]–[3.28].

178 *Native Title Act 1993* (Cth) s 7.

179 See, eg, Bartlett, above n 126, ch 28. Issues of extinguishment are considered by Bartlett in pt 3.

180 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 2.

181 *Clissold v Perry* (1904) 1 CLR 363, 373. See also *Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552, 563 (Griffith CJ and Rich J).

182 *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].

183 '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*

legislation.[184] The wording of a statute may of course be clear enough to rebut the presumption.[185]

18.107 Professor Kevin Gray describes the 'interpretive canons' that reflect the principle of legality in the property context as summarised by two propositions, which he says 'comprise the core of an historic and freestanding common law doctrine relating to takings':[186]

> First, expropriatory legislation is presumed (in the absence of an unequivocally expressed common intent) to require the payment of compensation. This presumption gives expression to what McTiernan J once called an important 'rule of political ethics'. Any compulsory deprivation of title for the benefit of the wider community represents a sacrifice which should be shared by that community collectively. No individual citizen should be 'singled out to bear a burden which ought to be paid for by society as a whole'. The prejudice against arbitrary or uncompensated taking is, in the words of Kirby J, 'basic and virtually uniform in civilised legal systems'.
>
> Second, merely regulatory legislation is presumed (in the absence of a clear contrary intent) to require *no* payment of compensation. The prime demonstration of this rule of interpretation appears in the widespread refusal to accept that the restrictions imposed by zoning laws give rise to any compensation claim by the affected landowner. Such 'adjustment of competing claims between citizens' imposes (or reinforces) burdens which must simply be 'endured in the public interest'.[187]

18.108 In relation to the assertion of control over water, the legislation by which common law rights of land holders were replaced by access licences gave rise to consideration of the principle of legality in relation to the question of whether the vesting clauses in state legislation extinguished private rights.[188] In the *ICM Case*, the High Court concluded that the combined effect of the state legislation was to extinguish common law rights.[189]

International law

18.109 Article 17 of the UDHR provides:

> (1) Everyone has the right to own property alone as well as in association with others.

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).

184 *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 *University of Western Australia v Gray (No 20)* (2008) 246 ALR 603, [87] (French J).

185 *ASIC v DB Management Pty Ltd* (2000) 199 CLR 321, [43]. See also *Mabo v Queensland [No 1]* (1988) 166 CLR 186. In the latter case, while the High Court held that the *Queensland Coast Islands Declaratory Act 1985* (Qld) was invalid under the *Racial Discrimination Act*, Brennan, Toohey and Gaudron JJ observed that the Qld Act would only have had the 'draconian' effect of extinguishing native title, without compensation, if the terms of the legislation 'do not reasonably admit of another': Ibid 213–14.

186 Kevin Gray, 'Can Environmental Regulation Constitute a Taking of Property at Common Law?' (2007) 24 *Environmental and Planning Law Journal* 161, 166.

187 Ibid 165–6. Citations omitted.

188 Gardner et al, above n 71, [9.31]–[9.33], ch 10.

189 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [72] (French CJ, Gummow and Crennan JJ); [144] (Hayne, Kiefel and Bell JJ).

(2) No one shall be arbitrarily deprived of his property.

18.110 Article 17.1 is reflected in art 5(d)(v) of the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD),[190] which guarantees 'the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law' in the exercise of a range of rights, including the 'right to own property alone as well as in association with others'.[191]

18.111 The recognition and protection of intellectual property is specifically referred to in the UDHR, art 27:

> Everyone has the right to the protection of the moral and material interests resulting from any scientific literary or artistic production of which he is the author.

18.112 Such international instruments do not become part of Australian law until incorporated into domestic law by statute,[192] as for example when the *Racial Discrimination Act* was enacted to give effect to CERD. International instruments cannot otherwise be used to 'override clear and valid provisions of Australian national law'.[193] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[194]

18.113 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*.[195] 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 reduce alcohol-related problems on Palm Island.

18.114 The protection of property stated in the UDHR is a limited one.[196] 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 … enjoy no such status.[197]

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190 *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).

191 See also *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26.

192 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

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

194 *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 2.

195 *Maloney v The Queen* (2013) 252 CLR 168.

196 Professor Simon Evans suggests that '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': Simon Evans, 'Should Australian Bills of Rights Protect Property Rights' (2006) 31 *Alternative Law Journal* 19, 20. Lorraine Finlay submitted, however, that 'a compensation guarantee is implicit': L Finlay, *Submission 97*.

197 Environmental Justice Australia, *Submission 65*.

18.115 There is no express guarantee of property rights in either the ICCPR or the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),[198] although the ICESCR, in art 15, does recognise the right of an author, in terms replicating art 27 of the UDHR.

18.116 A further obligation under international law arises out of free trade agreements (FTAs) that Australia has entered into.[199] The FTAs have introduced certain obligations with respect to expropriation of property that are binding on Australia at international law. For example, art 11.7 of the *Australia-United States Free Trade Agreement* provides:

> Article 11.7: Expropriation and Compensation
>
> 1. Neither Party may expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation ('expropriation'), except:
>
> (a) for a public purpose;
>
> (b) in a non-discriminatory manner;
>
> (c) on payment of prompt, adequate, and effective compensation; and
>
> (d) in accordance with due process of law.[200]

18.117 Actions that amount to nationalisation or expropriation may include both 'direct expropriation'—when property is transferred to the state; and 'indirect expropriation'—'where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure'.[201] Among the factors to be considered is 'the extent to which the government action interferes with distinct, reasonable investment-backed expectations'.[202] In this respect, the meaning of 'indirect expropriation' may be wider than the meaning attributed to the term 'acquisition' in s 51(xxxi) of the *Constitution* by the High Court. A qualification is set out: namely, '[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment, do not constitute indirect expropriations'.[203]

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198 Lorraine Finlay points to other analysis which suggests that 'a general "global right to property" does exist as a binding obligation under international law': L Finlay, *Submission 97*.

199 See Department of Foreign Affairs and Trade (Cth), *Free Trade Agreements: Status of FTA Negotiations* <dfat.gov.au>.

200 Department of Foreign Affairs and Trade (Cth), *Australia-United States Free Trade Agreement: Chapter Eleven—Investment* <dfat.gov.au>. What amounts to adequate and effective compensation is spelled out, including that it be 'equivalent to the fair market value of the expropriated investment immediately before the expropriation took place': Ibid art 11.7(2)(b). Licences in relation to intellectual property rights issued in accordance with the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS agreement) are excepted: art 11.7(5)

201 Department of Foreign Affairs and Trade (Cth), above n 200, annex 11–B paras 2–3.

202 Ibid annex 11–B para 4(a)(ii).

203 Ibid annex 11–B para 4(b).

18.118 As noted above, Australia's obligations under international treaty law have no domestic force unless given effect by valid federal law. The Commonwealth Parliament has enacted the *US Free Trade Agreement Implementation Act 2004*, but it does not cover the subject of expropriation. Where statutory language permits, Australian courts are likely to favour constructions that are more consistent with Australia's treaty obligations. They will not, however, use treaty provisions to set aside the clearly expressed language of valid legislation. This may include expropriations under state laws. This does not mean that the federal government is relieved of its obligations at international law and may be obliged to compensate investors who lose property through state expropriation.

18.119 The Commonwealth government cannot compel a state government to comply with art 11.7 except by valid federal law. The Commonwealth Parliament has competence to implement treaties concluded in good faith under the external affairs power in s 51(xxix) of the Constitution. Such legislation may override inconsistent state laws. This is a matter that may be addressed by inter-governmental agreement.

Bills of rights

18.120 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,[204] New Zealand[205] and Victoria.[206]

18.121 The *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) expressly added a recognition of property interests in Protocol 1, art 1.[207] Headed, 'Protection of property', art 1 states that 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions'. There are qualifications in the expression of the right, considered below.

Justifications for interferences

18.122 At common law the power of parliament to encroach upon property rights was subject to the qualification that any deprivation was not arbitrary and only occurred where reasonable compensation was given. The most general justification for laws that interfere with, or take away, vested property interests—that the interference was not 'arbitrary'—is that the action was necessary and in the public interest. For example, the ECHR, after setting out the right to peaceful enjoyment of a person's 'possessions', states:

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204 *United States Constitution* amend V, the 'due process' provision.

205 *New Zealand Bill of Rights Act 1990* (NZ) s 21.

206 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 20.

207 *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). This may be regarded as an international treaty in addition to being a bill of rights: see Koen Lenaerts, 'Fundamental Rights in the European Union' (2000) 25 *European Law Review* 575.

> 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.[208]

18.123 Bills of rights commonly provide exceptions to the right not to be deprived of property, in similar terms, usually provided the exception is reasonable, in accordance with the law, and subject to just compensation.[209] 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.[210]

18.124 The provision in the *Australian Constitution* concerning acquisitions of property on just terms, considered above, is another example.

18.125 There are many laws and regulations that interfere with, or affect, property rights. The authority to do so is not in issue. What may amount to an interference 'in the public interest' can be subjected to a structured proportionality analysis, to assess whether a given law that interferes with property rights has a legitimate objective and is suitable and necessary to meet that objective, and whether—on balance—the public interest pursued by the law outweighs the harm done to the individual right.

Legitimate objectives

18.126 The control or regulation of the use of property in the public interest has been considered a legitimate objective, so long as that does not amount to an 'acquisition' or 'taking' of property, such as to contravene constitutional requirements of 'just terms' compensation.

18.127 For example the ECHR states that the right to possession

> 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.[211]

18.128 The regulation of the use of property rights may have an objective of protecting the environment, of balancing competing private interests, or be for the broader public interest.[212] Commonwealth laws that regulate the content and advertising of products, such as food, drinks, drugs and other substances, to protect the health and safety of Australians, are considered in Chapter 19. Laws that interfere with real property rights are considered in Chapter 20.

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208 *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) Protocol 1, art 1.

209 See, *New Zealand Bill of Rights Act 1990* (NZ) s 21; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 20.

210 *United States Constitution* amend V.

211 *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) Protocol 1, art 1.

212 See Lee Godden and Jacqueline Peel, *Environmental Law* (Oxford University Press, 2010) ch 4.

18.129 The objective may be to regulate competing private claims to rights—such as the various laws concerning priorities to land and goods, referred to above. One particular aspect of such laws was tested in the UK, invoking the ECHR, which was incorporated into the domestic law of the UK in the *Human Rights Act 1988*. In the House of Lords opinion in *JA Pye (Oxford) Ltd v Graham* (*Pye Case*), Michael Graham established a claim to title of certain agricultural land by virtue of adverse possession pursuant to the then applicable limitation of actions legislation.[213] The dispossessed landowners, including JA Pye (Oxford) Ltd, claimed that their property rights were protected by the ECHR and had been violated because they had lost ownership of their land without compensation.

18.130 The litigation was then taken to the European Court of Human Rights, finally reaching the Grand Chamber, which focused on the meaning of 'necessary to control the use of property in accordance with the general interest' in art 1. The Grand Chamber, by majority, held that, although the relevant provision was engaged, there had been no violation of the rights of the prior landowners by virtue of their loss of the land due to adverse possession.

18.131 The limitation of action provisions were characterised as 'not intended to deprive paper owners of their ownership',

> but rather to *regulate questions of title* in a system in which, historically, twelve years' adverse possession was sufficient to extinguish the former owner's right to re-enter or to recover possession, and the new title depended on the principle that unchallenged lengthy possession gave a title.[214]

18.132 Regulating questions of title as part of the general land law was a 'control of use' that did not amount to a 'deprivation of possessions' within art 1.

18.133 Distinguishing 'regulation' or 'control' from 'acquisition', 'deprivation' or 'taking' is generally intertwined with the question of compensation and its reasonableness. 'The precise location of the threshold where regulation shades into confiscation (ie effects a "regulatory taking")', Gray commented, 'is one of the most difficult questions of modern law'.[215] The specific application of the acquisition/regulation distinction in the context of Commonwealth laws is considered in Chapter 19, in relation to personal property, and Chapter 20, in relation to real property.

Balancing rights and interests

18.134 Where a law interferes with property rights and is aimed at a legitimate objective, a further question may be asked as to the appropriate balance between interests, including between private interests and between private interests and the public interest.

213 *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.
214 *Pye v United Kingdom* [2007] III Eur Court HR 365, [66]. Emphasis added.
215 Gray, above n 186, 175. See also O'Connor, above n 23.

18.135 An example of the balancing of private rights and the public interest is evident in *JT International SA v Commonwealth*, in considering whether there had been an acquisition of property within s 51(xxxi) of the *Constitution* pursuant to the *Tobacco Plain Packaging Act 2011* (Cth) (TPP Act). French CJ rejected the argument that there had been an 'acquisition' of the plaintiffs' intellectual property by the application of Commonwealth regulatory requirements as to the textual and graphical content of tobacco product packages. Rather, he said:

> it reflects 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. The scheme does that without effecting an acquisition.[216]

18.136 The Law Council submitted, to similar effect, that the question should be whether the public interest in acquisition, abrogation or erosion of the property right outweighs the public interest in preserving the property right.[217]

18.137 A balancing of rights is evident in the *Pye Case* illustrating the application of the ECHR provision in the UK. The majority of the Grand Chamber of the European Court of Human Rights stated that, to be compatible with the first part of art 1, an interference with the right to 'peaceful enjoyment' of property 'must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.[218] Normally a taking of property without reasonable compensation would amount to a 'disproportionate interference' in contravention of art 1.

> The provision does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of 'public interest' may call for less than reimbursement for the full market value.[219]

18.138 In this case, the applicants lost their land through the operation of limitation provisions for actions to recover land. The interest in land was '*necessarily* limited by the various rules of statue and common law applicable to real estate'—including 'town and country planning legislation, compulsory-purchase legislation, and the various rules on adverse possession'.[220]

18.139 In deciding whether there was a 'fair balance' in the application of the 'control of use', the majority said that there must be a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'. The Court acknowledged that 'the State enjoys 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

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216 *JT International SA v Commonwealth* (2012) 250 CLR 1, [43]. See Arts Law Centre of Australia, *Submission 50*.

217 Law Council of Australia, *Submission 75*.

218 *Pye v United Kingdom* [2007] III Eur Court HR 365, [53].

219 Ibid [54].

220 Ibid [62]. Emphasis added.

achieving the object of the law in question'.[221] The determination of what was a 'fair balance' was not a straightforward one, given that the decision was reversed several times before it reached the Grand Chamber, which itself overturned the first decision of the European Court.[222]

18.140 One rationale of the adverse possession rules was said to be certainty.[223] However where the ownership of land is clear, as in the context of registered titles, this rationale is not compelling. In the House of Lords in *Pye*, Lord Bingham said that

> where land is registered it is difficult to see any justification for a legal rule which compels such an apparently unjust result, and even harder to see why the party gaining title should not be required to pay some compensation at least to the party losing it.[224]

18.141 Such arguments support review of the law concerning adverse possession—a matter covered in Australia under state laws.[225] The particular law in question in the UK was amended in 2002.[226]

18.142 What a case like *Pye* demonstrates is how a proportionality analysis can be used in relation to laws that may be said to interfere with property rights. It also shows how fine the distinction sometimes is in characterising a law as a 'control of use' or 'regulation' as distinct from one that is regarded as a 'taking' or 'acquisition'—particularly where the law concerns a restriction of, or has an impact on, use.

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221 Ibid [75]. The particular litigation had gone through several stages to reach the Grand Chamber, in each case involving a reversal of the decision before. The litigation prior to the Grand Chamber's consideration is considered in Brendan Edgeworth, 'Adverse Possession, Prescription and Their Reform in Australian Law' (2007) 15 *Australian Property Law Journal* 1. While the decision was ultimately in favour of the adverse possessor, considerable disquiet was expressed by a number of the judges involved as to the result, particularly in the context of registered land titles.

222 The decision at first instance was that the claim to possessory title succeeded: [2000] Ch 676 (Neuberger J). This was reversed in the Court of Appeal: *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804. The House of Lords then allowed the appeal, restoring the first instance decision: *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419. The dispossessed landowners then applied to the European Court which upheld the claim: [2005] ECHR 921. The Grand Chamber then overturned the previous ruling: *JA Pye (Oxford) Ltd and JA Pye (Oxford) Land Ltd v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 44302/02, 30 August 2007).

223 The classical exposition of this is by Sir Thomas Plumer MR in *Marquis Cholmondeley v Lord Clinton* (1820) 2 Jac & W 1; 37 ER 527. Other justifications have been found, eg, in the 'law and economics' school: Brendan Edgeworth, above n 221, 12–13. The preference for the active user of land over the one who 'sleeps' on the title, may also reflect John Locke's justifications of property on the basis of labour: John Locke, *Two Treatises of Government* (Cambridge University Press, First Published 1690, 2nd Ed, Peter Laslett Ed, 1967) [27], [32]. See Brendan Edgeworth, above n 221, 14–15.

224 *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, [2].

225 Professor Brendan Edgeworth makes a compelling case for such review of adverse possession laws, and the related laws of prescriptive easements: Brendan Edgeworth, above n 221. See also Lynden Griggs, 'Possession, Indefeasibility and Human Rights' (2008) 8 *Queensland University of Technology Law Journal* 286.

226 See, eg, Elizabeth Cooke, *The New Law of Land Registration* (Hart Publishing, 2003).

19. Personal Property Rights

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Summary

19.1 Many Commonwealth laws interfere with personal property rights. The key areas of concern examined in this chapter include banking and taxation laws, personal property securities, intellectual property and criminal laws. Many have been the subject of recent reviews or extended consideration by parliamentary committees or the High Court.

19.2 The breadth of the proceeds of crime legislation is one area that may require further consideration. The *Proceeds of Crime Act 2002* (Cth) provided for a review, which took place in 2006. The Parliamentary Joint Committee on Law Enforcement provides ongoing scrutiny of the Commonwealth legislation. Given the potential impact of unexplained wealth measures on personal property, and the proposal for a national coordinated scheme by the Law Enforcement Committee, the ongoing scrutiny needs to ensure that such a scheme is proportionate in light of its objectives to meet the obligations agreed to under the *United Nations Convention Against Corruption*. The ALRC also suggests that a further review be scheduled in due course.

Laws that interfere with property rights

19.3 A wide range of Commonwealth laws may be seen as interfering with personal property rights. Grouped into areas, provisions affecting personal property are considered below under the following headings:

- banking laws;
- taxation;
- personal property securities;

- intellectual property;
- protection of cultural objects; and
- search and seizure provisions.

19.4 These laws are summarised below. Some of the justifications that have been advanced for laws that encroach on personal property rights, and public criticisms of laws on that basis, are also discussed.

Banking laws

Unclaimed money laws

19.5 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 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.[1]

19.6 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.[2] 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 10 years, would become the property of the Bank.[3]

19.7 The modern successor to the provision in the 1911 Act 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.

19.8 In 2012, the *Treasury Legislation Amendment (Unclaimed Money and Other Measures) Act 2012* (Cth) reduced the relevant period to three years. Similar changes

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1 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].

2 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.

3 Provision was made for the Governor of the Bank, with the consent of the Treasurer, to allow any claim after that period had expired, 'if he is satisfied that special reasons exist for the allowance of the claim': *Commonwealth Bank Act 1911* (Cth) s 51.

were made to first home owner accounts, life insurance and superannuation under the same amending Act.[4]

19.9 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 (Parliamentary Scrutiny) Act 2011*'.[5] However, it did not elaborate on this proposition.

19.10 The Hon Bernie Ripoll, the then Parliamentary Secretary to the Treasurer, stated that 'the reforms will ensure this lost money is properly protected so people can get what is rightfully theirs'.[6]

19.11 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.[7] However, 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 *International Covenant on Civil and Political Rights*, set out in Chapter 18.

19.12 The Human Rights Committee applied a structured proportionality test.[8] 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 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 a justification for the dramatic reduction in the period that must elapse before the obligation to transfer the funds to the ATO is activated.[9]

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4 *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).

