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WHAT MAKES A GOOD BIOGRAPHY?

ABSTRACT

Judicial biography is an undeveloped form of writing in Australia, and one that lacks any clear agreement over its purpose, audience and methods. This article considers the nature of biography both as a medium employed in various fields of professional activity and as a branch of historical analysis. A survey of some notable judicial biographies reveals the different approaches taken by lawyers and non-legal historians, and the problem of integrating an interpretation of the judicial record with a proper realisation of the biographical subject. It is suggested that those earlier judges who combined a political with a judicial career have attracted the most substantial attention, and that the full potential of the genre has yet to be achieved.

Has any historian ever finished a biography with a conviction that it is complete? I have not and I am in good company: Keith Hancock laboured over Smuts,¹ Kathleen Fitzpatrick was laid low by Henry James, Allan Martin lost his nerve with Henry Parkes.²

A history project often begins with the finished publication somewhere in your mind. You know what you want to make of it, you can even hear some passages, and the whole enterprise has a deceptive clarity. It is only as you embark on the research and wrestle with the problems of putting ideas into words that the enterprise escapes your control.

At some later point, sometimes dictated by a deadline, sometimes by the law of diminishing returns, you conclude, taking comfort in the finitude of academic knowledge. In disciplines such as chemistry the volume of publications doubles every two years; the citations of a research paper peak within 12 months and fall away rapidly. History is a more leisurely discipline, and a book might have a scholarly life of a decade or more. Your monograph won't be the last word but it should at least make an original contribution to the subject.

* Ernest Scott Professor of History, The University of Melbourne. His publications include volume four of *The Oxford History of Australia* (Oxford University Press, 1986), *A Colonial Liberalism: The Lost World of Three Victorian Visionaries* (Oxford University Press, 1991) and *The Poor Relation: A History of the Social Sciences in Australia* (Melbourne University Press, 2010). He is currently an ARC professorial fellow working on a study of Australia's post-war reconstruction.

¹ W K Hancock, *Smuts: The Sanguine Years, 1870–1919* (Cambridge University Press, 1962) vol 1; W K Hancock, *Smuts: The Fields of Force, 1919–1950* (Cambridge University Press, 1962). vol 2.

² A W Martin, *Henry Parkes: A Biography* (Melbourne University Press, 1980).

Biography does not allow the same reassurance. You might be dealing with a minor figure, and it is unlikely any publisher will accept a second effort. Or you might have taken up a person of substantial significance, in which case you have your own conviction about how the life ought to be interpreted. In either case, you are confronted with the impossibility of writing a definitive biography. You are dealing with a variety of activities, experiences and relationships, trying to make sense of the ambiguities of human motivation and behaviour with evidence that is frustratingly partial and incomplete.

Biography presents in a particularly marked form the limits imposed by the rules of historical interpretation. Put simply, the rules lay down that you must report the evidence faithfully: you can't go beyond the evidence, and you can't withhold evidence of significance. Observance of the rules deprives the historian of the resources of the novelist: you can't invent incidents, or adapt or reorganise them to sharpen the circumstances and raise the stakes. You can't contrive dialogue to dramatise interactions, nor can you have recourse to interior monologues in order to explore the thoughts and feelings of the actors.

In her account of how she wrote *The Secret River*, Kate Grenville takes us through the awakening of her interest in the subject, her initial reading of secondary sources and then an ingenuous description of how she worked in archival collections in her determination to realise her historical novel. Then comes a revealing passage:

This wasn't quite how it was in the documents but making a sequence out of these scenes wouldn't distort what had 'really happened' in any significant way. It would, though, turn them into a story.³

But it was not this candid admission that raised the ire of historians; rather, it was her claim to have thereby reached a truer version of the past than that achieved by historians.

Biography is a branch of history and is bound by its rules. It is also a genre of uncertain repute, mistrusted by some historians because its very individuality seems ill-suited to the larger patterns on which historical explanation depends. Insofar as history aspires to the objectivity of the social sciences, a sample of one seems a weak vessel.

I begin with these observations as a caveat for what follows. In order to suggest what makes a good judicial biography I shall appraise some Australian examples. In doing so I hope I don't sound as if I'm delivering judgment as a member of a superior court for I am highly conscious of the difficulties confronting the petitioner.

First of all, we might think about the significance of the qualifier, judicial biography. There are different branches of biography. It is a highly popular form

³ Kate Grenville, *Searching for the Secret River* (Text Publishing Company, 2006).

of trade publishing, pitched at a mass market. These biographies typically take a historical figure of wide interest — there are thousands of lives of Napoleon, hundreds of Lincoln and scores of books on Ned Kelly. More recently, this genre has expanded to take in more contemporary figures as part of the cult of the celebrity. These trade books are sometimes authorised by their subject and shade into the category of autobiography, whether genuine or ghosted, as was the case when Peter Coleman assisted Peter Costello with his memoirs.⁴

Such books have a standard format (big, generously illustrated, with a large font and generous margins) and a characteristic style (short chapters with a strong narrative and a very limited context, full of anecdote, lightly referenced, straightforward in exposition, high on partisanship and short on critical analysis). Popular subjects include prime ministers, war heroes and sportspeople. Don Bradman is probably the most popular Australian subject. I can think of no instance of a judicial biography of this kind.

Then there is a different kind of biography, written for a more restricted audience, no longer confined to the famous and infamous. It is here that the genre becomes more specialised to take in biographies of writers, artists, scientists, educationalists, ministers of religion, businessmen and trade unionists, soldiers and lawyers. Some of these are also commissioned or sponsored, and this provenance raises particular expectations. An early example is the life of the Victorian Chief Justice George Higinbotham. Written by his son-in-law, Edward Morris, at the request of the widow, it is a thoroughly filial literary memorial.⁵

Some of these more specialised biographies are written by practitioners in the same field. Hence scientists relate the lives of eminent scientists, priests record prelates, members of the military produce books on generals, educationalists write about educational administrators, and lawyers write judicial biography. The leading exponent is J M Bennett, who has published more than a dozen lives of colonial chief justices.⁶

⁴ Peter Costello and Peter Coleman, *The Costello Memoirs* (Melbourne University Press, 2008).

⁵ Edward E Morris, *A Memoir of George Higinbotham: An Australian Politician and Chief Justice of Victoria* (Macmillan, 1895).