5 Explanatory Memorandum, Banking Amendment (Unclaimed Money) Bill 2012 (Cth). The Act came into force on 1 July 2013.

6 See Bernie Ripoll, 'Media Release' (Media Release No 051, 26 November 2012).

7 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].

8 See Ch 2 in relation to proportionality; and Ch 3 in relation to the functions of the Committee.

9 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) [1.107].

19.13 The Human Rights Committee sought 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'.[10]

19.14 The Senate Standing Committee on Economics also 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.[11]

19.15 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 provided an 'appropriate measure of flexibility to address the concerns of financial institutions and protect the interests of consumers as required'.[12]

19.16 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 …[13]

19.17 In 2015, following a change of government, amending legislation was passed.[14]

19.18 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

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10 Ibid.

11 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.

12 Ibid [3.54]–[3.55].

13 Institute of Public Affairs, 'Gillard Government Seizure of Inactive Bank Accounts Is an Attack on Property Rights' (Media Release, 28 February 2013).

14 *Banking Amendment (Unclaimed Money) Regulation 2015* (Cth); *Banking Laws Amendment (Unclaimed Money) Act 2015* (Cth).

> transfer all accounts with unclaimed moneys to the Commonwealth even though many of the accounts are still effectively active. Once these accounts are transferred, account holders have to complete the necessary paperwork and verify their details in order to reclaim their accounts.[15]

19.19 The unclaimed moneys legislation is an example of an interference with personal property rights in the form of deposit accounts, which are 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 with respect to such legislation.

Taxation

19.20 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.

19.21 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'.[16]

Withholding refunds

19.22 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'.[17]

19.23 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.[18]

19.24 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.[19]

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15 *Banking Laws Amendment (Unclaimed Money) Bill 2015—Explanatory Guide* [1.4]–[1.5].
16 Australian Taxation Office, 'Law Administration Practice Statements' (PS LA 1998/1) [1].
17 The Tax Institute, *Submission 68*.
18 Ibid.
19 Ibid. The particular provisions identified were: *Taxation Administration Act 1953* (Cth) ss 14ZW(1)(aad)(i), 14ZYA.

19.25 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;
>
> (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

19.26 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.[20]

19.27 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.[21]

19.28 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:

> The 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.[22]

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20 Australian Taxation Office, 'General Debt Collection Powers and Principles' (PS LA 2011/14) [6]–[7].

21 Australian Taxation Office, 'Enforcement Measures Used for the Collection and Recovery of Tax-Related Liabilities and Other Amounts' (PS LA 2011/18) [98]–[99].

22 The Tax Institute, *Submission 68*.

19.29 While the Practice Statements are for the guidance of ATO staff, they are regularly updated and available online.[23] 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

19.30 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.[24] As noted above, schemes such as these set out rules of priority of interests.

19.31 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.[25]

19.32 A review of the operation of the *Personal Property Securities Act* was conducted in 2014–15 by Bruce Whittaker.[26] 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,[27] 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.[28]

19.33 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'.[29] He urged that a collaborative drafting process be conducted, with

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23 PS LA 2011/18, for example, was issued first on 14 April 2011, and updated on 17 May 2013 and 3 July 2014. However a taxpayer cannot enforce adherence to a practice statement: *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119 (24 October 2013) [11].

24 See further Australian Financial Security Authority, *Personal Property Securities Register* <www.ppsr.gov.au>.

25 Arts Law Centre of Australia, *Submission 50*.

26 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.

27 Ibid rec 17.

28 Ibid 73.

29 Ibid [10.1.1].

private-sector input and public consultation, through an exposure draft bill.[30] Whittaker also recommended that whether a further review was needed be considered five years after his review.[31] Regular reviews of such a kind are one mechanism for assessing whether the justifications for legislation still apply.

Intellectual property

Acquisition and the Constitution

19.34 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.[32] 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.[33]

19.35 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—s 51(xxix)—giving effect in this instance to the *World Health Organization Framework Convention on Tobacco Control*.[34]

19.36 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.[35] 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.[36]

19.37 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.

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30 Ibid [10.1.2].

31 Ibid [10.3].

32 *JT International SA v Commonwealth* (2012) 250 CLR 1.

33 *Tobacco Plain Packaging Act 2011* (Cth) ss 18–19; *Tobacco Plain Packaging Regulations 2011* (Cth).

34 *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.

35 *JT International SA v Commonwealth* (2012) 250 CLR 1.

36 Ibid [44].

Copyright

19.38 Protection of intellectual property rights was an issue identified in the Rights and Responsibilities consultation conducted by the Australian Human Rights Commission (AHRC) in 2014.[37] Protection from 'music theft' and online copyright infringement were concerns expressed during the consultation.[38] The *Copyright Amendment (Online Infringement) Act 2015* (Cth), passed on 22 June 2015, is intended to address some of these concerns.[39]

19.39 Copyright, as noted in Chapter 18, is a type of property that has a long history. It is also expressly referred to in a range of international treaties to which Australia is a party.

19.40 One stakeholder in this ALRC Inquiry drew attention to the ALRC's 2014 copyright report, in recommending a 'fair use' exception to copyright.[40] 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.[41]

19.41 This is essentially an argument for recognising another novel kind of property interest. Such a proposed 'right' has not been identified in law.[42] 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'.[43]

19.42 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.[44]

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37 Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015).

38 Ibid 44.

39 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: *Copyright Act 1968* (Cth) s 115A.

40 Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2014).

41 L Cradduck, *Submission 67*. Cradduck recommended that contracting out of copyright exceptions should be prohibited.

42 See Ch 18 concerning the fluidity and evolving nature of property rights.

43 Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015) 44.

44 Arts Law Centre of Australia, *Submission 50*.

19.43 The Australian Publishers Association submitted to similar effect that

> Copyright is not an example of Commonwealth law encroaching on rights or freedoms, it is the essential foundation for freedom of writers to ask a price for the use of their creations. Technologies have made it easier, in the words of the US Supreme Court 'to make other people's speeches'. That has made the principles of copyright more rather than less important to traditional rights and freedoms. There is a significant threat to traditional rights and freedoms, not from the inclusion of copyright in Commonwealth laws, but from the possibility of new exceptions that allow untrammelled free use of works and cut into the sustainability of an industry that has traditionally supported and expanded the freedom of expression that is a core tenet of our common law heritage.[45]

19.44 Such arguments were traversed by the ALRC in the copyright inquiry.[46]

Protection of cultural objects

19.45 The *Protection of Cultural Objects on Loan Act 2013* (Cth) provides a scheme to provide protection for cultural objects on loan. While the objects are in Australia the legislation limits the circumstances in which lenders, exhibition facilitators, exhibiting institutions and people working for them can lose ownership, physical possession, custody or control of the objects because of:

- legal proceedings in Australian or foreign courts;
- the exercise of certain powers (such as powers of seizure) under Commonwealth, State and Territory laws; or
- the operation of such laws.[47]

19.46 The legislation operates to protect the property rights of the lenders, while potentially interfering with the property interests of others who have valid claims. The legislation contains an 'historic shipwrecks' clause to ensure its constitutionality.[48]

19.47 The Explanatory Memorandum to the Bill identified the legitimate objective of the Bill as being to encourage the loan of objects from overseas for temporary public exhibition in Australia:

> The legislation addresses a significant obstacle that Australia's major cultural institutions (such as museums, galleries and libraries) face in securing the loan of foreign objects and aligns Australia with an emerging international standard to provide protection for cultural objects on loan. Under existing Commonwealth legislation, protection for objects on loan only applies in specific and limited circumstances under the *Protection of Movable Cultural Heritage Act 1986*. The absence of more comprehensive legislation has made it increasingly difficult for those institutions to secure foreign loans.[49]

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45 Australian Publishers Association, *Submission 145*.
46 The recommendations are still under consideration by the Australian Government.
47 See, Protection of Cultural Objects on Loan Bill 2012, Explanatory Memorandum.
48 *Protection of Cultural Objects on Loan Act 2013* (Cth) s 20. See Ch 18.
49 Protection of Cultural Objects on Loan Bill 2012, Explanatory Memorandum.

19.48 Another objective was of 'enhancing cultural life in Australia and promoting the right to enjoy and benefit from culture'.[50]

19.49 Given that the objective would have an impact on the assertion of rights by others, it said that '[t]o the extent that that Bill limits the right to an effective legal remedy, those limitations are reasonable, necessary and proportionate and the limitations are not arbitrary'.[51]

Proceeds of crime

19.50 Each Australian jurisdiction has legislation concerning the confiscation of the proceeds of crime.[52] 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.[53]

19.51 The Commonwealth laws include the *Proceeds of Crime Act 1987* (Cth) and the *Proceeds of Crime Act 2002* (Cth) (*Proceeds of Crime Act*). 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'.[54] 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.[55]

19.52 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:

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50 This was said to engage art 15(1)(a) of the ICESCR: the right of everyone to take part in cultural life.

51 Protection of Cultural Objects on Loan Bill 2012, Explanatory Memorandum. This legislation also provides some protection for a claim of *jus tertii*—see Ch 18. Proceeds under the *Proceeds of Crime Act 2002* (Cth) are exempt, in recognition of Australia's international obligations in relation to proceeds of crime, specifically the United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, the United Nations Convention Against Transnational Organised Crime and Its Protocol, and the United Nations Convention Against Corruption. See Craig Forrest, 'Immunity from Seizure and Suit in Australia: The Protection of Cultural Objects on Loan Act 2013' (2014) 21 *International Journal of Cultural Property* 143.

52 See summary in Lorana Bartels, 'Unexplained Wealth Laws in Australia' (Trends & Issues in Criminal Justice No 395, Australian Institute of Criminology, 2010).

53 Ibid.

54 Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, Report No 87 (1999) [1.6], [2.10]–[2.19].

55 Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, Report No 87 (1999).

> 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.[56]

19.53 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 traced back to antiquity'.[57] The ALRC cited two early examples: the feudal law of 'deodand' (Deo—to god; dandam, to be given), and the felony forfeiture rule.[58] The effect of deodand was 'to render forfeit any instrument or animal that was the cause of accidental death of a person'.[59] 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'.[60]

19.54 With the disappearance of the old common law rules,[61] new ones were developed, such as the rule that prevented a killer from benefiting from the estate of the person killed.[62] In addition, new statutory forms of forfeiture have been introduced: '*in rem* forfeiture laws which permit confiscation of goods employed for, or derived from,

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56 Explanatory Memorandum, Proceeds of Crime Bill (Cth) 2002.

57 Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, Report No 87 (1999) [2.1].

58 The origin of the word 'felony' is referred to by Gageler J in *Attorney-General (NT) v Emmerson* [2014] HCA 13 (2014) [103]. As Gageler J points out, there is a difference of view as to its origin: William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) 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, 1899) vol II, vol ii, 464–5.

59 '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*, 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.

60 Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, 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 59.

61 *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 59, 44–7.

62 See, eg, *Forfeiture Act 1995* (NSW).

illegal activity'.[63] 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.[64]

19.55 The *Proceeds of Crime Act* was said to implement Australia's obligations under the *International Convention for the Suppression of the Financing of Terrorism*, and resolutions of the United Nations Security Council relevant to the seizure of terrorism-related property.[65]

19.56 Two particular aspects of the legislation which prompted stakeholder comment concern literary proceeds and unexplained wealth.

Literary proceeds

19.57 'Literary proceeds' are defined in s 153 as 'any benefit that a person derives from the commercial exploitation of':

> (a) the person's notoriety resulting, directly or indirectly from the person committing an indictable offence or a foreign indictable offence; or
>
> (b) the notoriety of another person, involved in the commission of that offence, resulting from the first-mentioned person committing that offence.

19.58 If certain offences have been committed, literary proceeds orders can be made, ordering payments to the Commonwealth of amounts based on the literary proceeds that a person has derived in relation to such an offence. While there is no requirement that a person has been convicted of the offence, the court hearing the application for the order must be satisfied on the balance of probabilities that the person has committed the offence.[66]

19.59 The way the legislation operates is explained as follows:

> The Australian Federal Police are responsible for investigating whether or not a person has obtained literary benefits. If there is sufficient evidence to indicate that the literary proceeds provisions in the Act could capture a person's profits, the matter will be referred to the Commonwealth Director of Public Prosecutions. An application by the Commonwealth Director of Public Prosecutions is then made for restraining orders over the profits and then a literary proceeds order. The literary proceeds order will require that payments, based on the literary proceeds that a person has derived, are made to the Commonwealth.[67]

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63 Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, Report No 87 (1999) [2.5].

64 Richard Fox and Arie Freiberg, above n 59, 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).

65 Explanatory Memorandum, Proceeds of Crime Bill (Cth) 2002.

66 *Proceeds of Crime Act 2002* (Cth) s 152. See summary of provisions in: Monica Biddington, 'Selling Your Story: Literary Proceeds Orders under the Commonwealth *Proceeds of Crime Act 2002*' (Research Paper No 27, Law and Bills Digest Section, Parliament of Australia, August 2007).

67 Biddington, above n 66.

19.60 The court has to consider a number of factors when considering whether to make a literary proceeds order, including 'whether supplying the product or carrying out the activity was in the public interest'; and 'the social, cultural or educational value of the product or activity'.[68]

19.61 The provisions were tested in relation to the publication of *My Story*, a book co-authored by convicted drug smuggler Schapelle Corby with Kathryn Bonella, based on a series of secret interviews Bonella conducted with Corby inside prison in Bali. The Commonwealth Director of Public Prosecutions (CDPP) applied to the Supreme Court of Queensland, pursuant to s 20 of the *Proceeds of Crime Act*, for an order 'that any payments made by Pan Macmillan Australia to Schapelle Corby or her sister or brother-in-law or any other agent', in respect of the biography written by Corby and another, 'must not be disposed of otherwise than into the custody and control of the Official Trustee in Bankruptcy'. A similar order was sought concerning payments made to Corby's sister concerning an article published in the magazine, *New Idea*. Freezing orders were sought concerning any such payments until the determination of the CDPP's claim that these moneys should be paid to the Commonwealth.[69]

19.62 In March 2007 the Court of Appeal ruled in the CDPP's favour and held that, as literary proceeds were generated in Australia in consequence of the publication in Australia of both the book and article, that was 'sufficient to satisfy the test that a benefit was derived in Australia for the purposes of the legislation'.[70] The matter was then heard in the trial division of the Supreme Court. In 2009 the Court again ruled in the CDPP's favour, that the CDPP could seize future payments made to Corby's family as proceeds of crime. The order enabled the seizure of around $128,000.[71]

19.63 Such orders are not frequent. As one commentator remarked:

> Despite that success, applications for literary proceeds of crime orders … are few and far between. 'It's very rare', … but, in the case of Corby, 'you can't have legislation that is intended to be a deterrent and not enforce it in a high-profile case, it would send the wrong message'.[72]

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68 *Proceeds of Crime Act 2002* (Cth) ss 154(a)(ii)–(iii).

69 *DPP (Cth) v Corby* [2007] 2 Qd R 318, 319 (Keane JA).

70 Ibid 321 (Williams JA).

71 Daisy Dumas, 'Corby Caught in the Murky World of Proceeds-of-Crime Laws' *The Sydney Morning Herald* (Sydney), 20 February 2014 12; 'Schapelle Corby Book Proceeds Seized by Director of Public Prosecutions' *Herald Sun* (online), 8 April 2009 <www.heraldsun.com.au>. A US example involved Jordan Belfort (The Wolf of Wall St) who was convicted of fraud. He reportedly profited $US1.7 m from the sale of his memoirs and the movie rights based on his book, but the funds were seized under US proceeds of crime laws: Eriq Gardner, 'US Government Wants Jordan Belfort's Pay from "Wolf of Wall Street"' *The Hollywood Reporter* (online), 10 January 2014 <www.hollywoodreporter.com>. See also Lucas Bastin, 'David Hicks and Australian Proceeds of Crime Legislation: Can He Sell His Story?' (2009) 37 *Federal Law Review* 315; Rebecca Sullivan, 'Could Schapelle Corby Make Money from Her Crime?' *News.com.au* (online), 10 February 2014 <www.news.com.au>.

72 Dumas, above n 71, quoting Melbourne barrister Christian Juebner. A proposed interview of Corby by Channel 7 led to an AFP raid of the Sydney offices of Channel 7. When the likelihood of the interview changed, the AFP dropped its investigation: 'Schapelle Corby: AFP Discontinues Proceeds of Crime Investigation' *ABC News* (online), 14 March 2014 <http://www.abc.net.au/news/>.

19.64 The justification for the legislation is the avoidance of 'chequebook journalism' through the deterrence of possible seizure of assets. The Commonwealth is not alone in such legislation: Queensland, South Australia and the ACT have literary or 'artistic' proceeds confiscation provisions.[73]

19.65 Civil Liberties Australia submitted that, because the proceeds of literary works 'are not the direct proceeds of the commission of a crime', such targeting 'is an encroachment on freedom of speech'.[74]

Unexplained wealth

19.66 In 2010 the reach of the legislation was expanded to include 'unexplained wealth' provisions.[75] 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.[76]

19.67 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.[77]

19.68 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.[78] In the background to the Commonwealth provisions was an agreement by the Standing Committee of Attorneys-General,[79] in April 2009, to a set of resolutions 'for a comprehensive national response to combat organised crime',

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73 *Criminal Proceeds Confiscation Act 2002* (Qld) ss 200–11; *Criminal Assets Confiscation Act 2005* (SA) ss 110–17; *Confiscation of Criminal Assets Act 2003* (ACT) ss 80–1, 83. See analysis in Bastin, above n 71, 318–21.

74 Civil Liberties Australia, *Submission 94*.

75 *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth).

76 Revised Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 18.

77 *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.

78 Revised Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 4.

79 This body is now referred to as the Law, Crime and Community Safety Council (LCCSC).

including to strengthen criminal asset confiscation by the introduction of unexplained wealth provisions.[80]

19.69 However, proceeds of crime legislation may raise concerns about its breadth. In 2006, Tom Sherman 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:

> 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?[81]

19.70 The Law Council of Australia (Law Council) submitted to this ALRC Inquiry that civil confiscation and unexplained wealth proceedings under the *Proceeds of Crime Act* 'have the potential to interfere with property rights' and that consideration should be given to 'whether these schemes contain adequate safeguards to ensure proportionality and that intrusion upon property rights is justified'.[82] Similarly, in the AHRC 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'.[83]

19.71 In 2014, in *Attorney-General (NT) v Emmerson*,[84] 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.[85] One ground of alleged invalidity of the scheme was that it provided for an acquisition of property otherwise than on just terms.[86]

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80 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>.

81 Tom Sherman, 'Report on the Independent Review of the Operation of the *Proceeds of Crime Act 2002* (Cth)' (Attorney-General's Department, 2006) 37.

82 Law Council of Australia, *Submission 75*.

83 Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015) 46.

84 *Attorney-General (NT) v Emmerson* [2014] HCA 13 (2014).

85 *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 (2014) [15]–[21].

86 *Emmerson v DPP* (2013) 33 NTLR 1, [100] (Barr J in agreement with Riley CJ).

19.72 The objectives of the scheme were: to deter criminal activity and to prevent the unjust enrichment of persons involved in criminal activities. The objects were penal and in addition to any punishment imposed in criminal proceedings.[87]

19.73 A majority of the High Court 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 precludes any inquiry into the proportionality, justice or wisdom of the legislature's chosen measures.[88]

19.74 The Court further explained that 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'.[89]

19.75 With respect to the argument that the breadth of the provisions 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.[90]

19.76 The Court's judgment is an example of an application of the principle of legality: 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'.[91]

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87 *Attorney-General (NT) v Emmerson* [2014] HCA 13 (2014) [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'.

88 Ibid [80] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

89 Ibid [81]; *Burton v Honan* (1994) 86 CLR 169, 180.

90 *Attorney-General (NT) v Emmerson* [2014] HCA 13 (2014) [85]. Compare Gageler J who concluded that the dominant character of the laws was the acquisition of property, and the acquisition was otherwise than on just terms: Ibid [140].

91 A clear intention could not have overcome s 51(xxxi) of the *Constitution*, if it applied.

19.77 In 2012 the Parliamentary Joint Committee on Law Enforcement (Law Enforcement Committee) recommended strengthening the proceeds of crime legislation further (the Law Enforcement Committee report).[92] 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*.

19.78 The Law Enforcement Committee recommended 'major reform of the way unexplained wealth is dealt with in Australia as part of a harmonisation of Commonwealth, state and territory laws'.[93]

> 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.[94]

19.79 The Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 was reviewed by the Senate Legal and Constitutional Affairs Legislation Committee (Legal and Constitutional Affairs Committee) and the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee). The Committee supported the amendments to strengthen the *Proceeds of Crime Act*, informed by its view that 'serious and organised crime poses a significant threat to Australian communities'.[95]

19.80 The Law Enforcement Committee 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;[96] 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.[97]

19.81 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.

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92 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012). Legislation reflecting some of the recommendations was introduced in November 2012: Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012 (Cth) sch 1. This Bill lapsed.

93 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) viii.

94 Ibid.

95 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].

96 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 27–8.

97 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.

19.82 The removal of discretion was traversed fully in the Law Enforcement Committee report and by the Legislation Committee.

> 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 and may, rather than must, make the order, even though the CDPP or the agency bringing the application meets all of the requirements.[98]

19.83 The Law Enforcement Committee 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.[99] 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':[100]

> 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.[101]

19.84 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'.[102]

19.85 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 3. 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 breadth of

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98 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 a discretion was not included in the original Bill, when first introduced in 2009, but it was included by amendment in the Senate.

99 Ibid rec 12. Additional statutory oversight mechanisms were recommended: Ibid rec 13.

100 *Proceeds of Crime Act 2002* (Cth) ss 20A(4), 179E(6).

101 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].

102 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.

legislation is reviewed periodically. Since 2010 the confiscation scheme has been expressly subject to the oversight of the Law Enforcement Committee.[103]

19.86 The *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Act* was intended to improve the operation of the Commonwealth unexplained wealth provisions. The Act implemented a number of recommendations made in the Law Enforcement Committee report. These related to clarifying the investigation and litigation of Commonwealth unexplained wealth matters, such as streamlining affidavit requirements and removing a court's discretion to make unexplained wealth orders once relevant criteria are satisfied.[104] The amendments also included the stipulation of a report to the Law Enforcement Committee by the Commissioner of the Australian Federal Police about unexplained wealth investigations and proceedings.[105]

19.87 The Law Enforcement Committee also recommended that the Commonwealth Government take the lead in developing a nationally consistent unexplained wealth regime, and that a referral of powers be sought towards that end.[106] The 2015 amendments did not expressly refer to these recommendations but may be seen as a first step in this direction.

19.88 The *Proceeds of Crime Act* is subject to ongoing review by the Law Enforcement Committee. The breadth of the unexplained wealth provisions is a matter that falls within these ongoing functions.

19.89 The Law Council supported a review of the breadth of the Commonwealth proceeds of crime legislation by the Law Enforcement Committee 'to determine whether it unduly interferes with vested personal property rights' and whether the scheme was 'proportionate'. The Law Council considered that this was important because of the introduction of unexplained wealth measures into the Commonwealth legislation and the amendment in 2014 to prevent restrained assets being used to meet reasonable legal expenses for the purposes of defending unexplained wealth proceedings.

19.90 The Law Council suggested that such a review should take into account the following:

(a) personal property rights;

(b) the equality-of-arms principle;

(c) the presumption of innocence;

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103 *Proceeds of Crime Act 2002* (Cth) s 179U. This provision was introduced by the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth).

104 Explanatory Memorandum, Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth).

105 *Proceeds of Crime Act 2002* (Cth) ss 179U(3)–(5).

106 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) recs 14, 15. See also recs 16–18.

(d) legal aid commissions; and

(e) consistency with the *United Nations Convention Against Corruption*.[107]

19.91 The Law Council also pointed to an announcement in August 2015 for further changes to the unexplained wealth legislation as a matter that should be included in any review.[108]

19.92 The Law Council drew attention to the *Australian Border Force Act 2015* (Cth) and the amendment to s 213(3)(g) permitting the Comptroller-General of Customs to issue notices to financial institutions. 'Authorised officers', for the purposes of issuing notices, now include a Department of Immigration and Border Protection worker who is an Australian Public Service employee authorised by the Comptroller-General of Customs. The Law Council stated that the effect of this is that

> any authorised DIBP employee may apply for a freezing order where there is suspicion that funds in an account are proceeds of an indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concerns or is wholly or partly an instrument of a serious offence. A magistrate must then make the freezing order if satisfied that there is a risk that the balance of the account will be reduced.

19.93 The Law Council was concerned that the granting of a freeze order 'is a low threshold which leaves the court with limited discretion to refuse to make such an order', once the requirements of s 15B of the *Proceeds of Crime Act* have been met. The freeze order suspends a person's right to deal with their property, without:

(a) establishing beyond reasonable doubt that the person whose property is subject to the order has committed an offence; and

(b) the affected party being heard.[109]

19.94 The Law Council considered that the officers authorised to make a freeze order application 'should be limited to those with a demonstrated need to do so in the law enforcement context':

> It has not been demonstrated that such a need exists for APS employees within the broader DIBP and therefore may be unjustified. It is also noted that there is no time restriction on the power to freeze assets, which suggests its use may be disproportionate in its impact on those subjected to a freeze order. The Law Council recommends that the law be amended to impose a maximum time period, requiring authorised officers to justify the ongoing need for a freeze order.[110]

19.95 Concerns of this kind could be addressed through the ongoing review functions of the Law Enforcement Committee. Given the potential impact of unexplained wealth measures on personal property, and the Law Enforcement Committee's proposal for a national coordinated scheme, the ongoing scrutiny needs to ensure that such a scheme is proportionate in light of its objectives to meet the obligations agreed to under the

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107 Law Council of Australia, *Submission 140*.

108 'PM Urges Australians To Dob In Ice Dealers' *The Sydney Morning Herald* (online), 16 August 2015 <www.smh.com.au>; Michael McKenna, 'PM To Give Anti-Bikie Ice Watchdog More Bite' *The Australian* (online), 17 August 2015 <www.theaustralian.com.au>.

109 Law Council of Australia, *Submission 140*.

110 Ibid.

United Nations Convention Against Corruption. The ALRC considers that a further review in due course, like the one in 2006, should be scheduled in due course. Specific areas of review may include safeguards and procedural fairness issues.[111]

Search and seizure provisions

19.96 A number of Commonwealth criminal law provisions may interfere with property rights.[112] The Law Council identified, in particular, search and seizure provisions.[113]

19.97 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.[114] An executing officer need not inform the person where and when the equipment will be examined, if the officer 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'.[115]

19.98 While the Crimes Legislation Amendment Bill 2010 was discussed by the Scrutiny of Bills Committee, there was no comment on these provisions.[116]

19.99 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 provision for compensation for damage only to electronic equipment (s 3ZZCI) and not any other property owned by an individual, 'questions arise as to whether the scheme is reasonable or proportionate'.[117]

19.100 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 Australian Federal Police officers to covertly enter and

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111 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).

112 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.

113 Law Council of Australia, *Submission 75*.

114 *Crimes Act 1914* (Cth) ss 3K(3), (3AA).

115 Law Council of Australia, *Submission 75*.

116 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Ninth Report of 2010* (November 2010) 330–4.

117 Law Council of Australia, *Submission 75*.

search premises, without the knowledge of the occupier of the premises)'.[118] However, these comments addressed the extension of powers to issue warrants to new categories of legal officers, rather than addressing issues of interference with personal property.

19.101 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.[119] The Intelligence and Security Committee did not make specific recommendations about compensation for the seizure of property.

19.102 The Attorney-General's Department's submission to the Intelligence and Security Committee included the following comments about the justification 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.[120]

19.103 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.[121] 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.[122] The inclusion of such a clause is one way of counterbalancing concerns about potential encroachment on rights—by giving it a limited duration.

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118 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *14th Report of 2014* (October 2014) 786.

119 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) [2.49].

120 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).

121 *Crimes Act 1914* (Cth) s 3E(1).

122 Ibid s 3UK.

19.104 The Law Council also expressed concerns about s 35K of the *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*). This provision creates an immunity, subject to a number of conditions, for authorised conduct that is part of a special intelligence operation. Although the immunity does not extend to conduct that 'causes significant loss of, or serious damage to, property',[123] the Law Council submitted that the immunity

> 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.[124]

19.105 Despite the immunity, the Inspector-General of Intelligence and Security (IGIS) can recommend that ASIO pay compensation to aggrieved individuals in appropriate cases.[125] The Explanatory Memorandum for the Bill that inserted s 35K into the *ASIO Act* stated that

> the oversight role and function of the IGIS is an effective and important means of ensuring that consideration is given to the payment of compensation to individuals in appropriate cases concerning actions taken under Division 4, while preventing any prejudice to national security that could arise if participants in an SIO were subject to civil liability in respect of their conduct as part of the SIO.[126]

19.106 The Independent National Security Legislation Monitor's (INSLM) ongoing oversight roles include div 3, pt III of the *ASIO Act*, in which s 35K is located.[127] The Parliamentary Joint Committee on Intelligence and Security (Intelligence and Security Committee) is required to complete, by 7 March 2018, a review of the operation, effectiveness and implications of a number of provisions, including div 3, pt III of the *ASIO Act*.[128]

19.107 The Independent National Security Legislation Monitor's (INSLM) ongoing oversight roles include div 3, pt III of the *ASIO Act*, in which s 35K is located.[129] The Parliamentary Joint Committee on Intelligence and Security (Intelligence and Security Committee) is required to complete, by 7 March 2018, a review of the operation,

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123 *Australian Security Intelligence Organisation Act 1979* (Cth) s 35K(1)(e)(iii).

124 Law Council of Australia, *Submission 75*.

125 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).

126 Ibid.

127 *Independent National Security Legislation Monitor Act 2010* (Cth) s 6. Under s 5, the INSLM's functions include reviewing the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation. Counter-terrorism and national security legislation is defined to include div 3 pt III of the *ASIO Act*: s 4.

128 *Intelligence Services Act 2001* (Cth) s 29(1)(bb). The Intelligence and Security Committee also has the power to question ASIO officials about decisions to conduct a special intelligence operation, as part of its power to review the administration and expenditure of the intelligence agencies, including ASIO: Ibid s 29(1)(a).

129 *Independent National Security Legislation Monitor Act 2010* (Cth) s 6. Under s 5, the INSLM's functions include reviewing the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation. Counter-terrorism and national security legislation is defined to include div 3 pt III of the *ASIO Act*: s 4.

effectiveness and implications of a number of provisions, including div 3, pt III of the *ASIO Act*.[130]

Conclusion

19.108 Many Commonwealth laws identified as interfering with personal property rights have been the subject of recent reviews or extended consideration by parliamentary committees or the High Court. The parliamentary committees included an assessment of the laws in terms of their impact on rights and liberties and, in the case of the Human Rights Committee, compatibility with international human rights instruments using a proportionality analysis.

19.109 The ALRC concludes that the breadth of the *Proceeds of Crime Act* is one area that may require further consideration. The 2002 Act expressly provided for a review, which took place in 2006. The legislation was expanded in 2010 to extend to 'unexplained wealth' and was amended further in 2015. The Law Enforcement Committee provides ongoing scrutiny of the Commonwealth legislation and the Australian Federal Police must provide annual reports. However, given the potential impact of unexplained wealth measures on personal property, and the Law Enforcement Committee's proposal for a national coordinated scheme, the ongoing scrutiny needs to ensure that such a scheme is proportionate in light of its objectives to meet the obligations agreed to under the *United Nations Convention Against Corruption*. The ALRC also suggests that a further review, like the one conducted in 2006, be scheduled in due course.

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130 *Intelligence Services Act 2001* (Cth) s 29(1)(bb). The Intelligence and Security Committee also has the power to question ASIO officials about decisions to conduct a special intelligence operation, as part of its power to review the administration and expenditure of the intelligence agencies, including ASIO: Ibid s 29(1)(a).

20. Property Rights—Real Property

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Summary

20.1 This chapter builds on the discussion in Chapter 18 about the nature of property rights. It is about the common law protection of real property rights and considers particular areas of concern about Commonwealth laws affecting the rights of landholders. The main focus is on interferences with the right to use land, although there is also a limited discussion of the right to exclude others from the land.

20.2 Property rights find some protection from statutory interference 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'. An 'acquisition' of property is the most extreme form of 'interference' with real property rights. 'Interference', as used in the Terms of Reference, has a broader meaning than 'acquisition' as the term has been interpreted by the High Court with respect to s 51(xxxi).

20.3 Laws interfering with real property rights include the *Lands Acquisition Act 1989* (Cth), environmental laws, native title laws and criminal laws. Of these laws, environmental laws raised the most controversy and debate among stakeholders. Concerns were expressed that environmental laws may reduce the commercial uses to which property can be applied.

20.4 State and territory governments are primarily responsible for the management of native vegetation and biodiversity, and states have legislative power in relation to internal waters. Most of these jurisdictions do not have an equivalent provision to s 51(xxxi) of the *Australian Constitution*, which has given rise to complaint. State environmental laws are not the concern of this Inquiry; however, from the landholders' perspective the complexity of the 'interference' with property rights can only be understood in the light of both state and Commonwealth laws.

20.5 Concerns have been expressed about potential Commonwealth involvement in state 'interferences' with property rights because the Commonwealth may financially assist states with respect to natural resources management.[1] Further, the Commonwealth has significant policy responsibility for water management in the Murray-Darling Basin.[2] This Inquiry heard complaint about both the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*) and the *Water Act 2007* (Cth).

20.6 Justifications for interference with property rights from an environmental perspective include that environmental laws are necessary to implement international agreements, are in the public interest and that safeguards exist. Notably both the *EPBC Act* and the *Water Act* contain express provisions precluding the Commonwealth from acquiring property without providing compensation on just terms.[3] In the European context, a proportionality test has been used to determine whether interferences with real property rights caused by environmental laws are justified.

20.7 The *EPBC Act* interferes with the right to use land—but only to a limited extent. Whether the Act interferes with a farmer's ability to clear land is contested. The Act is constrained in its application. It does not interfere with the existing use of the land. Rather, it requires approval to change the existing use of the land where the proposed action has, or is likely to have, a 'significant' impact on a matter of national environmental significance. In most cases development proposals are approved, subject to conditions. Very few proposals have been refused. An independent review of the *EPBC Act* was completed in late 2009 and the next scheduled review is to be completed by 2019. The next scheduled review could reassess whether the interferences are proportionate and explore a range of compensatory mechanisms.

20.8 With respect to water, the common law recognised riparian rights: the proprietor of land abutting on water was entitled to certain rights in relation to that water as well as extensive rights in relation to groundwater. However, state and territory legislation

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1 *Natural Resources Management (Financial Assistance) Act 1992* (Cth).

2 *Water Act 2007* (Cth).

3 Ibid s 254; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 519.

has long provided that the primary right of access to water is vested in the Crown. The *Water Act* does not interfere in a negative way with the water entitlements in the Murray-Darling Basin that have been established under state and territory statutes. These water entitlements, that have been unbundled from land, may constitute a form of personal property. The Commonwealth has pursued consensual arrangements with the holders of water entitlements in order to deliver the desired policy outcomes with respect to water in the Murray-Darling Basin. Arguably the security and value of the water entitlements arising from state and territory law has been enhanced by the *Water Act* and non-legislative mechanisms such as water buy-backs. An independent review of the *Water Act* was completed in late 2014. It may be appropriate for the *Water Act* to be reviewed periodically as is the case with the *EPBC Act*.[4]

A common law principle

20.9 As noted in Chapter 18, the common law has long regarded a person's property rights as fundamental, and 'property rights' was one of the four areas identified as of concern in the national consultation on 'Rights and Responsibilities', conducted by the Australian Human Rights Commission in 2014.[5]

20.10 With respect to the right to exclude others from enjoyment of land, *Entick v Carrington* concerned trespass in order to undertake a search—an interference with real property in the possession of another.[6] 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.

20.11 A consequence of the principle in *Entick v Carrington* was stated by Bingham MR in *R v Somerset County Council; Ex parte Fewings*:

> In seeking to answer that question it is, as the judge very clearly explained, critical to distinguish between the legal position of the private landowner and that of a land-owning local authority … To the famous question asked by the owner of the vineyard: 'Is it not lawful for me to do what I will with mine own?' … the modern answer would be clear: 'Yes, subject to such regulatory and other constraints as the law imposes'. But if the same question were posed by a local authority the answer would be different. It would be: 'No, it is not lawful for you to do anything save what the law expressly or impliedly authorises. You enjoy no unfettered discretions. There are legal limits to every power you have'. As Laws J put it, the rule for local authorities is that any action to be taken must be justified by positive law … [7]

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4 Such a recommendation has been made to the Australian Government: Eamonn Moran et al, *Report of the Independent Review of the Water Act 2007* (2014) rec 23. A Bill introduced into the Parliament on 3 December 2015 would set 2024 as the date of the next review: Water Amendment (Review Implementation and Other Measures) Bill 2015 (Cth).

5 Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015) 8.

6 *Entick v Carrington* (1765) 19 St Tr 1029; 95 ER 807. See discussion in Ch 18.

7 *R v Somerset County Council; Ex parte Fewings* [1995] 3 All ER 20 25.

20.12 In *Plenty v Dillon*, Mason CJ, Brennan and Toohey JJ 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'.[8]

20.13 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.[9]

20.14 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 16, which deals with laws authorising what would otherwise be a tort.

20.15 The protection of the landowner by the common law 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.[10]

Protections from statutory encroachments

20.16 As outlined in Chapter 18, property rights find protection in the *Australian Constitution*, through the principle of legality at common law, and in international law.

Australian Constitution

20.17 Section 51(xxxi) of the *Australian Constitution* concerns the acquisition of property on just terms.[11] However, the protection offered by the *Constitution* is limited. It does not extend to the acquisition of property by state governments. Further, it

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8 *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* [1964] 1 QB 308, 320.

9 *Halliday v Nevill* (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.

10 *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.

11 Chapter 19 considered the application of this provision to Commonwealth laws concerning personal property. This chapter focuses upon real property.

relates only to 'acquisitions' of property, which does not capture all interferences with property rights.[12]

States and territories

20.18 As Latham CJ observed in *PJ Magennis Pty Ltd v Commonwealth* (*Magennis*), 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'.[13]

20.19 States are able to, and often do, provide compensation even though there is no constitutional requirement for them to do so. As at 1 November 2015, the Parliament of Western Australia was considering two Bills which would change the position in that state on the issue. One is a private members Bill which seeks to provide that '[a] public authority must not take property from a person, whether by direct or indirect means and whether intentionally or otherwise, under a written law or policy except on just terms'.[14] The other is a Government Bill that is intended to 'ensure that compensation which is payable for the compulsory acquisition of a part of a property is assessed not only on the value of the land taken, but also on the greater impact it has on the entire property'.[15]

20.20 On some occasions the Commonwealth has used its influence to encourage states to provide compensation.[16] Further, 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.[17]

20.21 The Law Council of Australia (Law Council) 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.[18]

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12 See Lorraine Finlay, 'The Attack on Property Rights' (The Samuel Griffith Society, 2010) 23 <http://samuelgriffith.org.au/>. See also L Finlay, *Submission 97*.

13 *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, 397–8.

14 Taking of Property on Just Terms Bill 2014 (WA) cl 6. The Explanatory Memorandum states that 'there is a strong case for legislative confirmation of the common law right to compensation on just terms where there has been a taking of property without recourse to existing statutory processes': Explanatory Memorandum, Taking of Property on Just Terms Bill 2014 (WA) 6.