⁶ J M Bennett, *Sir John Pedder: First Chief Justice of Tasmania* (University of Tasmania, 1977); *Sir Francis Forbes: First Chief Justice of New South Wales 1823–1837* (Federation Press, 2001); *Sir James Dowling: Second Chief Justice of New South Wales 1837–1844* (Federation Press, 2001); *Sir William à Beckett: First Chief Justice of Victoria* (Federation Press, 2001); *Sir Archibald Burt: First Chief Justice of Western Australia 1861–1879* (Federation Press, 2002); *Sir Charles Cooper: First Chief Justice of South Australia 1856–1861* (Federation Press, 2002); *Sir James Cockle: First Chief Justice of Queensland 1863–1879* (Federation Press, 2003); *Sir John Pedder: First Chief Justice of Tasmania 1824–1854* (Federation Press, 2003); *Sir William Stawell: Second Chief Justice of Victoria 1857–1886* (Federation Press, 2004); *Sir Henry Wrenfordsley: Second Chief Justice of Western Australia 1880–1883* (Federation Press, 2004); *Sir James Martin: Premier and Chief Justice* (Federation Press, 2005); *George Higinbotham: Third Chief Justice of Victoria*

Such biographies tend to be specialised in character, aimed at readers with the same expertise and interest, concerned with the particularities of the field and assuming familiarity with its procedures. I think, for example, of the scientific biographies compiled by the Academy of Science, which are highly technical in their explanation of the contribution made by the subject to an activity whose meaning and significance is assumed.⁷

But this is not an inevitable consequence of the pattern. Dick Selleck's life of the educationalist Frank Tate illuminates the social and intellectual milieu of early 20th century Melbourne.⁸ Bernard Smith's life of the artist Noel Counihan is a rich exploration of the cultural politics of communism.⁹ David Marr's life of Garfield Barwick is arguably another example. Marr is a journalist, commentator and writer (he has also written an impressive biography of Patrick White),¹⁰ but is also a trained lawyer and used that training to write a highly critical — some would say tendentious — biography of Barwick that integrated his cases and judgments into a carefully plotted interpretation of his subject.¹¹

Finally, some are written by historians. These biographers often have a particular interest in the field: labour historians write biographies of trade unionists, literary historians are most likely to take up a novelist or playwright, an economic historian to choose a business leader, and so on. This gives them familiarity with the subject, but the author is not a practitioner and stands at a remove. Such biographies sometimes take the form of trade publications, but more often they are monographs, written within the conventions of the discipline. Their framework of reference is the academic profession as an interpretive community, so that they situate the subject within the relevant disciplinary literature, and apply the methods of historical investigation. There are a number of such biographies of Australian judges, but with widely divergent judicial content.

Take, for example, the biography of Redmond Barry, the senior puisne judge of the Supreme Court of Victoria from 1852 to 1880.¹² The biographer is Ann Galbally, an art historian, drawn to her subject because of his formative role in the Victorian library, museum and art gallery as well as the University of Melbourne, the

1886–1892 (Federation Press, 2007); *Sir Valentine Fleming: Second Chief Justice of Tasmania 1854–1869* (Federation Press, 2007); *Sir Alfred Stephen: Third Chief Justice of New South Wales 1844–1873* (Federation Press, 2009).

⁷ These biographies appear in the *Historical Records of Australian Science*, published by the Australian Academy of Science from 1980 until 2002 and thereafter by the CSIRO; they are available on the Academy website, <<http://www.science.org.au/publications/history-and-biographies.html>>.

⁸ R J W Selleck, *Frank Tate: A Biography* (Melbourne University Press, 1982).

⁹ Bernard Smith, *Noel Counihan: Artist and Revolutionary* (Oxford University Press, 1993).

¹⁰ David Marr, *Patrick White: A Life* (Random House, 1991).

¹¹ David Marr, *Barwick* (Allen and Unwin, 1980).

¹² Ann Galbally, *Redmond Barry: An Anglo-Irish Australian* (Melbourne University Press, 1989).

Royal Society and the Melbourne Club. It is a fine biography of an Anglo-Irish autocrat, and revealing in its picture of the multiple roles of the judiciary in colonial Melbourne, but remarkably restricted in the consideration of Barry on the bench. There is an account of Barry's clash with Higinbotham over the Attorney-General's attempt to regulate the judiciary, but the only cases that Galbally considers are the Eureka trials and then those of Ellen and Edward Kelly.

Compare this with the brief life of Barry's contemporary and rival, William Stawell.¹³ The author, Charles Parkinson, is a graduate in history as well as law, and it shows. He captures Stawell's transition from a young roisterer to an evangelical Anglican, integrates his role in the drafting of the *Victorian Constitution*¹⁴ with his vigilance as Chief Justice to uphold the independence of the judiciary, regulate the conduct of the executive and the legislature, maintain the privileges of the Legislative Council and protect the prerogatives of the governor and the Colonial Office as checks on levelling democracy.

It is surprising that there are not more biographies of colonial judges. Charles Currey, a member of the Sydney Law School, led the way with his life of Francis Forbes, the first Chief Justice of the Supreme Court of New South Wales.¹⁵ He showed how the absence of representative government in a penal colony displaced politics into the courts, setting up a persistent contest between governors and the judiciary, and marking out the rule of law as a fundamental force in Australian history. Legal historians took up this theme in some important works — David Neal's *The Rule of Law in a Penal Colony*, Paul Finn's *Law and Government in Colonial Australia*, Bruce Kercher's *An Unruly Child* — but few biographies have followed it.¹⁶

With federation and the establishment of the High Court, the famine ends. Of the first five appointments, all but O'Connor have one or more substantial biographies. The problem is that these formative judges had extended careers in colonial and federal politics before their elevation to the High Court. They followed the common practice of combining a career at the bar with active engagement in public life, for 19th century politics did not require a full-time commitment and parliamentary arrangements allowed members substantial time to pursue their extra-parliamentary interests. Each of the biographers is thus confronted with the task of apportioning space to the phases of the subject's career and integrating the components into a coherent whole.

¹³ Charles Parkinson, *Sir William Stawell and the Victorian Constitution* (Australian Scholarly Publishing, 2004).

¹⁴ *Constitution Act 1855* (Vic).

¹⁵ C H Currey, *Sir Francis Forbes: The First Chief Justice of the Supreme Court of New South Wales* (Angus and Robertson, 1968).

¹⁶ David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991); Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987); Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen and Unwin, 1995).

In writing the life of Samuel Griffith, Roger Joyce took the exhaustive approach. His original manuscript was 750,000 words in length, and on the advice of his publisher he cut that down to 442,000 and then even more ruthlessly to 200,000 words.¹⁷ A substantial number of them are given over to Griffith's activity in Parliament, his terms as Premier of Queensland and involvement in federation. Griffith became Chief Justice of the Supreme Court of Queensland in 1893, and of the High Court on its formation in 1903 until 1919. He presided over 413 reported cases in the first jurisdiction, 950 in the latter: I take these figures from Roger Joyce, who I suspect took notes on all of them.¹⁸

But what was he to do with them? He has a chapter on the decade in Queensland, and reports a small proportion of cases, chosen I think either for their significance or human interest. With the High Court the emphasis is on the constitutional cases and the way that Griffith was determined to maintain the federal compact that he had helped design. But this method of exegesis, which consists essentially of case summaries, hardly helps the reader to understand how the points at law were decided or indeed the nature of Australia's federal legalism. It is supplemented with passages that show Griffith as an austere and demanding figure and relate his strained relations with colleagues, but Joyce himself acknowledged that could not integrate his material into a fully realised biography.