15 Explanatory Memorandum, Land Acquisition Legislation Amendment (Compensation) Bill 2014 (WA) 1.

16 See, eg, *Native Title Act 1993* (Cth) s 20(1). Sections 19 and 20 empower state and territory governments to extinguish or impair native title by 'validating' past acts but only if those schemes are consistent with the *Native Title Act*, including payment of compensation.

17 *Northern Territory (Self-Government) Act 1978* (Cth) s 50; *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 23(1)(a).

18 Law Council of Australia, *Submission 75*.

20.22 The federal referendum in 1988 included a proposed law to alter the *Australian Constitution*, among other things, 'to ensure fair terms for persons whose property is acquired by any government'. The vote in favour of the resolution was only 30%.[19] One commentator argued that 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'.[20]

20.23 The Law Council was concerned by the utilisation by the Commonwealth of the 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.[21]

20.24 In *Pye v Renshaw*, the High Court dismissed an appeal by a landholder (Mr Pye) with respect to the resumption of his land by New South Wales for the purpose of resettling returned soldiers.[22] NSW and the Commonwealth had earlier entered into a funding agreement in respect of the general scheme for resettling returned soldiers. Both jurisdictions had enacted a statute with respect to the agreement. The Commonwealth statute was struck down in *Magennis* on s 51(xxxi) grounds; and NSW subsequently repealed its statute—the *War Service Land Settlement Agreement Act 1945* (NSW). The state had sought to authorise the acquisition of land by way of a different statute, the *Closer Settlement (Amendment) Act 1907–1950* (NSW). In 1950, following the High Court's decision in *Magennis*, NSW amended the *Closer Settlement (Amendment) Act* 'by deleting all reference to any agreement with the Commonwealth' and 'also deleted from all relevant legislation all reference to any agreement with the Commonwealth and all reference to any direct or indirect participation of the Commonwealth in any scheme of soldier settlement'.[23] The High Court held that the effect of the amending legislation was

> to make it perfectly clear that all relevant legislation of the Parliament of New South Wales is intended to take effect unconditioned by any Commonwealth legislation and irrespective of the existence of any agreement between the Commonwealth and the State of New South Wales.[24]

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19 Tony Wassaf, 'Implications of *Durham Holdings Case* and Coal Compensation Discrimination' (2001) 20 *Australian Mining and Property Law Journal* 10, 12.

20 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.

21 Law Council of Australia, *Submission 75*.

22 *Pye v Renshaw* (1951) 84 CLR 58.

23 Ibid 79.

24 *Pye v Renshaw* (1951) 84 CLR 58, 80.

20.25 The Court concluded that '[t]here is no possible ground of attack on the validity of this legislation, there is no ground whatever for saying that it is inoperative, and all courts are bound to give effect to it according to its tenor'.[25]

20.26 In *ICM Agriculture Pty Ltd v Commonwealth* (*ICM Case*) there was a constitutional challenge to a funding agreement (and related legislation) under which the Commonwealth had paid financial assistance to NSW. While the claim failed,[26] 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.[27] A majority of the High Court approved *Magennis* and held that 'the legislative power of the Commonwealth conferred by ss 96 and 51(xxxvi) does not extend to the grant of financial assistance to a State on terms and conditions requiring the State to acquire property on other than just terms'.[28] Hayne, Kiefel and Bell JJ noted that a law may contravene s 51(xxxi) 'directly or indirectly, explicitly or implicitly'.[29] Further, French CJ, Gummow and Crennan JJ indicated that the limitation in s 51(xxxi) may extend to executive action.[30]

20.27 The Law Council drew attention to *Spencer v Commonwealth*,[31] as demonstrating a possible inconsistency in relation to protection of property rights under Australian law.[32] The applicant, Peter Spencer, owned a farm, 'Saarahnlee', in NSW. 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 NSW and the Commonwealth—constituted an acquisition of property other than on just terms pursuant to s 51(xxxi) of the *Constitution*.[33] 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 NSW was designed to avoid the 'just terms' constraint on the exercise of legislative power under s 51(xxxi) of the *Constitution.* The Federal Court rejected Spencer's claim.[34]

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25 Ibid.

26 See discussion in Ch 18.

27 *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).

28 Ibid [46] (French CJ, Gummow and Crennan JJ); [249] (Heydon J). The extract quoted is from the joint judgment. Heydon J expressed different reasons. The joint judgment of Hayne, Kiefel and Bell JJ expressed no opinion on this issue.

29 Ibid [139].

30 Ibid [29].

31 *Spencer v Commonwealth* (2010) 241 CLR 118.

32 Law Council of Australia, *Submission 75*.

33 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].

34 *Spencer v Commonwealth* [2008] FCA 1256 (26 August 2008).

20.28 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.[35]

20.29 The case was referred back to the Federal Court for reconsideration, with the Federal Court subsequently ordering that Spencer's application be dismissed.[36]

20.30 Essentially, Spencer claimed that the State of NSW had enacted the two state laws in response to, and induced by, the Commonwealth providing funds and imposing pressure on the state,[37] in part so that the Commonwealth could meet its greenhouse gas emission targets under the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*.[38] Spencer challenged the validity of two federal laws,[39] four intergovernmental agreements,[40] the two state laws[41] and an 'informal arrangement' between the Commonwealth and NSW. Whether the two federal laws could be characterised as laws with respect to the acquisition of property lay at the heart of the case.

20.31 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.[42] The Federal Court observed that, according to the provisions of the Act, the state 'may accept the financial assistance on the terms offered, and if it does, then it will be subject to conditions concerning repayment'.[43] 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.[44] Pursuant to an agreement with the Commonwealth in 1997, the State of NSW undertook to enact native vegetation conservation legislation.

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35 *Spencer v Commonwealth* (2010) 241 CLR 118, [4]. The Federal Court noted that 'the aspect of *ICM* on which some members of the Court focused was the possibility of an informal arrangement or agreement': *Spencer v Commonwealth* [2015] FCA 754 (24 July 2015) [475].

36 *Spencer v Commonwealth* [2015] FCA 754 (24 July 2015).

37 Ibid [34].

38 Ibid [1]. *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 2303 UNTS 162 (entered into force 16 February 2005).

39 *Natural Heritage Trust of Australia Act 1997* (Cth); *Natural Resources Management (Financial Assistance) Act 1992* (Cth).

40 Two Natural Heritage Trust agreements (described in the case as the '1997 NHT Agreement' and the '2003 NHT Agreement') and two salinity agreements (described as the '2000 Salinity Agreement' and the '2002 Salinity Agreement').

41 *Native Vegetation Act 2003* (NSW); *Native Vegetation Conservation Act 1997* (NSW).

42 *Natural Resources Management (Financial Assistance) Act 1992* (Cth) s 5(1).

43 *Spencer v Commonwealth* [2015] FCA 754 (24 July 2015) [483].

44 *Natural Heritage Trust of Australia Act 1997* (Cth) s 10(a).

In 1997 the *Native Vegetation Conservation Act 1997* (NSW) was introduced, restricting the clearing of native vegetation on land.

20.32 The Federal Court was of the view that the 1997 intergovernmental agreement

> does impose terms and conditions on New South Wales, requiring it to enact legislation to decrease vegetation clearance, and increase retention of native vegetation. However, unlike *Magennis*, the agreement says nothing about the content of the legislation, and certainly nothing about New South Wales having to acquire property as part of any native vegetation clearance legislative scheme.[45]

20.33 Further agreements provided for compensation to assist where property rights were lost, which were to be addressed in developing catchment or regional plans.[46]

20.34 The Court observed that there was 'considerable' state legislation controlling land management and native vegetation clearing that dated from 'well before 1997',[47] but found that both the *Native Vegetation Conservation Act* and the *Native Vegetation Act 2003* (NSW) were 'intended to continue, and increase, that control'.[48]

20.35 The Court was in 'no doubt' that each of the four intergovernmental agreements

> proposed a series of measures to be carried out principally by the State, to reduce the clearance of native vegetation and indeed to increase the total cover of native vegetation across New South Wales. They did so in the context of much broader measures to promote natural resources management and ecologically sustainable development, those purposes and objectives being shared (at least to a significant extent) by the Commonwealth and the State.[49]

20.36 The evidence revealed 'the Commonwealth relying on its grants power as a way to influence policy and reform initiatives over which it does not have exclusive legislative competence'.[50] However, the Court saw this as 'the working out of the federal system',[51] finding 'no evidence of any improper or inappropriate, let alone unlawful, collusion or conspiracy', nor 'any plan to "get around" s 51(xxxi)'.[52]

20.37 The Court considered the practical operation and effect of the two Commonwealth statutes as part of a broader scheme.[53] While the *Natural Resources Management (Financial Assistance) Act* obliges a payee (here the state) to repay the whole or part of the payment if a condition to which the agreement is subject is not fulfilled,[54] the Court concluded that the imposition of a liability is 'at the most general level, without regard to subject matter, and in particular without any reference, express

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45 *Spencer v Commonwealth* [2015] FCA 754 (24 July 2015) [488].

46 'The likelihood of adverse impacts on some farmers being sufficiently serious to warrant "structural adjustment", or compensation by way of the State purchasing properties, was recognised expressly in the two Salinity Agreements and by reports leading to the state legislative reforms': Ibid [324].

47 Ibid [544].

48 Ibid [545].

49 Ibid [481].

50 Ibid [370].

51 Ibid.

52 Ibid [371].

53 Ibid [3].

54 *Natural Resources Management (Financial Assistance) Act 1992* (Cth) s 8.

or implied, to proprietary interests, let alone the acquisition of property'.[55] With respect to the *Natural Heritage Trust Act*, the Court did not see a sufficient connection between the objectives of the National Vegetation Initiative that were set out in s 10 'and any conduct amounting to an acquisition of property'.[56]

20.38 The Federal Court concluded that the two federal laws should not be characterised as laws with respect to the acquisition of property;[57] that the four intergovernmental agreements did not require or effect an acquisition of property;[58] and that the two state Acts did not have the effect of acquiring 'Saarahnlee'.[59] Spencer did not prove the existence of an informal arrangement.[60]

20.39 In *Esposito v Commonwealth* (*Esposito*), a similar argument was made. The argument was that

> the funding agreement between the Commonwealth and New South Wales which provided the funds which were to be used to acquire the appellants' land was to be seen as a circuitous device by which the Commonwealth and the State could, by combination, avoid the prohibition in s 51(xxxi). … There were two steps. First, the Commonwealth would use its powers under the EPBC Act to render the land in the Heritage Estates effectively worthless. Secondly, New South Wales would then use its powers to acquire the land using the funds provided by the Commonwealth under the agreement.[61]

20.40 However, the Full Court of the Federal Court agreed with the primary judge that there had been no 'acquisition'[62] and that the alleged concerted action had not been established.[63]

'Acquisition'

20.41 As discussed in Chapter 18, there must be an 'acquisition' of property in order for s 51(xxxi) of the *Constitution* to be engaged. The Law Council observed that 'some limits on the use of property are not an "acquisition" by the Commonwealth'.[64] A number of High Court cases which have considered whether there has been an 'acquisition' of property on other than just terms have concerned the right to use land.

20.42 In *Commonwealth v Tasmania* (*Tasmanian Dam Case*), 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

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55 *Spencer v Commonwealth* [2015] FCA 754 (24 July 2015) [393].
56 Ibid [395].
57 Ibid [3].
58 Ibid [485], [488], [489], [491].
59 Ibid [493].
60 Ibid [5], [371].
61 *Esposito v Commonwealth* [2015] FCAFC 160 (17 November 2015) [65].
62 Ibid [19], [66]–[71]. Importantly, the Full Court observed that 'New South Wales did not use any of its powers to acquire land compulsorily nor was it required to do so under the [inter-governmental] agreement': [67].
63 Ibid [72], [78].
64 Law Council of Australia, *Submission 140*. See also L Finlay, *Submission 97*.

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'.[65] The High Court did not accept this contention.

20.43 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 'sterilised' 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.[66] Similar views were expressed by Murphy and Brennan JJ.[67] Dr Gerry Bates has explained this judicial reasoning: 'sterilising' the land for this use did not 'prohibit other uses to which the property might be put and the Commonwealth had not effectively acquired the property'.[68]

20.44 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 [Hydro-Electric Commission] land is effectively frozen unless the Minister consents to development of it'.[69] His Honour continued:

> 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 …[70]

20.45 In *Newcrest Mining (WA) Ltd v Commonwealth* (*Newcrest*), the extension of the Kakadu National Park by proclamations made under the *National Parks and Wildlife Conservation Amendment Act 1987* (Cth) extinguished the appellant's mining rights.[71] As Kirby J explained:

> If s 7 of the 1987 Act is valid it purportedly exempted the Commonwealth from any liability to pay compensation to the appellants for such acquisition. Hence the appellants' assertion of invalidity based upon the constitutional requirement of just terms.[72]

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65 *Commonwealth v Tasmania* (1983) 158 CLR 1, 24.
66 Ibid 145–6.
67 Ibid 181 (per Murphy J); 248 (per Brennan J).
68 Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 2013) 151.
69 *Commonwealth v Tasmania* (1983) 158 CLR 1, 286.
70 Ibid 287.
71 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.
72 Ibid 639.

20.46 The Commonwealth contended that it had not acquired any property. A majority of the High Court rejected this contention. 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'.[73] Brennan CJ explained that the sterilisation had amounted to an acquisition of property because

> the Commonwealth was left in undisturbed possession of the minerals on and under the land included in Kakadu National Park. The Commonwealth's interest in respect of the minerals was enhanced by the sterilisation of Newcrest's interests therein. … The property consisted not in a right to possession or occupation of the relevant area of land nor in the bare leasehold interest vested in Newcrest but in the benefit of relief from the burden of Newcrest's rights to carry on 'operations for the recovery of minerals'.[74]

20.47 That is, the benefit that passed to the Commonwealth was the unexpired term of the mining leases.[75] Gummow J stated that there is 'no reason why the identifiable benefit or advantage relating to the ownership or use of property, which is acquired, should correspond precisely to that which was taken'.[76]

20.48 *Commonwealth v Western Australia* also concerned the right to use land for mining.[77] The land had been acquired by the Commonwealth pursuant to the *Lands Acquisition Act 1955* (Cth), and was subsequently declared a defence practice area (DPA) pursuant to the Defence Force Regulations. Two mining companies applied for mining exploration licences over land within the DPA, pursuant to the *Mining Act 1978* (WA). The Commonwealth argued that such licences could not be granted in the DPA.[78] The State counterclaimed that the relevant Commonwealth laws[79] were invalid as amounting to an acquisition of the State's property other than on just terms. The counterclaim was unsuccessful. The majority thought that frequent or prolonged authorisations for defence operations under the Defence Force Regulations could amount to an acquisition of the state's property, but that the evidence of the frequency of authorisations was absent in this case.[80]

20.49 By contrast, Kirby J considered that the use of the land for defence operations was 'clearly substantial'.[81] Kirby J found that there had been an 'acquisition':

> Because of those Regulations the entire area, and access to it, come under the power of the Commonwealth. The identifiable benefit or advantage to the Commonwealth was the ultimately unimpeded control which it thereby gained over the entire DPA … The loss of property interests suffered by the State is the loss of control over, and potential revenue from the exploitation of minerals found in the DPA during the

73 Bates, above n 68, 151 [5.34].
74 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 530.
75 Bates, above n 68, 151 [5.34].
76 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 634.
77 *Commonwealth v Western Australia* (1999) 196 CLR 392.
78 Ibid [3].
79 The laws are outlined at Ibid [66].
80 Ibid [72] (Gleeson CJ and Gaudron J), [77] (McHugh J agreeing with Hayne J), [156] (Gummow J), [259] (Hayne J).
81 Ibid [176]–[177].

> currency of the designation of the area as a DPA. There is an adequate correspondence between the loss of the State's interest and the countervailing benefit or advantage gained by the Commonwealth. The one is the result of the other. At the very least, the Commonwealth, by reason of the Defence Force Regulations, acquired the benefit of relief from the burden of the State's interests.[82]

20.50 However, Kirby J held that the Defence Force Regulations afforded 'just terms' to the state.[83]

20.51 The views expressed by Mason, Brennan and Murphy JJ in the *Tasmanian Dam Case* have generally continued to have majority support, while the view of Deane J has been carried on by Kirby and Callinan JJ in particular, but always as a minority view.[84]

20.52 In *Spencer*, the Court found that there had been a 'taking' of Spencer's 'bundle of rights' in his farm, but no 'acquisition' in constitutional terms.[85] Spencer alleged that he held a 'bundle of rights' over 'Saarahnlee' including rights to use and develop it as he saw fit and that the State had 'acquired' a benefit of a proprietary character, 'which was effectively to control what occurred on, or what was done' with it.[86]

20.53 The Court found that the impact of the state legislation had led to a 'taking' or 'sterilisation'.[87] The Court explained that, by 2006, the NSW Government had a 'specific exit assistance scheme for those farmers adversely affected by the State's native vegetation clearance laws'.[88] In 2007 'Saarahnlee' was assessed for the purposes of the Farmers Exit Assistance Program and public monies were offered to Spencer.[89] The Court stated that this evidence 'proves that ['Saarahnlee'] was considered, by those administering the scheme, not to be commercially viable by reason of the operation and application of the native vegetation clearance laws'.[90] There was 'a sterilisation of Mr Spencer's property, in terms of the uses to which it could be put'.[91] The Court was of the view that the offer under the Farmers Exit Assistance Package constituted a 'taking' because Spencer's bundle of rights in Saarahnlee was 'fundamentally' altered and impaired.[92]

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82 Ibid [187].

83 Ibid [198]. Callinan J similarly held that there was a purported 'acquisition' of the state's property, but considered that the Regulations did not provide 'just terms' and that the Declaration was invalid. See Ibid [271]–[293].

84 See further 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. 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.

85 *Spencer v Commonwealth* [2015] FCA 754 (24 July 2015) [4], [550].

86 Ibid [34].

87 Ibid [4].

88 Ibid [159]. The Court considered that there was insufficient evidence to make a positive finding that the exit assistance program was entirely funded and operated by the State: Ibid [362].

89 *Spencer v Commonwealth* [2015] FCA 754 (24 July 2015) [506], [509], [510].

90 Ibid [509].

91 Ibid.

92 Ibid [550].

20.54 Importantly, however, 'there was no acquisition by the State nor by any other person of an interest or benefit of a proprietary nature in the bundle of rights Mr Spencer held in his farm'.[93] The Court explained that for 'acquisition', 'what must be identified in the circumstances is the legal interest said to have been created between another party and Mr Spencer's land'.[94] In the Court's view, Spencer's rejection of the State's offer to pay the then market value for the property 'illustrates that he, and not anyone else, continued to be the person with a proprietary relationship over Saarahnlee'.[95]

20.55 Spencer also argued that his property, acquired pursuant to the scheme between the Commonwealth and NSW, included carbon sequestration rights.[96] Spencer alleged that he had rights in the carbon sequestered in vegetation on the property:[97]

> Absent the stricter vegetation clearance laws, he claims, he could have pursued his projects and development plans throughout the later 2000s and onwards. Emissions from his clearing of land would then have counted in Australia's inventory [of greenhouse gas emissions] and would have contributed to an increase in emissions reported.[98]

20.56 He alleged that the Commonwealth had obtained two kinds of benefits of a proprietary nature. First, it had 'acquired' a financial advantage in not having to implement other measures to reduce greenhouse gas emissions to meet targets under the Kyoto Protocol.[99] Secondly, it had obtained the benefit of the carbon stored in the native vegetation on the land as a result of banning land clearing.[100] The Court did not accept this claim, finding that Spencer 'has not established he ever held, at the requisite time, any carbon sequestration rights under the Conveyancing Act, and that no such rights existed as a profit à prendre at common law'[101] and that the alleged benefits or advantages that were secured did not have the necessary proprietary character.[102]

20.57 In *Esposito*, the appellants' arguments about s 51(xxxi) also failed on the basis that there was no acquisition of property.[103] The case concerned allotments of land, in an area called the Heritage Estates. The landowners were not permitted to build on the land because of the zoning. The applicants and other landowners within the Heritage Estates had been agitating for the land to be rezoned for a number of years. The Shoalhaven City Council sought the approval of the then Commonwealth Minister for the Environment, Water, Heritage and the Arts for the Council's proposal to rezone

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93 Ibid [4].
94 Ibid [564].
95 Ibid [567].
96 Carbon sequestration rights are mentioned in Ch 18. A carbon sequestration right is defined in NSW 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': *Conveyancing Act 1919* (NSW) s 87A. It is also deemed to be a profit à prendre, a defined interest in land: Ibid s 88AB.
97 *Spencer v Commonwealth* [2015] FCA 754 (24 July 2015) [34].
98 Ibid [247].
99 Ibid [22], [34].
100 Ibid.
101 Ibid [573].
102 Ibid [580]–[581].
103 The appellants (the landowners) were representative members of a class action.

some of the land and to undertake certain infrastructure works. The Minister made a decision under s 130 of the *EPBC Act* to refuse the approval sought. Subsequently, the relevant Commonwealth Department and the State of NSW entered into a cooperative arrangement to facilitate the Commonwealth providing funding to NSW to assist the State with the voluntary acquisition of the land within the Heritage Estates.

20.58 One of the arguments about s 51(xxxi) of the *Constitution*, concerning Commonwealth funding, was outlined earlier. The other argument was that the impact of the Minister's decision was to reduce the value of the land 'effectively to nil'

> by imposing upon them Federal legal constraints which, in substance if not form, have had the effect of barring them from the enjoyment of their land. At the same time, the Commonwealth has received what was said to be the correlative advantage of increasing the environmental amenity of the [nearby] Booderee National Park.[104]

20.59 The Full Court of the Federal Court explained that the Council had sought the Federal Minister's approval for both the rezoning of the land (despite such permission not being required by the *EPBC Act*) and for infrastructure works which would have involved actual development activity by the Council.[105] The latter approval was required under the *EPBC Act* because the Heritage Estates contained two threatened flora and two threatened fauna which were listed under the provisions of the *EPBC Act*.[106] The Minister had decided that the land should not be rezoned and that the infrastructure works should not be permitted to proceed.[107]

20.60 When examining the status of the land, the Full Court observed that, 'at the time the various members of the class acquired their lots they were acquiring land upon which, by State law, they were not permitted to build residential dwellings', noting that the landowners' use of their land 'was already largely sterilised by State law'.[108] With respect to the effect of the *EPBC Act*, the Full Court stated:

> Whatever the fetter on the development of the appellants' land was, it arose when the EPBC Act came into force on 16 July 2000. It was at that time that it became subject to a prohibition that prevented significant action which impacted on the Threatened Species or the environment of the Booderee National Park. What occurred on 13 March 2009 was not the imposition of some fresh prohibition by the Federal Minister but rather a decision by him under Pt 9 not to *lift* the prohibition which already existed under Pt 3.[109]

20.61 The Full Court explained that the appellants 'were not legally permitted to build residential dwellings on their land at any time and the EPBC Act did not change that state of affairs either when it became law on its proclamation or when the Federal

104 *Esposito v Commonwealth* [2015] FCAFC 160 (17 November 2015) [11].
105 Ibid [5]–[6].
106 Ibid [4]. Relevant provisions of the EPBC Act are detailed later in this chapter.
107 Ibid [7].
108 Ibid [21].
109 Ibid [32].

Minister made his decision under it'.[110] Noting that a hope 'is not a species of property',[111] it concluded:

> it is clear to us that the appellants continue to own all of the property they have always owned. What they have lost—the fulfilment of a value adding hope and with it the destruction of much of the value of their property—are not themselves proprietary in nature.[112]

20.62 The two limitations in the protection afforded by s 51(xxxi) of the *Constitution*—the need for an 'acquisition' and the position in the states—have been viewed by some as problematic.[113] In June 2010, the Hon Bob Katter MP introduced a private member's Bill into the Commonwealth Parliament. The Constitution Alteration (Just Terms) Bill 2010 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'.[114] The first reading speech referred to Spencer's legal action.[115] The Bill did not proceed.

Principle of legality

20.63 The 'principle of legality' provides some protection to vested property rights.[116] 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 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.[117]

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110 Ibid [57].

111 Ibid [59].

112 Ibid [61].

113 See, eg, National Farmers' Federation, *Submission 127*; L Finlay, *Submission 97*.

114 Diane Spooner, '*Property' and Acquisition on Just Terms* <www.aph.gov.au> 1. This second aspect is similar to the idea raised in the 1988 referendum.

115 For further information about the Bill see Diane Spooner, *'Property' and Acquisition on Just Terms* <www.aph.gov.au>.

116 See Ch 2 and Ch 18.

117 William Blackstone, *Commentaries on the Laws of England*, (Clarendon Press reprinted by Legal Classics Library, first published 1765–1769, 1983 ed) vol I, bk I, ch 1, 135.

20.64 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.[118]

20.65 However, the protection afforded by the principle of legality is not absolute. Rather, a significant qualification is placed on the principle in respect of regulatory restrictions on land use:[119]

> Across the common law world the standard response is that mere regulatory interference with land use or land management does *not* constitute a deprivation of property for which compensation need be paid. The words which ring in the common lawyer's ear are those of the English law lord, Viscount Simonds [in *Belfast Corporation v O D Cars Ltd* [1960] AC 490, 519], who acidly observed almost 50 years ago that regulatory diminutions of an owner's rights 'can be effected without a cry being raised that Magna Carta is dethroned or a sacred principle of liberty infringed'.[120]

International law

20.66 Article 17(2) of the *Universal Declaration of Human Rights* provides that '[n]o one shall be arbitrarily deprived of his property'.[121] This protection is, however, a limited one.

20.67 As discussed in Chapter 18, Australia has entered into a number of free trade agreements, and obligations under international law may also arise in this context.

20.68 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[122] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[123]

Bills of rights

20.69 As noted in Chapter 18, in other countries, bills of rights or human rights statutes provide some protection to property rights. The *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention on*

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118 *R & R Fazzolari Ltd v Parramatta City Council* (2009) 237 CLR 603, [43] (French CJ).

119 See D Farrier, *Submission 126*.

120 Kevin Gray, 'Can Environmental Regulation Constitute a Taking of Property at Common Law?' (2007) 24 *Environmental and Planning Law Journal* 161, 163.

121 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948).

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

123 *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 2.

Human Rights) expressly added a recognition of property rights in protocol 1, art 1—'for the peaceful enjoyment of one's possessions'.[124]

Justifications for limits on real property rights

20.70 Arguably, there are a number of laws that interfere with real property rights. Whether such an interference is justified may be assessed by applying a structured proportionality analysis, of the sort widely used in international law, in countries with bills of rights and human rights Acts and by the Australian Parliamentary Joint Committee on Human Rights. 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.

20.71 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. This Inquiry heard from two groups of stakeholders concerned about property rights: those who emphasised an environmental perspective and those who emphasised a private property perspective. The National Farmers' Federation (NFF) represented those who emphasised a private property perspective. In the wider public debate, others have also defended private property.[125]

20.72 The Australian Network of Environmental Defenders Offices (the EDOs) and Environmental Justice Australia represented 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'.[126] Laws limit land and water use to balance competing private interests, to protect the environment[127] or for the public interest. The EDOs 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'.[128] 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.

124 *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).

125 See, eg, Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015) 41.

126 Environmental Justice Australia, *Submission 65*.

127 See Lee Godden and Jacqueline Peel, *Environmental Law* (Oxford University Press, 2010) ch 4.

128 Australian Network of Environmental Defenders Offices, *Submission 60*.

International obligations

20.73 There are a range of environmental treaties which require Australia to take actions which may affect property rights.[129] For example, a number of provisions in the *EPBC Act* were enacted so as to comply with Australia's international obligations.[130] The Independent Review in 2009 of the *EPBC Act* (Hawke Report) stated that the need to meet Australia's international obligations is at 'the heart' of the Act and guides its framework. The Hawke Report listed 11 treaties and declarations which were of the 'most relevance' to environmental protection under the Act.[131] The EDOs observed that the *EPBC Act* is the 'principal legislative vehicle', at the Commonwealth level, to implement Australia's international environmental obligations. It also referred to literature that has argued that 'Australia could and should be doing more to protect species and areas listed under international conventions; that the EPBC Act may fall short of properly implementing Australia's international environmental obligations'.[132]

Public interest

20.74 The EDOs and Environmental Justice Australia argued that environmental laws are in the public interest. As the EDOs put it, environmental laws exist 'to protect the environment and conserve natural resources in the public interest, for the benefit of all Australians, including property owners'.[133] The EDOs cited Dr Nicole Graham, that environmental laws 'indicate the government's prerogative, indeed responsibility, to balance private rights against the public's interest in health and environmental protection'.[134] 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.[135]

20.75 The EDOs called for recognition that rights and freedoms operate in an ecological context, and stated that the need for ecological sustainability meant that the

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129 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).

130 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.

131 Allan Hawke, *The Australian Environment Act—Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2009) [85]. These same 11 were listed in the submission from the Department: see Department of the Environment (Cth), *Submission 149*.

132 Australian Network of Environmental Defenders Offices, *Submission 121*.

133 Australian Network of Environmental Defenders Offices, *Submission 60*.

134 Ibid citing Nicole Graham, 'Land Clearing Laws Bring Out Worrying Libertarian Streak', *The Conversation* (online), 4 August 2014 <http://theconversation.com>.

135 Environmental Justice Australia, *Submission 65* citing Gray, above n 120. With respect to the privileges of ownership having been curtailed in the context of Torrens Title, see *Oates v Director General of the Department of Infrastructure Planning and Natural Resources* [2004] NSWLEC 164 (14 April 2004).

public interest is more prominent today than in Blackstone's 18th century England.[136] They 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*'.[137] The EDOs 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"'.[138]

20.76 Another argument pertaining to the public interest is that a wider requirement to pay compensation to landholders would discourage regulators from implementing environmental protections.[139] The EDOs referred to 'takings' legislation in the United States[140] which, it argued, has had a 'chilling effect' on government regulatory activity.[141] Some consider that s 51(xxxi) of the *Constitution* can have a similar effect. However, others argue that placing a price on interferences with property rights leads to better regulatory design on the basis that what is costless is likely to be overindulged.[142]

20.77 The EDOs also submitted that the ALRC should consider 'the right of all Australians to a healthy environment' which it said, was 'emerging' in human rights law.[143]

Adequacy of existing protection

20.78 Both Environmental Justice Australia and the EDOs submitted that existing protections are adequate to safeguard against any encroachments.[144] Environmental Justice Australia submitted that the protection of s 51(xxxi) 'operates to protect

136 See Ch 18 for a discussion of water. EDOs of Australia 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 Defenders Offices, *Submission 60*.

137 Ibid.

138 Ibid. They cited NSW Office of Environment & Heritage, *Who Cares About the Environment in 2012?* (2013) 41–2.

139 Pamela O'Connor, 'The Changing Paradigm of Property and the Framing of Regulation as a Taking' (2011) 36 *Monash University Law Review* 50, 73.

140 See Ch 18.

141 Australian Network of Environmental Defenders Offices, *Submission 60*. See the submission for a list of other concerns about the implications of any changes to compensation laws.

142 See, eg, L Finlay, *Submission 97*; Jonathan Adler, 'The Adverse Environmental Consequences of Uncompensated Land-Use Controls' in Bruce Benson (ed), *Property Rights: Eminent Domain and Regulatory Takings Re-Examined* (Palgrave Macmillan, 2010) 187.

143 Australian Network of Environmental Defenders Offices, *Submission 60*. The EDOs 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'.

144 Environmental Justice Australia, *Submission 65*; Australian Network of Environmental Defenders Offices, *Submission 60*. See also Andrew Macintosh and Richard Denniss, 'Property Rights and the Environment: Should Farmers Have a Right to Compensation?' (Discussion Paper No 74, The Australia Institute, 2004).

individuals and ensure that they do not bear a disproportionate burden for the benefit of the community'.[145]

20.79 Both stakeholders also referred to other measures that 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.[146] The EDOs referred to 'public participation and transparency in decision-making, court review mechanisms and other procedural fairness'[147] that have characterised the implementation of existing environmental laws.

20.80 With respect to the *EPBC Act*, the EDOs submitted that the embedded objective of 'promot[ing] ecologically sustainable development'[148] guides decision-makers to effectively balance and integrate economic, environmental and social considerations before making a decision that affects property rights.[149]

Economic arguments

20.81 The EDOs referred to a 2012 Senate Inquiry that 'called into question' the suggestion that environmental laws are causing private developers to shoulder an unreasonable burden.[150] They also referred to a number of economic arguments in criticism of US-style 'takings' legislation.[151]

20.82 The economic arguments used to justify encroachments on real property rights were considered, for example, by the Productivity Commission in 2004.[152] In addition, Associate Professor Andrew Macintosh and Dr 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'.[153] In part, the 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'.[154]

20.83 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.[155] The NFF advocated the implementation of a beneficiary-pays model—the person who obtains a

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145 Environmental Justice Australia, *Submission 65*.
146 Ibid.
147 Australian Network of Environmental Defenders Offices, *Submission 60*.
148 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(b).
149 Australian Network of Environmental Defenders Offices, *Submission 60*.
150 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).
151 Australian Network of Environmental Defenders Offices, *Submission 60*.
152 Productivity Commission, 'Impacts of Native Vegetation and Biodiversity Regulations' (Inquiry Report No 29, 2004).
153 Macintosh and Denniss, above n 144, v.
154 Ibid. However, some might counter that farmers and irrigators obtain a significant economic benefit from having healthy land and a healthy functioning river system.
155 Ibid vi.

benefit should pay the cost of undertaking it. So, if a landowner is prohibited from clearing land for the benefit of the wider community, then the community should pay that landowner 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 clears the land, that landowner will have to pay the community for any environmental damage caused.

20.84 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.[156] They concluded that farmers should not be provided with additional statutory rights to compensation concerning interferences with land use, in part because such an approach would be unlikely to result in a significant increase in agricultural investment or output.[157] While they acknowledged that there was a more convincing economic argument with respect to the claim for compensation concerning 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.[158]

20.85 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'.[159] 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':[160]

> 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.[161]

20.86 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 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-

156 Ibid.
157 Ibid.
158 Ibid vi–vii.
159 Productivity Commission, above n 152, 221.
160 Ibid 224.
161 Ibid 225.

> community perspective. In this case, compensation would merely shift an unnecessary large cost burden from landholders to taxpayers.[162]

20.87 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.[163]

20.88 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.[164]

20.89 Macintosh and Denniss explained that farm lobby groups welcomed the Productivity Commission's report, as supporting their claims for a statutory right to compensation. However,

> [d]espite 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.[165]

Distinguishing between rights

20.90 Some stakeholders submitted that an individual's rights pertaining to a particular property are a different order of rights from human rights. The EDOs argued that the inclusion of environmental law in the Terms of Reference 'as an area that potentially unreasonably impinges upon personal freedoms evidences a misunderstanding of human rights principles as they relate to property rights'.[166] Environmental Justice Australia submitted that clearing land of native vegetation is not an innate human right:

> 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.[167]

20.91 Environmental Justice Australia contrasted the rights to ownership of property and against arbitrary deprivation of that property that are protected in international law, which enjoy 'a fundamental foundation in the integrity and dignity inherent in every

162 Ibid.
163 Ibid 238 (rec 10.7).
164 Ibid 239 (rec 10.9).
165 Macintosh and Denniss, above n 144, 2.
166 Australian Network of Environmental Defenders Offices, *Submission 60*.
167 Environmental Justice Australia, *Submission 65*. Similarly, the EDOs 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 landholders on terms subject to change. See Australian Network of Environmental Defenders Offices, *Submission 60*.

person', with 'particular rights to certain property as they exist at a particular point in time', which do not.[168]

20.92 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'.[169] Both it and the EDOs were critical of any attempt to use a human rights argument to challenge environmental law and regulation. The EDOs saw it as 'nonsensical'.[170] 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.[171] Conversely, Lorraine Finlay argued:

> Firstly, it is not a question of challenging environmental laws and regulations wholly and absolutely. There is obviously a clear community interest in environmental protection, and the question is rather one of the appropriate balance. That is, how do we strike a sensible balance between protecting the environment and protecting property rights? Secondly, property rights are intrinsically centred in a human rights framework. This is apparent at the international level where, for example, property rights are featured in the *Universal Declaration of Human Rights*. Even more importantly for our purposes, it is apparent at the domestic level within Australia through s 51(xxxi) of the *Australian Constitution* which … provides for one of the few express rights guarantees within the *Australian Constitution*.[172]

Proportionality

20.93 In the European context, a proportionality test has been used to determine whether interferences with real property rights caused by environmental laws are justified. As discussed in Chapter 18, protocol 1, art 1 to the *European Convention on Human Rights* protects the right to 'the peaceful enjoyment' of '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'.

20.94 The European Court of Human Rights has heard a significant number of cases where a citizen has alleged that a state has violated their right to property as protected in art 1 by taking measures (authorised by environment-related legislation) to protect the environment.[173] For example, in *Papastavrou v Greece*, administrative authorities

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168 Environmental Justice Australia, *Submission 65*. Others may object to this argument on the basis of internal inconsistency because a person cannot own property except as owner of particular items of property.

169 Ibid.

170 Australian Network of Environmental Defenders Offices, *Submission 60*.

171 Environmental Justice Australia, *Submission 65*.

172 L Finlay, *Submission 97*.

173 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). See also Ch 18 for a discussion of *Pye v United Kingdom* [2007] III Eur Court HR 365, although note that this case concerned the law of adverse possession rather than environmental law.

decided to reafforest land which the applicants claimed belonged to them. It was not possible to obtain compensation under Greek law. The Court found that the applicants' complaint came within the protection of peaceful enjoyment in art 1. The Court concluded that there had been a violation of art 1 because 'there was no reasonable balance struck between the public interest and requirements of the protection of the applicants' rights'.[174]

20.95 With respect to the question of whether there was a 'reasonable relationship of proportionality between the means employed and the aim pursued'—the cases relating to environmental legislation outline a number of principles. For example:

- '… an interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of protection of the individual's fundamental rights'.[175]
- 'The requisite balance will not be found if the person concerned has had to bear "an individual and excessive burden"'.[176]
- 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'.[177]

Laws that interfere with real property rights

20.96 A range of Commonwealth laws may be characterised as interfering with vested property rights—whether or not this interference may be considered justified.

20.97 The *Lands Acquisition Act 1989* (Cth) is the key piece of legislation concerning Commonwealth acquisition of land. With some exceptions, the Commonwealth can only acquire an interest in land[178] in accordance with the procedures outlined in that Act.[179] The Act provides a detailed process for Commonwealth acquisitions of land[180] and protections—including compensatory mechanisms—for people whose interests in

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174 *Papastavrou v Greece* [2003] IV Eur Court HR 257, [38]–[39].

175 *Fredin v Sweden (No 1)* (1991) 192 Eur Court HR (ser A), [51] citing the principle from *Mellacher v Austria* (1989) 169 Eur Court HR (ser A), [48] and *Sporrong v Sweden* (1982) 88 Eur Court HR (ser A), [69] (concerning 'fair balance'). See also *Pye* case discussed in Ch 18: *Pye v United Kingdom* [2007] III Eur Court HR 365.

176 *James v United Kingdom* (1986) 98 Eur Court HR (ser A), [50] citing the principle from *Sporrong v Sweden* (1982) 88 Eur Court HR (ser A), [73].

177 *Fredin v Sweden (No 1)* (1991) 192 Eur Court HR (ser A), [51] citing the principle from *Agosi v United Kingdom* (1986) 108 Eur Court HR (ser A), [52]. See also *Pye* case discussed in Ch 18: *Pye v United Kingdom* [2007] III Eur Court HR 365.

178 '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.