Geoffrey Bolton had a different problem in his biography of Barton.¹⁹ The penultimate chapter, 'Mr Justice Barton', comes as a pendant to the fortunes of federation and Australia's first Prime Minister; and it was eight years after he took his seat on the bench alongside Griffith before Barton gave his first dissenting judgment. Unlike Roger Joyce, Geoffrey Bolton has no training in law, and he made no effort to follow Joyce's case method. Rather, he explores Barton's investment in the *Constitution* he had helped draft, his resentment of the judicial newcomers who threatened to read it differently (including the anti-Semitic confidences he shared with Griffith at the expense of Isaac Isaacs) and the ex-Prime Minister's forlorn expectations that he might follow Griffith as chief justice.

Both the newcomers, Henry Higgins and Isaac Isaacs, were outsiders. One was an impoverished immigrant who made his way at the bar but resisted absorption into the Melbourne establishment, the other a Jew whom the establishment would not admit and was disliked and distrusted by his colleagues. Both were radicals.

John Rickard's life of Higgins is an ambitious work of historical biography, making use of the troubled childhood to explore the adult preoccupations.²⁰ The biography is necessarily concerned with Higgins' role as the second president of the Court of Conciliation and Arbitration, the author of the *Harvester Judgment*²¹ and proud creator of the new province for law and order. The chapter on Higgins' work on

¹⁷ Roger B Joyce, *Samuel Walker Griffith* (University of Queensland Press, 1984) x.

¹⁸ *Ibid* 219, 273.

¹⁹ Geoffrey Bolton, *Edmund Barton* (Allen and Unwin, 2000).

²⁰ John Rickard, *H B Higgins: The Rebel as Judge* (Allen and Unwin, 1984).

²¹ *Ex parte H V McKay* (1907) 2 CAR 1.

the High Court accordingly concentrates on the cases that struck down the powers he sought to exercise in his other jurisdiction, and his eventual vindication in the *Engineers' Case*²² provides its shape. Within this context Rickard explores the way that Higgins, with Isaacs, sought to overturn Griffith's insistence on the original intention of those who drafted *Commonwealth Constitution* with ordinary rules of statutory interpretation. At the same time Rickard draws attention to Higgins' impatience with strict legalism, and criticism of 'wordchopping'.²³ This is pursued by close attention to passages in Higgins' judgments where the language allows different levels of meaning, a sort of incipient literary deconstruction but one that is suggested rather than fully developed.

Zelman Cowen's life of Isaacs seems to me to invite the psychological reading that Rickard gives Higgins.²⁴ A brilliant scholar who overcame the handicap of his Jewish origins to win glittering prizes relates the path of an earlier one who did the same. A decade after Cowen completed the biography, he followed Isaacs to Yarralumla, and in the preface to a second edition he has explained how that perspective allowed him further insights.²⁵ What then are we to make of the findings that Isaacs paraded his knowledge, dwelt excessively on his accomplishments and affronted colleagues with his ambition and egocentrism?

Cowen's is a legal biography; that is to say, it takes up the principal cases that Isaacs heard, explicates the points of law they involved, identifies the precedents, explains the reasoning that informed the judgment and indicates how it would be interpreted in subsequent decisions. With this goes a consideration of his subject's judicial personality. Isaacs had great technical mastery of the law, but he was long-winded, diffuse and dogmatic. His extra-legal activities and interests are considered; the political and vice-regal roles, the ardent nationalism and centralism, the opposition to Zionism. It is an admiring but critical biography, deficient principally in the thinness of historical context and lack of biographical depth. For some time, Cowen has explained, he put aside his manuscript because of the lack of personal papers that 'would throw light on Isaacs as a person'.²⁶ Then came some family correspondence, allowing him to proceed. The letters afford testimony but hardly bring Isaacs alive. The devices of biography, the use of incident, the accumulation of detail, the posing of questions and delineation of interpretive themes to organise the material, are not used.

The same is true of Cowen's shorter life of John Latham.²⁷ It is in fact a potted biography of first the politician and then the chief justice. The politician's views, policies and measures are recorded down to his resignation of the Nationalist Party leadership in 1931, when we are told that his style and character did not make for

²² *Amalgamated Society of Engineers v Adelaide Steamship Company Co Ltd* (1920) 28 CLR 129.

²³ *Ibid* 287.

²⁴ Zelman Cowen, *Isaac Isaacs* (Oxford University Press, 1967).

²⁵ Zelman Cowen, *Isaac Isaacs* (University of Queensland Press, 2nd ed, 1993) vi.

²⁶ *Ibid* xi.

²⁷ Zelman Cowen, *Sir John Latham and Other Papers* (Oxford University Press, 1965).

popular appeal; but that style and character are never examined. The prim manner, dry delivery and uncompromising rigour of his parliamentary performance — one journalist described him as ‘the last proud scion of a long line of pokers’²⁸ — pass unnoticed. Latham’s narrow legalism and unhappy relations with colleagues on the High Court are related, and his judicial performance judged competent rather than distinguished. ‘I think he was much in love with the career he carved out for himself’, Cowen decides on the basis of conversations with him at the Boobook Club of which they were both members.²⁹ This is memoir, not biography.

One of Latham’s tribulations, until resignation from the High Court to enter federal politics, was Herbert Evatt. Evatt has attracted a number of biographers but none of them deal satisfactorily with his decade on the bench. Ken Buckley decided to treat it separately from the biography he and colleagues wrote fifteen years ago, but that supplementary monograph did not appear.³⁰ Peter Crockett makes some perceptive observations about the way this solitary, intense, overbearing and vulnerable man channelled his sympathies through ideas: ‘he expressed emotions through the law rather than revealing them naturally’.³¹ But Crockett provides only limited consideration of a few of Evatt’s cases.

Other politicians who progressed to the High Court have also attracted biographies, notably Sir Garfield Barwick and Lionel Murphy. Barwick served seventeen years as chief justice, Murphy more than a decade as a justice; the influential judgments of the former and frequent dissenting judgments of the latter take up a large part of their biographies.³² But Murphy was the last appointee from parliament, and an exclusively legal career is less likely to attract the attention of a biographer. There is a life of Chief Justice Sir Harry Gibbs,³³ and books discussing the work of the Mason and Brennan courts, but both await more substantial studies.³⁴ A former High Court judge who then served as Governor-General, Sir William Deane, is the subject of a biography that concentrates on his difficult relationship with the Howard government,³⁵ whereas Sir Ninian Stephen, who served less controversially in the same office, has a legal festschrift.³⁶

²⁸ Quoted in my entry on Latham in the *Australian Dictionary of Biography*, vol 10 (Melbourne University Press, 1986) 3.

²⁹ Cowen, above n 27, 58.

³⁰ Ken Buckley, Barbara Dale and Wayne Reynolds, *Doc Evatt: Patriot, Internationalist, Fighter and Scholar* (Longman Cheshire, 1994).

³¹ Peter Cockett, *Evatt: A Life* (Oxford University Press, 1993) 69.

³² Marr, above n 11; Jocelyne A Scutt, *Lionel Murphy: A Radical Judge* (McCulloch Publishing in association with Macmillan, 1987); Jenny Hocking, *Lionel Murphy: A Political Biography* (Cambridge University Press, 1997).