179 Ibid s 21(1).

180 See for example, Ibid pts IV–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.

land are adversely affected by a compulsory acquisition.[181] The *Lands Acquisition Act* was largely based on recommendations in the ALRC's 1977 report, *Lands Acquisition and Compensation*.[182] The Act was designed to modernise Australia's system of compulsory land acquisition and provide 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'.[183] The ALRC received no submissions that this Act is inconsistent with common law rights.

20.98 A number of Commonwealth laws may be seen as interfering with real property rights. These include:

- environmental laws;
- native title laws; and
- criminal laws.

20.99 Some of these laws may interfere with the right to use real property—for example, environmental laws—whereas others may interfere with the right to exclude others from one's land—for example, some criminal laws.

Environmental laws

20.100 Environmental laws may be understood as those that include provisions intended 'to protect the environment [including national heritage] and conserve natural resources in the public interest'.[184] There are approximately 60 Commonwealth environment-related statutes in force.[185]

20.101 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;[186]
- restrictions on the sale or lease of real property;[187]
- actions which adversely affect the 'enjoyment' (for example, search and enter powers), or value of real property;[188] and

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181 See, for example, the compensation scheme in pt VII of the Act.

182 Australian Law Reform Commission, *Lands Acquisition and Compensation*, Report No 14 (1980).

183 Department of Parliamentary Services (Cth), *Bills Digest*, No 114 of 1988, 24 October 1988, 1.

184 Australian Network of Environmental Defenders Offices, *Submission 60*.

185 See Department of the Environment (Cth), 'Legislation' <http://www.environment.gov.au>.

186 *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) ss 9–11; *Great Barrier Reef Marine Park Act 1975* (Cth) s 38DD.

187 *Building Energy Efficiency Disclosure Act 2010* (Cth) s 11.

188 *Environment Protection and Biodiversity Conservation Act 1999* (Cth); *National Radioactive Waste Management Act 2012* (Cth) s 11.

- restrictions on the assignment/sale of tradeable resource-use property rights.[189]

20.102 Many environmental planning statutes that may be considered to interfere with property rights are state—not Commonwealth—Acts.[190] Particular concerns have been expressed about the actions of state governments,[191] however state legislation is not the concern of this Inquiry.

20.103 While Finlay observed that state laws lie beyond the scope of this Inquiry, she submitted that Commonwealth laws could not be 'neatly "carve[d] out"' and considered alone when discussing the protection of property rights in Australia.[192] First, she noted that the 'majority' of 'environmental laws that directly impact upon property rights are State laws'. This therefore makes it 'impossible' to discuss the protection of property rights in Australia in a 'practical and meaningful way' without referring to state law. Secondly, she pointed to the increasing use of intergovernmental arrangements, 'encouraging the States (often through the use of tied funding) to implement policies that impact upon property rights'.[193] A related factor is the substantial and growing number of laws which are part of a cooperative scheme, of one form or another, between the Commonwealth and the states (or between the states alone). These cooperative schemes provide for a significant level of consistency and intertwining of Commonwealth and state laws.[194] Further, the Australian Government has committed to delivering a 'One-Stop Shop' for environmental approvals, which would mean that state planning systems would be accredited under national environmental law 'to create a single environmental assessment and approval process for nationally protected matters'.[195]

20.104 The Australian Human Rights Commission also identified the need to look at environmental issues in an integrated way:

> a comprehensive approach is required to fully explore these issues and enable dialogue between all key stakeholders, including governments (federal, state and territory). It is anticipated that the outcomes of this work could then drive significant reform to law and policy.[196]

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189 *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth); *Water Act 2007* (Cth); *Renewable Energy (Electricity) Act 2000* (Cth).

190 See eg, *Environmental Planning and Assessment Act 1979* (NSW).

191 Dr Noeleen McNamara, 'A Home Is No Longer a Castle? Real Property Rights in the Context of Mining and Environmental Claims' (Speech, ALRC Freedoms Symposium, Federal Court of Australia, Brisbane, 2 September 2015); National Farmers' Federation, *Submission 127*; M Nixon, *Submission 98*; L Finlay, *Submission 97*; National Farmers' Federation, *Submission 54*. See also Suri Ratnapala, 'Vegetation Management in Queensland: A Case of Constitutional Vandalism' (2004) 56 *IPA Review* 10.

192 L Finlay, *Submission 97*.

193 Ibid.

194 These co-operative scheme laws, including the *Water Act 2007* (Cth), are listed in Australasian Parliamentary Counsel's Committee, *National Uniform Legislation—Acts of Jurisdictions Implementing Uniform Legislation* <http://pcc.gov.au/>.

195 Department of the Environment (Cth), *One-Stop Shop for Environmental Approvals* <http://www.environment.gov.au/epbc/one-stop-shop>. As at 1 November 2015 a Bill to facilitate the One-Stop Shop policy was before the Parliament: Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 (Cth).

196 Australian Human Rights Commission, *Submission 141*.

20.105 The EDOs submitted that 'there are currently no Commonwealth environmental laws that unjustifiably interfere with vested property rights'.[197] Other stakeholders contested this, raising the *EPBC Act* and the *Water Act*.

20.106 Most Commonwealth environmental statutes include an express provision precluding the Commonwealth from compulsorily acquiring property without providing compensation on just terms.[198] While both the *EPBC Act* and the *Water Act* contain such provisions,[199] nonetheless concerns have been expressed that these two statutes may unjustifiably interfere with property rights.

EPBC Act

Key aspects

20.107 The *EPBC Act* is the central piece of Commonwealth environmental legislation.[200] It is the 'primary environmental impact assessment legislation at the national level'.[201] The objects of the Act include 'to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance' and 'to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources'.[202] The South Australian Ornithological Association said that the Act and similar legislation was enacted 'to prevent further degeneration of the natural estate and the further extinction of native species'.[203]

20.108 The *EPBC Act* affects a landholder by imposing environmental land use restrictions. The Act is concerned with *development*—it does not interfere with the *existing use* of land. Section 43B permits a person to take an 'action',[204] without an approval, if that action constitutes a lawful continuation of a use of the land.[205] Emeritus Professor David Farrier explained:

> The continuation of the existing use right is conceded even where it is compromising nature conservation values. There are not even provisions in the legislation which allow existing uses to be terminated on payment of compensation, unless the land itself is compulsorily purchased.[206]

20.109 The *EPBC Act* requires approval of the Minister to change the existing use of the land where the proposed action has, or is likely to have, a 'significant' impact on a

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197 Australian Network of Environmental Defenders Offices, *Submission 60*. See also Australian Network of Environmental Defenders Offices, *Submission 121*; Australian Conservation Foundation, *Submission 93*.

198 See, eg, *Greenhouse and Energy Minimum Standards Act 2012* (Cth) s 174. See the discussion of s 51(xxxi) and historic shipwreck clauses in Ch 18.

199 *Water Act 2007* (Cth) s 254; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 519.

200 For background on the scope of Commonwealth power with respect to the environment, see Department of the Environment (Cth), *Submission 149*.

201 Hawke, above n 131, 11.

202 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(a)–(b).

203 The South Australian Ornithological Association Inc, *Submission 82*.

204 An action includes a project, a development, an undertaking, an activity or series of activities, and an alteration to any of these: *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 523.

205 See also s 43A which concerns actions with prior authorisation. The Department's submission outlines both provisions in detail, see Department of the Environment (Cth), *Submission 149*.

206 D Farrier, *Submission 126*.

matter of environmental significance. The concept of 'significant impact' is 'central' to the Act.[207]

20.110 For example, a person is prohibited from taking an 'action' 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);
- the ecological character of a 'declared Ramsar wetland'—s 16(1);
- a 'listed threatened species' that is included in the extinct in the wild, critically endangered, endangered or vulnerable categories—s 18(1)–(4);
- a 'listed threatened ecological community' included in the critically endangered or endangered categories—s 18(5)–(6); and
- a 'listed migratory species'—s 20(1).

20.111 Contraventions of these laws attract civil penalties.

20.112 A person is prohibited from taking an 'action' that 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);
- the ecological character of a 'declared Ramsar wetland'—s 17B(1)–(2);
- a 'listed threatened species or a listed threatened ecological community'—s 18A(1)–(2); and
- a 'listed migratory species'—s 20A(1)–(2).

20.113 Contravention of any of these laws is an offence.

20.114 A person is prohibited from taking an 'action' that involves 'coal seam gas development' or 'large coal mining development' and the action has or will have, or is likely to have a significant impact on a 'water resource'.[208]

20.115 In *Greentree v Minister for the Environment and Heritage*, a farmer was prosecuted for breaching the *EPBC Act* by clearing, ploughing and sowing the land. The Full Court of the Federal Court upheld the Federal Court's decision that 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*.[209] The site had been degraded prior to the land clearing, but the Federal Court had found that despite this, there had been native trees and wetland plants on the site, that the site retained important attributes (for example, dead trees and fallen logs had provided 'a habitat critical to some species of birds') and that the site 'had the ability to regenerate

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207 Hawke, above n 131, [95].

208 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 24D(2)–(3) (civil penalty); s 24E(2)–(3) (offence).

209 *Greentree v Minister for Environment and Heritage* (2005) 144 FCR 388, [45]–[50].

relatively quickly'.[210] The clearing, ploughing and sowing had 'virtually sterilised' the site as a wetland.[211]

20.116 Viewing this as a 'flagrant' breach of the *EPBC Act*, the EDOs submitted that the case 'highlights both the restricted scope of the Act and the importance of enforcement under environmental legislation'.[212]

20.117 Justification for the prohibition of these actions—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 a landholder'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.[213]

20.118 Bates has commented that the question of significance is 'for subjective determination by the minister'.[214] Indeed, the *EPBC Act* places the Environment Minister 'at the centre of decision-making for matters of national environmental significance'.[215] The Department of the Environment explained:

> There are a variety of assessment processes available under the EPBC Act, depending on the nature and complexity of the action under assessment. At the end of the assessment process, the Minister may choose to reject any action that would have unacceptable impacts and may also attach approval conditions, to avoid, mitigate or offset impacts.[216]

20.119 While pt 17 div 16 of the *EPBC Act* provides for judicial review of administrative decisions, the statutory scheme may raise some concerns with respect to due process requirements.[217]

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210 Ibid [46].

211 Ibid [47].

212 Australian Network of Environmental Defenders Offices, *Submission 121*.

213 Explanatory Memorandum, Environment Protection and Biodiversity Conservation Bill 1998 (Cth) [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').

214 Bates, above n 68, 174 [5.71].

215 Hawke, above n 131, [12].

216 Department of the Environment (Cth), *Submission 149*. The submission referred to the relevant policy on environmental offsets which provides 'transparency around how the suitability of offsets is determined' given that '[t]he suitability of a proposed offset is considered as part of the decision as to whether or not to approve a proposed action under the EPBC Act': Department of Sustainability, Environment, Water, Population and Communities (Cth), *Environment Protection and Biodiversity Conservation Act 1999 Environmental Offsets Policy* (2012) 4.

217 Some possible arguments include the following. First, that the offences are not clearly defined, which is a basic requirement of the rule of law. Second, there is a question of constitutional validity insofar as the provisions require federal courts to convict and sentence persons based on future potential harm. This suggests the exercise of non-judicial power by a federal court contrary to the rule in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. However, on the other hand, there is a publicly notified process of assessment in which interested people can participate and extended standing for

20.120 The *EPBC Act* does interfere with a landholder's right to use land—but only to a limited extent. This Inquiry heard conflicting claims about whether the *EPBC Act* interferes with a farmer's ability to clear land.

Concerns about interferences and counter-arguments

20.121 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 did not express concerns about any impact on property rights.[218] Nor did it express concerns in this regard about subsequent Bills that 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);[219] and which established a new matter of national environmental significance in relation to the significant impacts or likely significant impacts of coal seam gas development and large coal mining development on a water resource (the so-called 'water trigger').[220]

20.122 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,[221] including an independent review of the Act[222] undertaken pursuant to s 522A.[223] Two of them are of particular relevance to the matters considered in this Inquiry.[224]

20.123 In March 2010, the NFF submitted to a Senate Committee Inquiry into native vegetation laws that where the operation of the *EPBC Act* results in landholders' property rights being reduced, the Act should require landholders to be compensated.[225] The Committee did not make a specific recommendation in this regard, but commented:

> 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

judicial review (although note that, as at 1 November 2015, a Bill is in the Parliament to reduce extended standing: Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (Cth)).

218 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Seventh Report of 1999* (April 1999).

219 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *11th Report of 2006* (November 2006). The Committee did express concerns about the imposition of strict liability. See Ch 10.

220 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest* No 4 of 2013, 5.

221 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; Hawke, above n 131, 4, 8. Further, in its submission to this ALRC Inquiry, the EDOs 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 Defenders Offices, *Submission 60*.

222 Hawke, above n 131.

223 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.

224 Senate Finance and Public Administration References Committee, Parliament of Australia, *Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures* (2010); Productivity Commission, above n 152.

225 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.

> economic value to the landowner. In such circumstances consideration should be given to compensation being provided to the landowner in recognition of this.[226]

20.124 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.[227] 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'.[228] 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 'substantially limit the continued profitability and viability of farms'.[229] The NFF submitted that

> the direct impact on property values, and uncertainties in the complex operational aspects of the EPBC Act … mean that farmers are denied the ability to plan in the longer term and subsequently derive optimum value from their land assets. Such impacts are unjustified and disproportionate in comparison to the environmental benefit that flows to the landholder.[230]

20.125 It noted that the compensation provision in s 519 was limited to situations where there had been an 'acquisition' and called for legislation to be introduced to provide compensation for a 'taking'—'in the sense of a fundamental alteration or interference with the property rights of a landholder'. It submitted that the Senate Committee's comments in the inquiry into native vegetation laws 'represent an acknowledgment that compensation may be appropriate in circumstances that do not amount to a direct acquisition of property within the meaning of section 51(xxxi)'. It expressed the view that 'a "significant impact" does not justify landholders carrying the bulk of the financial burden that necessarily arises in the pursuit of achieving the goals of these measures, which are primarily aimed at protecting a broader public good'.[231]

20.126 Dr Noeleen McNamara expressed the view that not all environmental constraints imposed by the *EPBC Act* are equal, considering 'the restriction or prohibition of land clearing consequent upon the protection of endangered species and ecological communities' to be the 'most egregious' in terms of the economic cost imposed on the landholder.[232]

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226 Senate Finance and Public Administration References Committee, Parliament of Australia, *Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures* (2010), [5.13].

227 National Farmers' Federation, *Submission 127*; National Farmers' Federation, *Submission 54*.

228 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*.

229 Ibid.

230 National Farmers' Federation, *Submission 127*.

231 Ibid.

232 Dr Noeleen McNamara, 'A Home Is No Longer a Castle? Real Property Rights in the Context of Mining and Environmental Claims' (Speech, ALRC Freedoms Symposium, Federal Court of Australia, Brisbane, 2 September 2015).

20.127 By contrast, the EDOs submitted that the *EPBC Act* 'does not unduly encroach on private property rights'. The EDOs and Farrier considered that the *EPBC Act* would rarely interfere with a farmer's ability to clear land.[233] This is because state and territory legislation regulates land clearing—other than in those 'very rare' instances where the clearing is likely to have a significant impact on a matter of national environmental significance.[234] The EDOs considered the 'significant impact' requirement to be a 'high' threshold and observed that the 'vast majority' of development proposals would be assessed at a local or state level only. The EDOs maintained that private landholders wanting to develop their farm or residential lot are 'largely unaffected' by the *EPBC Act*. The EDOs explained that, for the most part, the *EPBC Act* 'only regulates high-impact developments (such as mining operations or large infrastructure projects)' and 'the majority of these actions are undertaken by large companies on land that has been purchased for the purposes of commercial exploitation'.[235]

20.128 Both stakeholders observed that the Minister may approve an action which is likely to have a significant impact on a matter of national environmental significance—and the EDOs noted that in 'almost all cases' the Minister does.[236] Farrier noted that when the Minister decides whether or not to approve the taking of the action, and what conditions to attach to an approval, the Minister is required to consider 'economic and social matters'.[237] He also submitted that 'approvals are rarely denied'.[238] Figures released by the Department of the Environment support these statements. Since 2000, when the *EPBC Act* commenced, 799 actions have been approved and only 11 have been refused.[239] The EDOs concluded that

> the Act is not prohibitive or particularly restrictive in the way it is applied. Rather—and like most environmental legislation in Australia—it is based on a system of permits and approvals which authorise and mitigate activities with adverse environmental impacts.[240]

20.129 Further, the EDOs submitted that the *EPBC Act* confers 'significant' benefits on landholders, giving two examples. First, they referred to the fact that pursuant to the Act, the Minister may impose further conditions on mining developments, even though they have already been approved under the relevant state or territory laws. They gave the example of the Gloucester Coal Seam Methane Gas Project and remarked that conditions imposed under the *EPBC Act* framework 'may reduce impacts on

233 D Farrier, *Submission 126*; Australian Network of Environmental Defenders Offices, *Submission 121*.
234 Australian Network of Environmental Defenders Offices, *Submission 121*.
235 Ibid.
236 Ibid.
237 D Farrier, *Submission 126* citing s 136(1)(b).
238 D Farrier, *Submission 126*.
239 Department of the Environment (Cth), *Annual Report 2014–2015* (2015) 200.
240 Australian Network of Environmental Defenders Offices, *Submission 121*. The EDOs said that 'it is difficult to argue that the requirement to obtain a permit for an action that is likely to have a significant impact on a matter protected under international law constitutes an undue burden on private property holders'.

neighbouring properties or the environment in general, particularly in relation to water resources'.[241]

20.130 Secondly, the EDOs referred to the addition of the 'water trigger' to the matters of national environmental significance. The development of coal seam gas resources in NSW and Queensland has been contentious. Those opposed to coal seam gas development have expressed concerns about conflicts with land use and the impact on the environment (particularly concerns about water resources such as aquifer drawdown and possible contamination).[242] Concerns have also been expressed about the impacts on water resources from large coal mining development.[243] In the second reading speech for the relevant Bill to amend the *EPBC Act*, the then Minister stated

> people quite reasonably expect the minister for the environment and water to take into account, by law, the impacts of coal seam gas and large coal mining on water resources. They want to know what I am considering: if there is an irreversible depletion and contamination of our surface and groundwater resources; the impacts on the way critical water systems operate; and the related effects on our ecosystems.[244]

20.131 The addition of the 'water trigger' to the *EPBC Act* was welcomed by some agricultural representative bodies and by environmental groups.[245] The EDOs submitted that the *EPBC Act* was amended to protect 'a resource used by private landholders, in the knowledge that natural resources are interconnected and their value is shared'.[246]

Redressing the perceived interference with property rights

20.132 To redress the perceived impacts of environmental legislation, the NFF called for the introduction of legislation to compensate for a 'taking'—an interference that falls short of an 'acquisition'. Finlay supported such calls, arguing that individual landholders should be compensated 'when they are required to "sterilize" their land for environmental purposes'.[247] However, other stakeholders and commentators did not consider this to be a necessary or viable option. The EDOs reiterated its view that 'there is little evidence to suggest that the EPBC Act constitutes an undue burden on private landholders'.[248] Farrier submitted that it

> would be a massive departure from existing understandings to say that government cannot control the development of land without compensating the landowner: that there is some kind of right to development for which compensation should be paid if it is removed. This would have significant implications in an urban context.[249]

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241 Ibid.
242 See Department of Parliamentary Services (Cth), *Bills Digest*, No 108 of 2012–13, 13 May 2013, 8–12.
243 Ibid 12.
244 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2013, 1846 (Tony Burke).
245 Department of Parliamentary Services (Cth), *Bills Digest*, No 108 of 2012–13, 13 May 2013, 19–20.
246 Australian Network of Environmental Defenders Offices, *Submission 121*.
247 L Finlay, *Submission 97*.
248 Australian Network of Environmental Defenders Offices, *Submission 121*.
249 D Farrier, *Submission 126*.

20.133 The Australian Property Institute similarly considered that the distinction between an acquisition of property attracting compensation and regulatory activity—such as land use zoning—not attracting compensation to be 'an established feature of Australian real property'.[250]

20.134 McNamara considered it unlikely that the Parliament would amend the *EPBC Act* to provide a compensatory mechanism that could result in large amounts being paid to individual landholders. However, she was of the opinion that other mechanisms—an economic 'toolkit'—could be used instead:

> My suggestion is that the Act or Regulations could incorporate a rebate and subsidy whereby a proprietor affected by EPBC designation would qualify for one or all of the following economic adjustments:
>
> 1. a rebate on local government rates, which could be administered through the State departments of local government.
> 2. a rebate, or indeed, abolition, of any land tax liability administered through state treasuries.
> 3. a subsidy to enable the purchase of appropriate herbicides and pesticides, administered through the relevant local government.
> 4. a subsidy to enable the land owner to institute a program of culling feral pests on the land.
> 5. an environmental rebate against the landholder's income tax.
> 6. an interest rate subsidy for Commonwealth development assistance.[251]

20.135 The Department of the Environment explained that, if it is not possible to avoid impacting property rights, the Australian Government's preferred approach is to attempt to mitigate the impact by way of an 'offset'.

> Environmental offsets are measures that provide compensation for the residual adverse impacts of an action on the environment, once all reasonable avoidance and mitigation measures have been applied. For example, where the habitat of a threatened species is to be cleared as a result of a proposed action, an appropriate offset could include protecting an equivalent piece of habitat elsewhere, or alternative measures such as revegetation, weed management or feral animal control.
>
> ... Using the [*EPBC Act* environmental offsets] policy, offsets are negotiated with project proponents and then built into the conditions of approval. This gives landowners, developers and government a degree of flexibility in managing impacts identified during the assessment process.[252]

20.136 Farrier submitted that 'landowners significantly affected by conservation legislation can frequently take advantage of rural adjustment programmes which

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250 The Australian Property Institute, *Submission 138*.

251 Dr Noeleen McNamara, 'A Home Is No Longer a Castle? Real Property Rights in the Context of Mining and Environmental Claims' (Speech, ALRC Freedoms Symposium, Federal Court of Australia, Brisbane, 2 September 2015).

252 Department of the Environment (Cth), *Submission 149*. The relevant policy referred to is Department of Sustainability, Environment, Water, Population and Communities (Cth), above n 216.

provide funding to allow them to exit their industry', citing the facts in *Spencer*.[253] He further commented:

> Apart from this, the focus of the current debate in Australia about conservation management on private land has changed radically in recent years and is still in the process of evolving. Funding transfers by government to rural landowners are now increasingly framed as payments for the provision of environmental services not as compensation for lost expectations. This usually involves payments for active management by landowners to advance biodiversity conservation objectives.[254]

20.137 Such 'stewardship payments' send a positive message to landholders, that 'they have a vital role to play, a role which the community regards as being sufficiently important that it is prepared to pay for it'.[255]

20.138 The next scheduled independent review of the *EPBC Act* is to be completed by 2019. The Department of the Environment submitted that that review 'may provide a suitable opportunity for more detailed consideration of the EPBC Act's interaction with property rights'.[256] The ALRC considers that the next review could reassess whether interferences with property rights are proportionate and could explore a range of compensatory mechanisms. This review may also afford an opportunity for consideration of the interrelationship of Commonwealth and state laws, as this ALRC Inquiry heard that Commonwealth and state environmental laws should be considered in an integrated way.[257] Any review of the *EPBC Act* could also consider the application of strict and absolute liability in environmental offences.[258]

Water Act 2007

Key aspects

20.139 Chapter 18 provides background on the legal nature of water rights, including reference to the common law recognition of riparian and groundwater rights and to state and territory legislation which has long provided for water resource management by government and replaced common law rights. While in many cases water rights have been uncoupled from land, they are discussed in this chapter, rather than Chapter 19, because many view rights to water in a non-technical way, as intrinsically related to real property, as it was reflected in the common law.

20.140 The *Water Act* was informed by, and builds upon, key aspects of the National Water Initiative (NWI),[259] as well as the Australian Government's 2007 policy, *A National Plan for Water Security*.[260] It is also supported by two other

253 D Farrier, *Submission 126*.
254 Ibid. See also Department of the Environment (Cth), *Submission 149*.
255 David Farrier, 'Implementing the In-Situ Conservation Provisions of the United Nations Convention on Biological Diversity in Australia: Questioning the Role of National Parks' (1996) 3 *Australasian Journal of Natural Resources Law and Policy* 1, 22.
256 Department of the Environment (Cth), *Submission 149*.
257 See Australian Human Rights Commission, *Submission 141*; L Finlay, *Submission 97*.
258 See Ch 10.
259 An intergovernmental agreement between the Commonwealth and all state and territory governments.
260 Department of Agriculture and Water Resources (Cth), *Submission 144*.

intergovernmental agreements.[261] The NWI sought to establish clearly defined and tradeable statutory rights in water access entitlements,[262] thereby facilitating water users with increased security of access to water resources.[263] The 2007 policy sought to address the 'over-allocation' of water in the Murray-Darling Basin by state and territory governments, where 'more entitlements to water' had been issued 'than can be supplied on a sustainable basis'.[264] The policy sought to reduce the use of water by reducing the allocation and improving the efficiency of the use by funding programs to invest in irrigation infrastructure.[265]

20.141 The development of the Murray-Darling Basin Plan (Basin Plan) has been described as the 'central concept' of the *Water Act*.[266] Section 22 of the *Water Act* outlines mandatory content to be included in the Basin Plan, including the maximum long-term annual average quantities of water that can be taken, on a sustainable basis, from the Basin water resources as a whole and from the water resources of each of the water resource plan areas.[267] These averages are referred to as sustainable diversion limits (SDLs).[268] In effect, SDLs limit water resources that can be extracted from the Murray-Darling Basin.[269] The intention was 'to ensure that water is taken from Basin water resources on an environmentally sustainable basis rather than based on historical levels of surface water use'.[270] SDLs will be 'implemented' under Basin State legislation.[271]

20.142 It was expected that the Basin Plan would be in place by 2009.[272] However, extensive community discussion and debate, including about the SDLs,[273] led to a later commencement date: 24 November 2012.[274] The Basin Plan will not be fully implemented until 1 July 2019 when the SDLs take effect.[275] It is expected that Basin State water resource plans, which give effect to the SDLs, will have been accredited under the *Water Act* by 1 July 2019. Until then, Basin State water resource plans continue to determine diversion limits.

261 The *2008 Intergovernmental Agreement on Murray-Darling Basin Reform* and the *2013 Intergovernmental Agreement on Implementing Water Reform in the Murray-Darling Basin*. See Moran et al, above n 4, ix.

262 An access entitlement is 'the long term right to receive annual allocations': 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.

263 Department of Agriculture and Water Resources (Cth), *Submission 144*.

264 Australian Government, *A National Plan for Water Security* (2007) 1, 4.

265 Australian Government, above n 264. See also Australian Government Solicitor, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No 90 (July 2009).

266 *Lee v Commonwealth* (2014) 229 FCR 431, [33].

267 *Water Act 2007* (Cth) s 22(1) item 6.

268 Section 23 provides further detail about long-term average SDLs.

269 Department of Agriculture and Water Resources (Cth), *Submission 144*.

270 Explanatory Memorandum, Water Bill 2007 (Cth) [54].

271 Department of Agriculture and Water Resources (Cth), *Submission 144*. A Basin State means NSW, Victoria, Queensland, South Australia and the Australian Capital Territory: *Water Act 2007* (Cth) s 4.

272 Moran et al, above n 4, ix.

273 Ibid 5.

274 Ibid ix.

275 Ibid xxiv.

20.143 The impact of the diversion limits on the individual holders of water access entitlements, such as farmers, is that the amount of water that may be taken may be reduced through the limiting of the allocation made under state and territory plans—once the SDLs come into effect. This involves a risk to individual rights holders: 'they may simply have less water to use or trade'.[276]

20.144 However, the Commonwealth has committed to 'bridge the gap' between the 'baseline diversion limits'[277] and the SDLs.[278] The Department of Agriculture and Water Resources, which has responsibility for the *Water Act*, explained:

> The purpose of Commonwealth policy is to ensure that there is no effect on the reliability and hence value of any water access entitlements and rights as the result of the Basin Plan. Water recovery programs are undertaken by agreement with willing partners who agree to undertake irrigation infrastructure improvements or to sell entitlements to the Commonwealth.[279]

20.145 The *value* of water access entitlements was therefore to be maintained by virtue of the scheme's effect on the reliability of water access. This is to be achieved through Commonwealth support for improved efficiency in water use and also increasing the environmental pool of water, through consensual purchase of water access entitlements from willing sellers and investment in water-saving irrigation infrastructure. Infrastructure investment is prioritised over buying water access entitlements, and water purchases are capped at 1,500 gigalitres.[280]

20.146 Notwithstanding that the Commonwealth has committed to achieve the target SDLs in these two ways, s 77 sets out the circumstances where a water entitlement holder may claim a payment from the Commonwealth for a reduction in the diversion limit. Further, the Basin Plan contains 'additional protective provisions', known as 'reasonable excuse provisions', in the event that a Basin State does not comply with the SDL as a result of circumstances beyond its control.[281] The Department of Agriculture and Water Resources explained that the effect of the reasonable excuse provisions is that 'all the water recovery risk associated with meeting the SDLs sits with the Commonwealth'.[282]

20.147 The *Water Act* also established the Commonwealth Environmental Water Holder (CEWH) to manage Commonwealth-held environmental water.[283] There are three ways that the Commonwealth can use this environmental water:

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276 Department of Parliamentary Services (Cth), *Bills Digest*, No 30 of 2007–08, 14 August 2007, 19.

277 Baseline diversion limits 'establish a baseline from which to determine required reductions in diversions': Explanatory Statement, Basin Plan 2012 (Cth), [105].

278 Successive Commonwealth governments have committed to bridging the full gap: Department of the Environment (Cth), Submission No 50 to Senate Select Committee Inquiry into the Murray-Darling Basin Plan, Parliament of Australia, September 2015, 4.

279 Department of Agriculture and Water Resources (Cth), *Submission 144*.

280 Ibid. See Department of the Environment (Cth), *Water Recovery Strategy for the Murray-Darling Basin* (2014).

281 Department of Agriculture and Water Resources (Cth), *Submission 144*.

282 Ibid.

283 Moran et al, above n 4, ix.

- delivering water to a river or wetland to meet an indentified environmental demand
- leaving water in storage and carrying it over for use in the next water year (referred to as 'carryover')
- trading water, that is, selling water and using the proceeds to buy water in another catchment or in a future year.[284]

Concerns about interferences and counter-arguments

20.148 The Scrutiny of Bills Committee expressed some concerns about the impact on 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.[285]

20.149 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 Basin Plan, has the potential to erode farmers' water rights and entitlements without full compensation; and, secondly, that the Basin Plan's Constraints Management Strategy could potentially result in the flooding of private land.[286]

20.150 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 where 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'.[287]

20.151 The NFF referred to the litigation in *Lee v Commonwealth*.[288] Each landowner in this litigation—Lee and Gropler—operated an irrigated horticultural farm that draws water from the Murray River. These landowners argued that the *Water Act* had effected an acquisition of property otherwise than on just terms and claimed compensation under s 254 of the *Water Act*—the statutory just terms provision in that Act.[289] The Federal Court rejected the claim,[290] the Full Federal Court dismissed the appeal,[291] and the application for special leave to the High Court was refused.[292] The

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284 Commonwealth Environmental Water Office, Submission No 45 to Senate Select Committee Inquiry into the Murray-Darling Basin Plan, Parliament of Australia, 17 September 2015, 1.

285 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *First Report of 2008* (March 2008) 43–4.

286 National Farmers' Federation, *Submission 54*.

287 Ibid. See also National Farmers' Federation, *Submission 127*.

288 National Farmers' Federation, *Submission 127*.

289 There were essentially four claims in respect of s 254. The focus of discussion in this chapter is the claim concerning carryover water.

290 *Lee v Commonwealth* (2014) 220 FCR 300. 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: Ibid [234].

291 *Lee v Commonwealth* (2014) 229 FCR 431.

292 Transcript of Proceedings, *Lee v Commonwealth* [2015] HCATrans 123 (15 May 2015).

NFF expressed disappointment at the outcome in this litigation, preferring the approach taken by Heydon J, in dissent, in the *ICM Case*.[293]

20.152 Before the Federal Court, Lee had argued that, as a result of the CEWH conserving water for environmental use, his entitlement to carryover water—that is, water that could be carried over from one year to the next pursuant to state law—would be reduced and consequently the value of his water entitlements had been reduced.[294] The Court found that, even if there were rights taken from Lee, there was 'no acquisition of property from him by any other person', observing that s 254 is 'directed to acquisition, not deprivation'.[295] The Federal Court considered the case in respect of s 254 to be analogous to that in the *ICM Case*, rather than that in *Newcrest*.[296]

20.153 In the *ICM Case*, French CJ, Gummow and Crennan JJ said:

> To acquire the substance of proprietary interests in the mining tenements considered in [*Newcrest*] 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, 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.[297]

20.154 The NFF submitted that Heydon J's approach in the *ICM Case* 'indicates that there is some support for the proposition that Commonwealth or State Governments may obtain an advantage within the meaning of s 51(xxxi) in some circumstances where water rights are removed for environmental purposes'.[298] When considering whether there had been a contingent increase in the capacity of NSW to take or grant rights to water, Heydon J stated that the Commonwealth's arguments assumed that 'if groundwater resources are to be employed sustainably, the allocations of 2008 will leave no surplus water available to New South Wales or anyone but the aquifer access licensees'.[299] However,

> to the extent that [the Commonwealth's assumption] turns out to be pessimistic, New South Wales will have gained something it did not have before 2008—a capacity to take more water itself or to issue more rights to others without damaging the goal of sustainability. This capacity, if it turns out that it has been gained, will be a benefit or advantage which New South Wales has acquired within the meaning of s 51(xxxi). And the possibility that that capacity will be gained is a presently existing, direct and identifiable benefit or advantage accruing to New South Wales as a result of the extinguishment of the bore licensee's rights, even though it may not be proprietary in a conventional sense: it is thus an acquisition of property by New South Wales.[300]

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293 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140.
294 *Lee v Commonwealth* (2014) 220 FCR 300, [197].
295 Ibid [200].
296 Ibid [206]. See *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.
297 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [85]. The reference to Brennan CJ is to *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1, [17].
298 National Farmers' Federation, *Submission 127*.
299 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [235].
300 Ibid.

20.155 The Department of Agriculture and Water Resources stated that claims that the Basin Plan could lead to water rights being eroded without compensation were 'incorrect'.[301] Similarly, the EDOs expressed the view that the NFF's concern about the erosion of rights is not reflective of the statutory scheme.[302] Both stakeholders referred to a number of the same features of the *Water Act*.

20.156 First, s 255 of *Water Act* does not permit the compulsory acquisition of a water access right or an interest in a water access right.[303] The EDOs noted that farmers who sell their entitlements to the CEWH do so 'voluntarily' and presumably 'following full consideration of the advantages and disadvantages of doing so'.[304]

20.157 Second, both stakeholders submitted that the *Water Act* enhances the value of water rights and ensures that water rights cannot be eroded without compensation. The EDOs observed that the 'decision to unbundle water entitlements from land has created an entirely new asset which has in turn generated additional wealth for many landholders'.[305] The Department specifically mentioned pt 4 of the Act which concerns Basin water charge and water market rules and chapter 12 of the Basin Plan which outlines trading rules. It submitted that '[t]hese arrangements help to enhance the security and value of entitlements'.[306]

20.158 Third, both stakeholders referred to div 4 of pt 2 of the Act which 'provides that water access entitlement holders may be eligible for financial payments from the Commonwealth if their water allocations are reduced in certain circumstances'. The EDOs submitted that

> the Water Act provides for entitlement holders to be compensated in certain circumstances where allocations are reduced due to the operation of the Basin Plan. These provisions are to be considered in tandem with State laws, which also enable entitlement holders to be compensated (subject to meeting certain criteria) for reductions in allocations.[307]

20.159 The Department also referred to s 77, noting that it 'provides an important backstop to the bridging the gap commitment and reasonable excuse provisions by providing that the Commonwealth will make payments to any qualifying water access holders'.[308] The EDOs additionally submitted that, as water allocations are not fixed, it was 'impossible' to argue that increasing the pool of environmental water has a greater detrimental impact on allocations and entitlements than factors such as rainfall, the amount of water in storage, and state allocation policies.[309]

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301 Department of Agriculture and Water Resources (Cth), *Submission 144*.

302 Australian Network of Environmental Defenders Offices, *Submission 121*.

303 But see The Australian Property Institute, *Submission 138*. The Institute suggested that s 255 of the *Water Act* may merit further review, presumably because a water access right and an interest in a water access right 'may be property for the purposes of s 51(xxxi)'. See Ch 18 for a discussion of 'property'.

304 Australian Network of Environmental Defenders Offices, *Submission 121*.

305 Ibid.

306 Department of Agriculture and Water Resources (Cth), *Submission 144*.

307 Australian Network of Environmental Defenders Offices, *Submission 121*.

308 Department of Agriculture and Water Resources (Cth), *Submission 144*.

309 Australian Network of Environmental Defenders Offices, *Submission 121*.

20.160 Both stakeholders also referred to the *Water Amendment Act 2015* (Cth), which limits the volume of water that can be bought from water access entitlement holders by the CEWH to 1,500 gigalitres per year.[310] The Explanatory Memorandum states that the Bill provides 'increased assurance to rural and irrigation communities regarding the implementation of the Basin Plan and the commitment to minimise the potential socio-economic impacts of Commonwealth environmental water purchases'.[311] The EDOs have criticised this legislative change, viewing the purchase of entitlements as 'the principal—and most effective—means of returning water to the environment'. In its view, this amending Act is 'underpinned by the assumption that the (entirely voluntary) sale of entitlements to the CEWH has a negative impact on Basin communities'.[312]

20.161 These two stakeholders viewed the situation differently from the NFF. In sum, the EDOs submitted that there has been 'a strong desire to protect private interests to the greatest extent possible' and in its view socio-economic considerations have driven the development and implementation of the Basin Plan and the interpretation given to the Act.[313] It expressed the opinion that this approach has compromised environmental outcomes.[314] The Department concluded that the *Water Act* 'has had the effect of enhancing the security and value of statutory water entitlements in the Murray-Darling Basin as established under state and territory law'.[315]

20.162 The NFF argues that a 'diminution' of water access entitlements, unaccompanied by compensation 'at market rates', is an unjustifiable interference with property rights. However, the judgments in the *Lee* litigation and information provided by stakeholders—including the Department responsible for the administration of the *Water Act*—suggest that any diminution of the consumptive pool caused by the Commonwealth under the *Water Act* will be by consensual purchase of water entitlements and from water savings associated with investments in more efficient infrastructure. Such measures may be seen as addressing any interference with property rights.

20.163 The NFF were also concerned by the potential for land to be flooded pursuant to the Constraints Management Strategy (CMS).[316] The CMS was finalised by the Murray-Darling Basin Authority in 2013. 'Constraints' are 'rules and structures that influence the volume and timing of regulated water delivery'.[317] The CMS is

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310 At 1 November 2015 the Act had not commenced.

311 Explanatory Memorandum, Water Amendment Bill 2015 (Cth) 2.

312 Australian Network of Environmental Defenders Offices, *Submission 121*.

313 Ibid. See also Emma Carmody, 'The Silence of the Plan: Will the Convention on Biological Diversity and the Ramsar Convention Be Implemented in the Murray-Darling Basin?' (2013) 30 *Environmental and Planning Law Journal* 56.

314 Australian Network of Environmental Defenders Offices, *Submission 121*.

315 Department of Agriculture and Water Resources (Cth), *Submission 144*.

316 National Farmers' Federation, *Submission 127*.

317 Department of Agriculture and Water Resources (Cth), *Submission 144*.

concerned with 'relaxing' some 'constraints'[318]—for example, releasing water that may flood land.