³³ Joan Priest, *Sir Harry Gibbs: Without Fear or Favour* (Scribblers Publishing, 1995).

³⁴ Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996); Robin Creyke and Patrick Keyzer (eds), *The Brennan Legacy: Blowing the Winds of Legal Orthodoxy* (Federation Press, 2002).

³⁵ Tony Stephens, *Sir William Deane: The Things That Matter* (Hodder, 2002).

³⁶ Timothy L H McCormack and Cheryl Saunders (eds), *Sir Ninian Stephen: A Tribute* (Melbourne University Publishing, 2007).

The chief exception to this neglect of the exclusively judicial life — leaving aside his service on wartime boards and especially the period as Australian Minister in Washington from 1942 to 1944 — is Sir Owen Dixon, the subject of a fine biography by Philip Ayres.³⁷ Given the longevity of Dixon's tenure and his eminence as a jurist, Ayres pays substantial attention to the major decisions and the workings of the court. All of this is illuminated by the picture that Ayres builds up, with the assistance of Dixon's diaries, of an austere perfectionist whose impatience with human frailty extended to personal relations. My friends in the Melbourne Law School are critical of these dimensions of the work, regarding them as digressions, and also with Ayres' obiter dicta on Dixon's strict and complete legalism. As a non-lawyer, I find these dimensions of the work particularly valuable. This is a fully realised portrait of a judicial career.

Some of the same qualities are apparent in Blanche D'Alpuget's life of Sir Richard Kirby, an acting judge of the New South Wales Supreme Court, then a member of the Arbitration Court and finally — after Dixon's High Court ruled in 1956 that the Arbitration Court breached the separation of powers³⁸ — the first President of the Conciliation and Arbitration Commission.³⁹ The novelist's skills are apparent in the handling of Kirby's formative experiences and personality, and the evocation of ambience. That striking down of the Arbitration Court came after Dixon's eyes fell on the wig tin of its Chief Justice at a judicial convention in Sydney in 1951 and was affronted by its inscription, 'Kelly CJ'.⁴⁰ Kelly is the subject of a highly original study by Braham Dabscheck, which combines a theoretical analysis of arbitration and a sharply pointed sketch of his subject's beliefs to interpret his decision-making.⁴¹

Mark Finnane's recent biography of J V Barry, civil libertarian, criminologist, historian and member of the Victorian Supreme Court, is another impressive work.⁴² It is perhaps the most fully contextualised judicial biography. By this I mean that it relates both the life and the legal life, and makes each enhance the other. It is attentive to time and place; it captures what is distinctive to the activity and the vocation, and how it was practised by this individual. It clearly has significance for legal scholarship, for it reveals the vector of forces that operate in judicial determination, and in doing so it breaks down the unhelpful popular polarisation of judicial activism and strict legal interpretation. It also provides a bridge to the discipline of history as practised in Australia, which pays insufficient attention to the law. And it lends itself to the art of biography, that most challenging of literary forms.

³⁷ Philip Ayres, *Owen Dixon* (Miegunyah Press, 2003).

³⁸ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

³⁹ Blanche D'Alpuget, *Mediator: A Biography of Sir Richard Kirby* (Melbourne University Press, 1977).

⁴⁰ *Ibid* 141.

⁴¹ Braham Dabscheck, *Arbitrator at Work: Sir William Raymond Kelly and the Regulation of Australian Industrial Relations* (Allen and Unwin, 1983).

⁴² Mark Finnane with the assistance of John Myrtle, *J V Barry: A Life* (University of New South Wales Press, 2007).

Judicial biography is an undeveloped branch of scholarship in Australia. We have a long tradition of writing the lives of judges, either as a form of legal history or because the life extended beyond bar and bench. The first type of biography is generally narrow and institutional, dominated by the exercise of the office and consisting largely of the judicial record. I'm not sure that its full potential has been utilised, for that would require greater attention to the prosopographical method.

The second is written for a broader readership, more interested in the public career than the operation of the courts. I suggest that this is a stunted genre, languishing for want of a satisfactory treatment of the judicial function. The law reports are not sufficient. Just as the life of a novelist requires more than plot summaries and that of a scientist more than recital of the notable papers, so the judicial biography has to rest on something more than the case method. But it cannot disregard this essential quotidian activity. Rather, the challenge is to bring it to life, to reveal its patterns and show its animating purpose. By such means the biographer makes the judicial personality illuminate the life of the law.

**A MIRROR TO THE MAN
REFLECTING ON JUSTICE WILLIAM DEANE:
A PRIVATE MAN IN PUBLIC OFFICE**

ABSTRACT

Sir William Deane was a member of the High Court of Australia during one of its most creative periods, from 1982 to 1995. His decisions displayed a notable commitment to social justice and a willingness to extend the constitutional protection of human rights. These tendencies were particularly prominent during the Mason Court years (1987–1995), manifesting in decisions including *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Dietrich v The Queen* (1992) 177 CLR 292; *Leeth v Commonwealth* (1992) 174 CLR 455; and the political communication cases of 1992 and 1994. Although his judgments displayed a clear vision of his judicial responsibilities, Deane adopted a strict extra-judicial silence regarding the principles that informed his judicial philosophy. However, as Australia's 22nd Governor-General Deane was more open regarding his personal beliefs and their influence on his performance of those duties. This article utilises Deane's public statements as Governor-General to shed light on the foundations of his judicial philosophy. In particular, as Governor-General Deane drew on his Christian faith to support his commitment to highlight the cause of indigenous reconciliation and the plight of the disadvantaged in Australia. This article argues that Deane's spiritual convictions, as articulated in his vice-regal statements, can also be regarded as underpinning his understanding of his role as High Court Justice.

I INTRODUCTION

When Sir William Deane retired as Governor-General in 2001 he was regarded by many as one of Australia's most prominent public figures, an 'Australian living treasure'.¹ Deane's popularity, and critics, stemmed from his commitment to social

* LLB (Hons), PhD (ANU), Lecturer, ANU College of Law. The author wishes to thank the participants at the Roundtable 'A Judicious Life: Judicial and Political Biography' University of Adelaide, 5 December 2009; the ANU College of Law's WWG; Helen Bermingham, Molly O'Brien and James Stellios for discussing the ideas in this article with me; and Hollie Kerwin for her research assistance. Correspondence to <Heather.Roberts@anu.edu.au>.

¹ Sir William Deane was nominated as a national treasure in 1997. See National Trust of Australia, *Australia's Living National Treasures* <<http://www.nsw.nationaltrust.org.au/about/treasures.asp>>.

justice issues while Governor-General (from 1996 to 2001), particularly the cause of Aboriginal reconciliation. For Deane, championing these issues was an essential part of the Governor-General's duty: to hold up a mirror to the nation.²

Deane's high public profile as Governor-General stood in sharp contrast to his publicity-shy reputation in 1995, when news of the appointment was announced. A member of the High Court since 1982, and author of many controversial decisions, including the famous joint judgment with Gaudron J in *Mabo v Queensland (No 2)*,³ Deane had consistently and conscientiously remained out of the public eye.⁴ Deane would later explain that his extra-judicial silence stemmed from his understanding and personal experience of the judicial role, that, 'for me, the best way of performing my judicial functions was to confine what I had to say in my judgments, and quite frankly I found writing the judgments quite often exhausting.'⁵ However, when freed from the demands and confines of the judicial role, Deane became increasingly open regarding his vision for Australia. In particular, as Governor-General Deane would speak of the place of religious belief in his life, and how it underpinned the social justice ethos he brought to the vice-regal office.

This article argues that the spiritual beliefs Deane explicitly applied in his later life can also be regarded as underpinning his understanding of his role as a High Court judge. Part I of this article explores how Deane identified and applied the core principles of his faith as Governor-General. Part II then identifies how those beliefs can be seen in key elements of Deane's High Court decision-making, particularly his constitutional jurisprudence.⁶ It is true that utilising Deane's own later speeches

² Deane borrowed this metaphor from Sir Zelman Cowen. See, eg, Sir William Deane, 'Launch of the Indigenous Health and Welfare Report, Darwin, 2 April 1997', quoted in Sir William Deane, *Directions: A Vision for Australia* (St Pauls Publications, 2002) 79. A documentary on the office of Governor-General produced during Deane's term picked up this metaphor as its title. See *A Mirror to the People — The Governor-General* (Directed by Daryl Dellora, Ronin Films, 1999).

³ (1992) 175 CLR 1 ('*Mabo*').

⁴ Deane's publicity-shy persona was noted in the press at the time his appointment was announced, and following his press conference in response to that announcement. See, eg, Mike Steketee, 'Deane: Sound, Male and Judicial', *The Australian* (Sydney), 22 August 1995, 1; Paul Chamberlin and Marion Frith, 'A Radical Traditional Choice', *The Age* (Melbourne), 22 August 1995, 11; Margo Kingston and Verge Blunden, 'The New GG — A Devout Catholic with a Quest to Put Big Brother in his Place', *Sydney Morning Herald* (Sydney), 22 August 1995, 6.

⁵ Sir William Deane, quoted in Peter Charlton, 'Clear Views from the Top', *Courier Mail* (Brisbane), 23 August 1995, 15.

⁶ As a consequence of this article's focus on Deane's constitutional law jurisprudence, the many instances in which Deane manifested his social justice principles by holding private citizens and businesses to account for their treatment of the vulnerable are not discussed. Illustrating these trends in Deane's jurisprudence, see, eg, *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Jaensch v Coffey* (1984) 155 CLR 549; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Muschinski v Dodds* (1985) 160 CLR 583; and *Baumgartner v Baumgartner* (1987) 164 CLR 137.

and interviews to explore the principles that informed his earlier jurisprudence risks the contaminating influence of hindsight. However, Deane's extra-judicial silence compels the creative use of such public materials to search deeper within his judicial philosophy.⁷ Although this article cannot provide a comprehensive picture of Deane, his faith, or the values that underpinned his reasoning, through this lateral perspective on his public life it hopes to shed further light on the legal reasoning of a key figure in Australian judicial history.

II PART 1: GOVERNING IN FAITH — DEANE'S CHRISTIAN BELIEFS, ARTICULATED AND APPLIED AS GOVERNOR-GENERAL

A *The 'Touchstone' of Deane's Christian Faith*

Deane brought an explicit spiritual commitment to his role as Governor-General. However, some of his most detailed reflections on his spiritual life were published a year after his retirement from that role, in an interview on the ABC Radio's *Encounter* program.⁸ On *Encounter*, Deane reflected on his path to vice-regal office and the spiritual principles that he believed inspired his service in that role. There, Deane encapsulated the essence of his spirituality in the following statement:

more and more the whole of Christianity ... for me comes down to Chapter 25 of St Matthew's Gospel: I was hungry and he gave me food; I was thirsty, he gave me drink; I was without a home and he took me in ... I was in prison and you came to me. That, if you think about the context of St Matthew's Gospel, is the whole touchstone by which according to Christian belief, one's life ultimately tends to be assessed, or stands to be assessed.⁹

This passage highlights three important aspects of Deane's spiritual beliefs. First, the essence of Deane's faith was non-sectarian. In part, Deane saw his personal transition towards what he identified as these 'universal Christian principles' as a response to his experiences of religious factionalism. Deane had been raised as a Catholic, and, as he explained on *Encounter*, had witnessed the religious tensions

⁷ Contrast the extra-judicial materials available to illuminate the judicial philosophies of Deane's contemporaries on the Court. See, eg, Sir Gerard Brennan, 'Courts For The People: Not People's Courts' (1995) 2 *Deakin Law Review* 1; Sir Daryl Dawson, 'The Constitution – Major Overhaul or Simple Tune-up?' (1984) 14 *Melbourne University Law Review* 353; Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1, 5; and John Toohey, 'A Government of Laws, and Not of Men?' (1993) 4 *Public Law Review* 158. In respect of Sir Anthony Mason's speeches, see also Geoffrey Lindell (ed), *The Mason Papers: Selected Articles and Speeches by Sir Anthony Mason* (Federation Press, 2007).

⁸ ABC Radio National, 'Sir William Deane', *Encounter*, 12 May 2002, <<http://www.abc.net.au/rn/relig/enc/stories/s550825.htm>> ('*Encounter*').

⁹ *Ibid.*

in the Australian community in his youth during the 1930s and 1940s.¹⁰ Deane reflected that ‘as one gets older’ he was drawn to recognising the deep similarities between ‘all the great religion[s] of the world’.¹¹

Second, Deane’s spirituality did not express itself in prescriptive codes of morality. Rather, the essence of Deane’s faith lay in an ethos of care and compassion for the disadvantaged and vulnerable in the community. Finally, and vitally for his life in public office, Deane believed that one’s faith was lived, tested and proved in action. As Deane explained:

you can’t draw a line between belief and action, you can’t as it were, go to church on one day and then forget all about the background of belief and what belief requires in your ordinary life.¹²

Compassion for the disadvantaged was necessary but not sufficient in a good Christian life. Rather, for Deane, faith entailed a personal responsibility to act consistently with those beliefs in all aspects of one’s ‘ordinary life’. The balance of this Part demonstrates how Deane regarded these principles as underpinning his obligations and duties as Governor-General.

B *‘To Play a Small Part’ for the Disadvantaged and Reconciliation*

Prior to Deane’s term, the office of Governor-General had historically been primarily a ceremonial and community role. As Professor Winterton observed, with the exception of the 1975 constitutional crisis, the Governor-General had served as a largely ‘non-political, impartial and independent representative of the community

¹⁰ Deane also referred to his experiences of racial and religious intolerance in the 1930s in Australia in his ‘1999 Australia Day Message’ quoted in Deane, *Directions*, above n 2, 63. A searchable archive of Deane’s Australia Day speeches can be found at <<http://parlinfo.aph.gov.au>>.