20.164 The NFF called for the ALRC

> to explicitly explore the issue that is likely to arise under the Government's constraint management strategy—whereby private land is deliberately flooded in order to deliver environmental water held by the Commonwealth Environmental Water Holder. The CMS Annual Progress report itself highlights our concerns. As stated in the report *'there are some hotspots where access, crops, livestock, sheds and pumps can be affected'*—ie where private property will be flooded.[319]

20.165 The NFF expressed concern that the *Water Act* and the Basin Plan 'do not seem to explicitly protect rights' in the case of possible deliberate flooding.[320] The CMS Annual Progress Report, referred to above, notes that '[d]elivering higher flows would in many cases cause some negative effects for landholders' but that these could be mitigated.[321] One of the mitigation options identified, and referred to by the NFF in its submission, is '[n]egotiated agreements with landholders to create easements that enable regulated water to access the privately owned parts of the floodplain'.[322]

20.166 The Department submitted that concerns about the CMS permitting deliberate flooding of private land 'represent a misunderstanding of how the CMS framework will be implemented'. It explained:

> the CEWH has said that it has not and will not place water orders that would result in flooding of private land without the consent of the landowner and in any case the CEWH can only place orders. Decisions on the volume of water released from storages are made by the state government agency responsible for managing that storage.[323]

20.167 The EDOs referred to s 110(2) of the *Water Act*, which concerns application of state laws to the CEWH and specifically provides that s 110 does not authorise the environmental watering of land without the land owner's consent.[324] It also referred to the CEWH's website which states that the CEWH seeks to obtain consent by negotiation if potentially unacceptable impacts on private property are identified. The website notes that '[i]n many situations landholders support watering events because the outcomes are mutually beneficial, such as by creating environmental benefits while also supporting the productivity of floodplain pastures'.[325]

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318 Murray-Darling Basin Authority, *Constraints Management Strategy Annual Progress Report 2013–14* (2014) 3.
319 National Farmers' Federation, *Submission 127*. (Footnotes omitted)
320 Ibid.
321 Murray-Darling Basin Authority, above n 318, 12.
322 Ibid 24.
323 Department of Agriculture and Water Resources (Cth), *Submission 144*.
324 Australian Network of Environmental Defenders Offices, *Submission 121*.
325 Ibid.

20.168 The ALRC is of the view that the operation of the *Water Act* does not appear to amount to an unjustifiable interference with property rights in this respect.

Redressing the perceived interference with property rights

20.169 As explained in Chapter 18, the common law regime of water rights has been replaced in Australia by statutory water access licences or rights. The current scheme as a whole has an impact—but one that is being managed.

20.170 A number of stakeholders considered that the *Water Act* does not need to be reviewed to ensure that it does not unjustifiably interfere with rights pertaining to real property.[326] An independent review of the *Water Act* was completed in late 2014,[327] pursuant to s 253. This review included significant consultation with stakeholders, including all states and territories, and 'addressed impacts on private property and entitlement holders'.[328] The Australian Government accepted all recommendations made in this review. On 3 December 2015, a Bill was introduced to Parliament to amend the *Water Act* to implement the Government's response to the recommendations.[329]

20.171 The EDOs submitted that an additional review is 'unnecessary as it would duplicate existing statutory and non-statutory review processes which tend to emphasise socio-economic assessment'.[330] The Department emphasised the need for stakeholders to have stability and certainty:

> The Basin Plan is currently being implemented in anticipation of the SDLs taking effect in 2019. During this time it is vital for the Murray-Darling Basin's communities and industries that there is certainty as to the function and effects of the Water Act and Basin Plan.[331]

20.172 The independent review had heard a similar appeal, noting that some stakeholders had stated that, 'after such a long period of significant policy change, communities and businesses need stability and certainty, and consider that effort should now be directed to implementing agreed reforms'.[332]

20.173 The ALRC dos not suggest a further review be conducted at this time. However, the ALRC notes that the *Water Act* does not provide for periodic review, as

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326 Department of Agriculture and Water Resources (Cth), *Submission 144*; Australian Network of Environmental Defenders Offices, *Submission 121*. However, the Australian Property Institute suggested that s 255 and 'other matters' in the *Water Act* 'may' merit further review: The Australian Property Institute, *Submission 138*.

327 Moran et al, above n 4.

328 Australian Network of Environmental Defenders Offices, *Submission 121*.

329 Explanatory Memorandum, Water Amendment (Review Implementation and Other Measures) Bill 2015 (Cth); Water Amendment (Review Implementation and Other Measures) Bill 2015 (Cth).

330 Australian Network of Environmental Defenders Offices, *Submission 121*. The EDOs referred to the Senate Communications and Environment Legislation Committee Inquiry into the Water Amendment Bill 2015 and the Select Committee on the Murray-Darling Basin Plan.

331 Department of Agriculture and Water Resources (Cth), *Submission 144*.

332 Moran et al, above n 4, i.

is the case with the *EPBC Act*. It may be appropriate for the *Water Act* to be reviewed periodically.[333]

20.174 The ALRC also notes that the terminology accompanying the scheme is new and some apprehensions about the scheme may reflect difficulties in understanding the full effect of the scheme. A clear explanation of the new terms may assist stakeholders to appreciate the positive changes that are intended by the scheme.

Native title laws

20.175 As discussed in Chapter 18, native title is not a common law tenure but rather has its source in the traditional laws and customs of the relevant Aboriginal and Torres Strait Islander peoples. The case of *Mabo v Queensland [No 2]* is significant because it was the first time that native title was recognised under common law in Australia.[334] The content of native title rights and interests is defined by traditional laws and customs. This means that native title rights and interests 'may not, and often will not, correspond with rights and interests in land familiar to the Anglo-Australian property lawyer'.[335] It also means that, as Gummow J noted in *Wik Peoples v Queensland*, the 'content of native title, its nature and incidents, will vary from one case to another'.[336]

20.176 The *Native Title Act 1993* (Cth) (*Native Title Act*) established a regime to facilitate the common law's recognition of native title by providing a claims process for the determination of native title. As the ALRC has previously observed, the Act 'provides the framework in which the facts in the other normative system—Aboriginal and Torres Strait Islander law and custom—must be proved'.[337] The Act does not create new rights and interests in land. Instead,

> the native title rights and interests to which the *Native Title Act* refers are rights and interests finding their origin in pre-sovereignty law and custom, not rights or interests which are a creature of that Act.[338]

20.177 As native title concerns rights in relation to land and waters, it is considered here. In this Inquiry, the ALRC received three submissions discussing native title in a broad sense.[339]

333 Such a recommendation has been made to the Australian Government: Ibid rec 23. A Bill introduced into the Parliament on 3 December 2015 would set 2024 as the date of the next review: Water Amendment (Review Implementation and Other Measures) Bill 2015 (Cth).

334 *Mabo v Queensland [No 2]* (1992) 175 CLR 1. See also *Milirrpum v Nabalco* (1971) 17 FLR 141.

335 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [40] (Gleeson CJ, Gummow and Hayne JJ).

336 *Wik Peoples v Queensland* (1996) 187 CLR 1, 169.

337 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) [2.62].

338 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [45] (Gleeson CJ, Gummow and Hayne JJ).

339 Australian Human Rights Commission, *Submission 141*; Arts Law Centre of Australia, *Submission 50*; D Wy Kanak, *Submission 38*. The Arts Law Centre's submission concerned traditional knowledge and traditional cultural expressions. See Ch 18.

20.178 For native title rights and interests to be recognised by Australian law, the Aboriginal and Torres Strait Islander peoples' rights and interests must be possessed under laws and customs with origins in the period prior to the Crown's assertion of sovereignty.[340] Between settlement and the decision in *Mabo [No 2]* there was much disruption of the relationship that Aboriginal and Torres Strait Islander peoples had with their traditional lands and waters. As a result of this disruption, for many Aboriginal and Torres Strait Islander peoples, providing evidence of continuity with pre-sovereign rights and interests is very difficult.[341] The ALRC considered some of these issues in its 2015 report, *Connection to Country: Review of the Native Title Act 1993 (Cth)*. This report made 30 recommendations, including about how the existence of native title rights and interests is established.[342]

20.179 In addition to difficulties associated with proof, native title may be 'extinguished' by acts of the executive pursuant to legislative authority, or grants of rights to third parties, that are inconsistent with the claimed native title rights and interests.[343] The grant of freehold title has been held to be 'wholly inconsistent with the existence thereafter of any right of native title'.[344]

20.180 The *Native Title Act* provides a statutory regime for managing issues of extinguishment.[345] Extinguishment of native title constitutes the highest example of interference with Aboriginal and Torres Strait Islander peoples' traditional rights and interests in land and waters. As noted in Chapter 18, the Crown's power to extinguish native title is not in question (as is also the case with respect to titles resting in Crown grants).

20.181 Given the limitations of native title under the *Native Title Act*, other options to facilitate 'land justice' and economic development for Aboriginal and Torres Strait Islander peoples have been suggested and, in some cases, developed. For example, progress is being made via settlements that encompass land, economic development and compensation for dispossession.[346] In 2015, the Australian Human Rights

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340 *Native Title Act 1993* (Cth) s 223; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

341 See further Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) chs 5–7.

342 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015). Other countries have facilitated the recognition of the rights to land of their own Indigenous peoples in different ways. For example, in Canada, First Nations peoples' rights may amount to 'aboriginal title', which is akin to a possessory title to land. Aboriginal title may amount to exclusive rights whereas 'aboriginal rights' are non-exclusive rights. See Ibid ch 9.

343 *Western Australia v Ward* (2002) 213 CLR 1, [26], [78] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Western Australia v Brown* (2014) 306 ALR 168, [33]; *Akiba v Commonwealth* (2013) 250 CLR 209, [31]–[35] (French CJ and Crennan J); [52], [62] (Hayne, Kiefel and Bell JJ). See also *Native Title Act 1993* (Cth) pt 2 div 2B, s 237A. See also Ch 18.

344 *Fejo v Northern Territory* (1998) 195 CLR 96, [47] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

345 See Ch 18 for a discussion of the interaction with the *Racial Discrimination Act 1975* (Cth).

346 See Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) ch 3.

Commission has had a significant role in discussions about the economic development of land held by Aboriginal and Torres Strait Islander peoples.[347]

Criminal laws

20.182 A number of Commonwealth criminal law provisions may interfere with property rights. Some are considered in Chapter 19, dealing with personal property.

20.183 A small number of criminal offences may be characterised as interfering with a person's interests in real property. For example:

- *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; and
- *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.[348]

20.184 Other Commonwealth statutes also contain offence provisions for preventing entry to land where an officer or other specified person is empowered to enter.[349]

Search warrants to enter premises

20.185 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.

20.186 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.[350] 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.[351]

20.187 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

347 Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015); Australian Human Rights Commission, *Communiqué: Indigenous Leaders Roundtable on Economic Development and Property Rights* (Broome, 19–20 May 2015). See Australian Human Rights Commission, *Submission 141*.

348 See Ch 16.

349 See, eg, *Taxation Administration Act 1953* (Cth) s 353–10.

350 Australian Law Reform Commission, *Criminal Investigation*, Interim Report No 2 (1975) [60]. See also *Handock v Baker* (1800) 2 Bos & P 260.

351 See, eg, *Entick v Carrington* (1765) 19 St Tr 1029. See discussion in Ch 18.

necessary implication.[352] This is underscored by the principle that there is no common law right for law enforcement to enter private property without a warrant.[353]

20.188 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 that 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.[354]

20.189 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.[355]

20.190 In light of this commentary, s 3ZB appears to be uncontroversial.[356]

Conclusion

20.191 The primary focus of this chapter has been on Commonwealth environmental laws and whether and how these laws interfere with the right to use land and water. The *EPBC Act* interferes with the right to use land—but only to a limited extent. The extent to which the Act interferes with a farmer's ability to clear land was contested in this Inquiry. The ALRC concludes that the *EPBC Act* could be further reviewed to determine whether limits on real property rights are appropriately justified. The next scheduled independent review of the *EPBC Act* is to be completed by 2019. The ALRC suggests that the next appointed *EPBC Act* reviewer could reassess whether the interferences are proportionate and explore a range of compensatory mechanisms as

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352 *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206. See also *Coco v The Queen* (1994) 179 CLR 427. 'Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language': 436.

353 *Entick v Carrington* (1765) 19 St Tr 1029; 95 ER 807.

354 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).

355 Australian Law Reform Commission, *Criminal Investigation*, Interim Report No 2 (1975) [60].

356 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. Further, the ALRC's literature review did not disclose academic commentary on criminal statutes that encroach on real property rights.

part of that review. This review may also afford an opportunity for consideration of the interrelationship of Commonwealth and state laws, as this ALRC Inquiry heard that Commonwealth and state environmental laws should be considered in an integrated way.

20.192 The *Water Act* does not interfere in a negative way with the water entitlements in the Murray-Darling Basin that have been established under state and territory laws. An independent review of the *Water Act* was completed in 2014 and one of the recommendations was that the *Water Act* be reviewed periodically—as is the case with the *EPBC Act*. The ALRC concludes that it may be appropriate for the *Water Act* to be reviewed periodically.

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Work Health and Safety Act 2011 (Cth)	Chs 9, 10, 11
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ALRC Reports cited in this Report

No	Report
ALRC 2	*Criminal Investigation*, 1975
ALRC 14	*Lands Acquisition and Compensation*, 1980
ALRC 26	*Evidence* (Interim), 1985
ALRC 38	*Evidence*, 1987
ALRC 48	*Criminal Admiralty Jurisdiction and Prize*, 1990
ALRC 78	*Beyond the Door-Keeper: Standing to Sue for Public Remedies*, 1996
ALRC 87	*Confiscation That Counts: A Review of the Proceeds of Crime Act 1987*, 1999
ALRC 92	*The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, 2001
ALRC 95	*Principled Regulation: Federal Civil & Administrative Penalties in Australia*, 2002
ALRC 98	*Keeping Secrets: The Protection of Classified and Security Sensitive Information*, 2004
ALRC 102	*Uniform Evidence Law*, 2005
ALRC 104	*Fighting Words: A Review of Sedition Laws in Australia*, 2006
ALRC 107	*Privilege in Perspective: Client Legal Privilege in Federal Investigations*, 2008
ALRC 111	*Making Inquiries: A New Statutory Framework*, 2009
ALRC 112	*Secrecy Laws and Open Government in Australia*, 2010

ALRC 114	*Family Violence: A National Legal Response*, 2010
ALRC 122	*Copyright and the Digital Economy*, 2014
ALRC 123	*Serious Invasions of Privacy in the Digital Era*, 2014
ALRC 126	*Connection to Country: Review of the Native Title Act 1993 (Cth)*, 2015

Consultations

Name	Location
AiGroup	Sydney
Academic roundtable, TC Beirne School of Law, University of Queensland Professor Simon Bronitt TC Beirne School of Law Lorraine Finlayson School of Law, Murdoch University Kate Galloway College of Business, Law and Governance, James Cook University Dr Noelene McNamara School of Law and Justice, University of Southern Queensland Professor Reid Mortensen Head of School of Law and Justice, University of Southern Queensland Professor Graeme Orr TC Beirne School of Law Emeritus Professor Suri Ratnapala TC Beirne School of Law and ALRC Part-time Commissioner Associate Professor Margaret Stephenson TC Beirne School of Law Peta Stephenson PhD candidate, TC Beirne School of Law Associate Professor Tamara Walsh TC Beirne School of Law	Brisbane
Academic roundtable on freedom of religion, Melbourne Law School, University of Melbourne Professor Carolyn Evans Dean, Melbourne Law School	Melbourne

Professor Beth Gaze Melbourne Law School Professor John Tobin Melbourne Law School Jamie Gardiner Vice-President, Liberty Victoria Reverend Angus McLeay Anglican Minister Dr Eve Lester Australian Catholic University Daniel Hickman Australian Catholic University	
Professor Nicholas Aroney TC Beirne School of Law, University of Queensland	Sydney
Attorney-General's Department (Cth) Access to Justice Division, Office of Constitutional Law, Civil Law Division, International Law and Human Rights Division	Canberra
Attorney General's Department (Cth) Criminal Justice Division, International Crime Cooperation Division, National Security Law and Policy Division, International Law and Human Rights Division	Canberra
Attorney-General's Department (Cth) Human Rights Policy Branch and Administrative Law Branch	Canberra
Attorney-General's Department (Cth) Human Rights Policy Branch	Sydney
Attorney-General's Department (Cth) Human Rights Policy Branch, Federal Offenders Section and Serious and Organised Crime Team	Sydney
Attorney-General's Department (Cth) Human Rights Policy Branch and Criminal Law and Law Enforcement Branch	Sydney

The Hon Robert Austin Barrister at Law, Level 22 Chambers	Sydney
Australian Council of Trade Unions	Melbourne Sydney
Australian Crime Commission	Canberra
Australian Federal Police Proceeds of Crime Litigation Unit, Criminal Assets Confiscation Taskforce	Sydney
Australian Institute of Company Directors	Sydney
Australian Network of Environmental Defender's Offices	Sydney
Australian Property Institute	Sydney
Australian Securities and Investments Commission	Melbourne Sydney
Professor Stephen Bottomley Dean, ANU College of Law	Canberra
Robert Bromwich SC Commonwealth Director of Public Prosecutions	Sydney
Business Council of Australia	Sydney
Bruce Cowley Corporations Committee, Law Council of Australia	Sydney
Department of Employment (Cth)	Canberra
Department of the Environment (Cth)	Canberra Sydney
Department of Immigration and Border Protection (Cth)	Canberra
Professor David Farrier School of Law, University of Wollongong	Sydney

Associate Professor Miriam Gani Head of School, ANU College of Law	Sydney
The Hon Roger Gyles AO QC Independent National Security Legislation Monitor	Sydney
David Irvine AO Former Director-General of Security, Australian Security Intelligence Organisation	Sydney
Job Watch Inc	Melbourne
Professor Sarah Joseph, Director Adam Fletcher, PhD Candidate Castan Centre for Human Rights Law, Faculty of Law, Monash University	Melbourne
Law Council of Australia	Sydney
Law Council of Australia Media and Communications Committee	Sydney
Emeritus Professor Ron McCallum AO Sydney Law School, University of Sydney	Sydney
Greg McIntyre SC Chair, Australian Environment and Planning Law Group, Legal Practice Section, Law Council of Australia	Sydney
Dr Cosmas Moisidis	Sydney
Dr Warren Mundy Commissioner, Productivity Commission	Sydney
National Farmers' Federation	Canberra
Robert Orr Special Counsel, Australian Government Solicitor	Canberra
Professor Patrick Parkinson AM Sydney Law School, University of Sydney Michael Callinan CEO, Freedom of Faith	Sydney

Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia: Committee members, secretariat and research officers	Canberra
Parliamentary Joint Committee on Law Enforcement, Parliament of Australia: Committee members, secretariat and research officers	Canberra
Public Interest Advocacy Centre	Sydney
Peter Quiggin, PSM First Parliamentary Counsel, Office of Parliamentary Counsel	Sydney
Refugee Council of Australia Refugee Advice and Casework Service Khanh Hoang ANU College of Law Migration Law Program	Sydney
Professor Joellen Riley Dean, Professor of Labour Law, University of Sydney	Sydney
Donald Robertson Partner, Herbert Smith Freehills Adjunct Professor, Sydney Law School, University of Sydney	Sydney
Rule of Law Institute	Sydney
Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia; Senate Standing Committee on Regulations and Ordinances; and Parliamentary Joint Committee on Human Rights, Parliament of Australia: Committee members, secretariat and legal advisors	Canberra
The Tax Institute	Sydney
The Treasury (Cth)	Canberra

Professor George Williams AO Anthony Mason Professor, Scientia Professor, Foundation Director, Gilbert and Tobin Centre of Public Law, University of New South Wales	Sydney
Tim Wilson Human Rights Commissioner, Australian Human Rights Commission	Sydney