¹¹ Deane, speaking on *Encounter*, above n 8. Deane’s commitment to embracing diversity in religious belief was later manifest in his decision in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 (‘*Scientology Case*’). Decided a year after Deane was appointed to the Court, this case saw Sir Ronald Wilson and Deane deliver a rare joint judgment. The question for the Court was whether Scientology constituted a religion for the purposes of Australian taxation law. As committed members of the Uniting and Catholic churches respectively, Wilson and Deane’s personal religious beliefs were opposed to Scientology. However, their joint decision reflected a broad, non-Christian, definition of religion which could encompass unorthodox and unpopular beliefs, including Scientology. On Wilson’s spiritual beliefs and the *Scientology Case*, see Antonio Buti, *Sir Ronald Wilson: A Matter of Conscience* (University of Western Australia Press, 2007) 218–20.

¹² Deane, speaking on *Encounter*, above n 8. Deane made this observation in the course of explaining what the broader Christian community should learn from Indigenous Christian communities in Australia.

on significant national occasions'.¹³ During the period following the constitutional crisis of 1975, Governors-General had largely focused their attention on avoiding partisan issues and fulfilling the unifying role of the office.¹⁴ Media coverage in August 1995 of the news of Deane's appointment as Governor-General designate intimated that he would follow that model. Some commentators cast Deane as a 'safe and non-controversial choice'¹⁵ for the post, emphasising also that he brought broad support from both sides of the political aisle.¹⁶

The years of Deane's term of office, 1996 to 2001, required the national representative and unifying symbol provided by the Governor-General. This was the era of national tragedies such as the Port Arthur massacre in 1996; the Thredbo landslide in 1997; and the loss of national icons such as Sir Donald Bradman in 2001. It was also the time of Pauline Hanson's politics; the High Court's decision in *Wik Peoples v Queensland*;¹⁷ and the Stolen Generation report¹⁸ and the political furore each created. When, as national mourner, Deane had taken sprigs of wattle to leave in memory of the young Australians killed in the canyoning accident at Interlaken, Switzerland, Deane's simple yet profound gesture had warmed the hearts of many Australians. However, in other contexts, Deane's actions took the office of Governor-General into the quagmire of Australian politics.

¹³ George Winterton, 'The Evolving Role of the Australian Governor-General' in M Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 44, 54.

¹⁴ Geoffrey Lindell, 'Governor-General' in T L H McCormack and C Saunders (eds), *Sir Ninian Stephen: A Tribute* (Melbourne University Press, 2007) 54.

¹⁵ Geoff Kitney, 'How the PM Sprang a Safe Surprise: Private Talks Led from the High Court to Yarralumla', *Sydney Morning Herald* (Sydney), 22 August 1995, 6. However, there was some controversy that the post was filled by (another) man: see, eg, Marion Frith, 'Women not the Model of a Modern G-G', *The Age* (Melbourne), 21 August 1995, 1, and Alan Ramsey, 'Yarralumla Needs a Woman's touch', *Sydney Morning Herald* (Sydney), 9 August 1995, 15.

¹⁶ One commentator observed that '[u]nlike his predecessor, Bill Hayden, whose appointment in 1988 was attacked by the Opposition, Sir William starts with goodwill and applause from both sides.' Steketee, above n 4. See also comments from former Prime Ministers Fraser and Hawke cited in John Ellicott and Michelle Coffey, 'Blacks See Republic Role for G-G', *The Australian* (Sydney), 23 August 1995, 2.

¹⁷ (1996) 187 CLR 1. This decision determined that pastoral leases did not necessarily extinguish native title and attracted fierce criticism from a number of politicians. For example, Tim Fischer famously remarked in response to *Wik* that future Court appointments should be filled by 'capital C conservatives'. See, eg, Nikki Savva, 'Fischer seeks a More Conservative Court', *The Age* (Melbourne), 5 March 1997, 1, 2.

¹⁸ Human Rights and Equal Opportunity Commission, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997). The 'Stolen Generation Report' revealed that Aboriginal children had been subject to a systematic program across the nation of forcible removal from their families, beginning in 1869 and concluding in the 1970s. The report concluded that these children and their families, although in some cases overcoming the impact of their removal, had suffered extreme trauma as a result of the removal policies.

Deane's tenure as Governor-General became controversial because of his understanding of his role as the 'mirror' to the nation. In particular, he expressed the desire to play a 'small part' in helping the disadvantaged in the Australian community and in the cause of reconciliation between Indigenous and non-Indigenous Australians.¹⁹ Consequently, Deane consistently drew the eyes of the nation towards the underprivileged, marginalised and unrecognised in Australia. It was on this basis, for example, that Deane's speeches as Governor-General repeatedly raised the issues of homelessness; drug and alcohol abuse; youth unemployment; and mental illness and health.²⁰ Further, in a final symbolic gesture, Deane used his last official event as Governor-General to underline the issue of homelessness in Australia, by hosting a lunch for youth from the charity Youth Off the Streets.²¹ Throughout his term Deane's message was simple and persistent: 'the collective plight of the disadvantaged in this country [was] a national problem of overwhelming dimensions.'²²

Deane frequently tied this message of care and compassion for the vulnerable in the Australian community to iconic Australian values and civic identity. For example, Deane explained that assistance to the disadvantaged reflected the core 'Aussie' commitment to 'a fair go'. This principle was evinced, Deane argued, by the generosity of ordinary Australians in reaching out to others to ensure that all people in Australia received an equal opportunity to share in the riches, peace and vibrancy of the nation.²³ At other times, Deane appealed to the legal foundations of the Australian nation, 'the people' and their decision to unite to form the Australian Commonwealth in 1901.²⁴ At the joint parliamentary sitting commemorating the

¹⁹ Deane identified these causes as his vision for his term at his press conference in August 1995. See, eg, Sir William Deane, quoted in Mike Steketee, 'Bill Deane: Rebel with a Cause', *Weekend Australian* (Sydney), 22–23 November 1997, 25.

²⁰ See, eg, Sir William Deane's '1999 Australia Day Message', above n 10.

²¹ See Governor-General's Program, 28 June 2001. At Deane's request, the customary gift from the Australian Government to a departing Governor-General was also made to a homeless shelter in Sydney (Charles O'Neill House). See John Howard, 'Farewell Address' (Speech delivered at the Farewell Reception for Sir William Deane, Great Hall, Parliament House, Canberra, 28 June 2001). See also the anecdote related by Cullen that: 'Each year, the Deanes host a series of Christmas and New Year parties for sick and disadvantaged children at Yarralumla and Admiralty House. As the tired children left one such party, Sir William handed each \$40, with the strict proviso that they spend \$20 on themselves but use the other \$20 to buy presents for their Mums.' Jenny Cullen, 'National Treasures', *The Australian Women's Weekly* (2001) January 55, 56.

²² See, eg, Sir William Deane, 'Opening Address' (Speech delivered at the National Conference of the Council to Homeless Persons, Melbourne, 4 September 1996); and Sir William Deane, 'Opening Address' (Speech delivered at View Clubs of Australia National Convention, Canberra, 17 September 1996). See also, Sir William Deane, '1997 Australia Day Address' available at <<http://parlinfo.aph.gov.au>>.

²³ See, eg, Sir William Deane, '2000 Australia Day Address' quoted in Deane, *Directions*, above n 2, 13.

²⁴ See, eg, Sir William Deane, 'Toast to Australia on the occasion of the Australia Day Luncheon' (Speech delivered at the Australia Day Luncheon, Melbourne, 24 January 1997). Deane also changed the official toast to reflect his understanding

centenary of the Australian federation, Deane explained the nature of his vision of Australian democracy in this way:

All of us who are privileged to hold public office, be it elected or appointed, owe a duty of trust to the present and future generations of Australians to put the pursuit of the common good above personal gain or ambition. Let us be conscious of that duty, and of the basic fact of our democracy, namely, that the ultimate source of all government power and authority in this land, is the people — all the people — of our Commonwealth.²⁵

Only by ensuring that all Australians experienced equal citizenship could the Australian nation be true to its ultimate foundation. What diminished one, diminished all. Deane thus relied on Australia's democratic foundations, and distinctive national ethos of a 'fair go', to reinforce his message that public officials had an obligation to act to improve the plight of the disadvantaged in Australia.

On other occasions, Deane linked his advocacy for the disadvantaged to what he would later describe as the core principles of his faith. For example, in his Australia Day Address in 1999, Deane reflected:

The ultimate test of our worth as a truly democratic nation must surely be how we treat our most vulnerable.²⁶

It was on this basis that Deane believed the status of Australia as a nation, and the conduct of governments in the nation, should be assessed. Deane applied his 'test' to both communities and individuals, remarking in 1998:

It is my firm belief that the ultimate test of our worth as a democratic nation is how we treat our most disadvantaged. And by 'we' I refer to all of us, as members of the community.²⁷

of sovereignty residing in the Australian people, to 'To the Queen of Australia *and the people of Australia*': Tony Stephens, *Sir William Deane: The Things that Matter* (Hodder, 2002) 6. Former Prime Minister Howard soon followed Deane's example, see Richard McGregor, 'Deane's Changes in Place on Roasted Toast to Queen', *The Australian* (Sydney), 5 November 1999, 6.

²⁵ Sir William Deane, Joint Commemorative Meeting of the Parliament of the Commonwealth of Australia and the Centenary Commemoration Ceremony, Melbourne, 9 May 2001 in Deane, *Directions*, above n 2, 72. See also an earlier explanation by Deane that: '[i]t is the very essence of a great and compassionate democracy such as ours that, when the views and aspirations of the majority ultimately prevail, there is respect, tolerance and understanding of the views and aspirations of the minority. Otherwise the unbearable cost of our development as a nation will be our disunity.': Deane quoted in Marion Frith 'A G-G's Mission' *The Age* (Melbourne), 17 May 1996, 27.

²⁶ See, eg, Sir William Deane, '1999 Australia Day Address'; above n 10.

²⁷ Sir William Deane, Opening of the Mission Australia National Conference, Newcastle, 2 February 1998 quoted in Deane, *Directions*, above n 2, 80.

Deane's vision was therefore one encompassing personal responsibility, and a commitment by all in Australia to alleviate suffering. Speaking to a Mission Australia event, Deane turned to Christian imagery to illustrate his philosophy of providing a hand of assistance to the disadvantaged:

[There] must also be the creation or encouragement of an awareness on the part of individual Australians that, while the assistance provided by Government and Government instrumentalities to the disadvantaged is absolutely vital, Government assistance can do only so much and must be supplemented by individual contributions of work, skill, dedication and, in many cases, companionship. In that regard, it is well to remember that the abiding wisdom of the patristic maxim that he who has failed to feed the man dying from hunger has truly killed him is directed to the individual and transcends mere notions of government welfare payments or services even when they are available.²⁸

Within Deane's vision, Australians, particularly Christian Australians, were left little room for complacency in their daily life. Each individual was morally charged to act, while public officials owed greater obligations because of the nature of the 'public trust' of their office.

While in statements such as these Deane alluded to the spiritual source of his 'test', it was after his retirement as Governor-General that Deane tied his vision more openly to his personal Christian beliefs. For example, shortly after his retirement as Governor-General, in 2002, Deane defined the obligations of those in public office in terms of his understanding of the touchstone of his Christian faith while launching an ecumenical religious centre:

In such times, when we are as a nation in danger of losing our way, it is particularly important that here in our national capital there should be at least one great ecumenical centre where there is no ambiguity about the constant relevance of the Christian message that the ultimate test of the worth of each of us as individuals and of all of us as a nation is how we have treated and treat the most disadvantaged and vulnerable of our fellow human beings. The parable of the Good Samaritan makes plain that, however convenient it might be to do so, one simply cannot confine one's definition of neighbour to including only our fellow Australians.²⁹

Speaking to an ecumenical gathering, it is perhaps not surprising that Deane chose to refer openly to his understanding of the Christian message. However, this speech clearly reflected the interlocking components of Deane's vision as Governor-General, that is, the obligations of public officials to serve 'the people' of Australia — 'all the people' — and that it was through their acts of service towards

²⁸ Sir William Deane, 'Opening Address' (4 September 1996) above n 22.

²⁹ Sir William Deane, Launch of 'Visions of Rottenberry Hill' at the Australian Centre for Christianity and Culture, Canberra, 31 January 2002 in Deane, *Directions*, above n 2, 87.

the disadvantaged that the nation would be judged. Not surprisingly, this repeated advocacy of the disadvantaged, and the moral overtones of his message, elicited controversy as overstepping the neutral role of the Governor-General.³⁰

The passion of Deane's speeches regarding Australia's moral obligation to alleviate disadvantage was matched only by his remarks on the topic of Aboriginal reconciliation. On this issue, Deane again turned to his understanding of his role as 'mirror' to the nation. This mirror must reflect both the glory and the errors in the Australian past, and openly acknowledge those faults: 'where there is no room for national pride, or national shame, about the past, there can be no national *soul*.'³¹ In particular, Deane saw Australia's shame as a nation in its present and past treatment of Indigenous Australians. In his famous lecture, 'Some Signposts from Daguragu' Deane explained:

It should, I think, be apparent to all well-meaning people, that true reconciliation between the Australian nation and its indigenous peoples, is not achievable in the absence of *acknowledgment* by the nation of the wrongfulness of the past dispossession, oppression and degradation of the Aboriginal peoples. That is not to say that individual Australians, who had no part in what was done in the past, should feel or acknowledge personal guilt. It is simply to assert our identity as a nation, and the basic fact that *national shame, as well as national pride*, can and should exist in relation to past acts and omissions, at least when done or made in the name of the community, or with the authority of government.³²

Through the metaphor of healing the Australian soul, Deane conveyed his sense of the paramount importance that *action* was required: first to acknowledge (confess) past acts, and then to redress the consequences of those actions. Only by such acts could the nation be healed. Without such healing, how could the nation move forward in peace towards prosperity for all Australians? Again, for Deane, all 'well-meaning' Australians, including the Governor-General, must take part in that healing process. It was for this reason that Deane issued personal apologies to Indigenous communities, including the Stolen Generations, for the tragedies of the past.³³ Robbed of their land, their history, their children and often their lives,

³⁰ See, eg, Cheryl Critchley, 'Deane defends Church Opinions', *Herald Sun* (Melbourne), 19 November 1997, 11; Rachel Hawes and Chip le Grand, 'G-G plays risky politics: Kennett', *The Australian* (Sydney), 19 November 1997, 1.

³¹ See, eg, Sir William Deane, 'Some Signposts from Daguragu' (1997) 8 *Public Law Review* 15, 21 (emphasis added). Daguragu is the Gurindji name for 'Wattie Creek', the site of the famous 1967 'Wave-Hill Walk Off' protest camp, where Aboriginal stockmen and their families rallied to force action on unequal wage provisions and Aboriginal land rights over the Victoria River area.

³² *Ibid* (emphasis added).

³³ See, eg, the response to Deane's personal 'profound' apology to the Stolen Generations, and the 'long applause' it received at the Australian Reconciliation Conference, held in Melbourne in May 1997 in Buti, above n 11, xix. See also Deane's controversial personal apology to the peoples of Mistake Creek at his speech

Deane saw full and frank acknowledgement of these past acts against Indigenous Australians as essential to the healing of the national spirit.

However, Deane's message was not simply one of spiritual and emotional healing of the country. His vision focused also on the need for governments and individuals to work together to alleviate the effects of past injustice. Thus, Deane envisioned reconciliation as necessarily encompassing measures to rectify the systemic and crushing disadvantage suffered by Indigenous peoples. For example, from his earliest speeches Deane emphasised the striking differences in quality of life that faced Indigenous communities. In his 1997 Australia Day Address Deane chose to showcase the importance of health reform as a component of reconciliation in the following way:

Let me take the example of a new-born Aboriginal baby girl and give you some plain facts about her future, if things don't change. On average, she can expect to live almost 20 years less than other Australians. She is three times more likely not to survive infancy. If she does survive until she is 15, she will be three-and-a-half times more likely to die before she reaches 25. If she reaches 25, she will be six times more likely to die before the age of 34. Her prospects are even worse if we look at particular illnesses. For example, if she does become a woman, her chances of dying from a diabetes-related illness are 17 times greater than those of a non-Aboriginal woman.³⁴

Without action to effect substantive equality between the indigenous and non-Indigenous communities in Australia, Deane argued, real reconciliation could not be achieved: 'How can we hope to go forward as friends and *equals* while our children's hands cannot touch?'³⁵

For many, statements such as these confirmed Deane's status as a part of the national conscience, offering a profound message of compassion and generosity.³⁶ For others, Deane's message was divisive, 'bleeding heart' rhetoric that politicised the ceremonial role of the Governor-General.³⁷ On this view, Deane could no longer claim to be a mirror to the people. Rather, he acted as a lens, focusing public attention on those issues vital in *his* world-view, distorting his commentary on the nature of Australia through his moralistic tone. Deane's statements on reconciliation gave particular momentum to this style of critique. In the so-

at the Ceremony of Reconciliation with the Kija People, Mistake Creek, Western Australia, 7 June 2001 in Deane, *Directions*, above n 2, 31.

³⁴ Sir William Deane, '1997 Australia Day Address', above n 22.

³⁵ Sir William Deane, 'Some Signposts from Daguragu', above n 31, 24 (emphasis added).

³⁶ See, eg, the comparison of Sir Ronald Wilson and Sir William Deane in Tony Stephens 'The Turbulent Knight', *Sydney Morning Herald* (Sydney), 4 September 1997, 13. This quote is also considered by Buti, above n 11, 340–1.

³⁷ Stephens titled Chapter 3 of his work exploring Deane's role as Governor-General 'The Work of a Bleeding Heart': Stephens, above n 24.

called history wars of the 1990s,³⁸ Deane's view of history was rejected by some as projecting Australia's past as a 'disgraceful story of imperialism, exploitation, racism, sexism and other forms of discrimination',³⁹ a history of ignominy and infamy. By referring to 'national shame', and past injustice and wrongs, Deane was regarded as projecting a politicised 'black-armband' vision of Australia's past. Deane's critics saw such remarks as embodying political activism and so usurping the democratic role of the people's representatives in Parliament.⁴⁰ For example, then Victorian Premier, Jeff Kennett, publicly criticised Deane, warning that he

should, like all predecessors before him, be careful to make sure that he doesn't become party-aligned, which I suspect he is in the sense that his views are all of one side.⁴¹

As a High Court Justice, Deane's decisions had also elicited criticism as usurping the democratic role of Parliament. As he had as Governor-General, Deane saw his role as a judge as encompassing an obligation to ensure that public officials acted in accordance with the public trust they held on behalf of 'all the people', and particularly, the disadvantaged and vulnerable in Australia. However, as a High Court judge, Deane did not explicitly connect this understanding of his role to his Christian principles.

III PART 2: DEANE, FAITH AND THE HIGH COURT

When Deane's appointment as the next Governor-General was announced in August 1995, the media offered a brief commentary on his most notable High Court decisions.⁴² They had much to discuss. Deane was appointed to the High Court in 1982 and his early years on the Court had included high profile disputes such as the *Tasmanian Dam Case*, the 'Murphy Affair' and the *Chamberlain* litigation.⁴³

³⁸ For an overview of the 'black-armband' debate and the 'history wars', see Mark McKenna, 'Different Perspectives on Black Armband History' (Research Paper No 5, Commonwealth Parliamentary Library, 1997). Recent changes to the Australian education system have resurrected discussion of 'black armband history': see, eg, Justine Ferrari, "'Black Armband' History Dumped', *The Australian* (Sydney), 26 February 2010, 3.

³⁹ John Howard, 'The Liberal Tradition: The Beliefs and Values which guide the Federal Government' (Speech delivered at the Sir Robert Menzies Lecture, Melbourne, 18 November 1996) <<http://www.menzieslecture.org/1996.html>>.

⁴⁰ Professor Lindell alluded to the risks to the office of appearing to be in conflict with the government of the day in Lindell, 'Governor-General', above n 14, 54–5.

⁴¹ Jeff Kennett quoted in John Short and Michael Magazanik, 'Kennett calls G-G for Playing Party Games', *The Australian* (Sydney), 21 November 1997, 5. See also Tony Stephens, 'Hackles Rise as Queen's Man has his Say', *Sydney Morning Herald* (Sydney), 20 November 1997, 1.

⁴² See, eg, newspaper commentary listed below nn 46 and 47.

⁴³ *Commonwealth v Tasmania* (1983) 158 CLR 1 (*Tasmanian Dam Case*); *R v Murphy* (1985) 158 CLR 596; *Chamberlain v The Queen* (1984) 153 CLR 521. For an overview of the controversy surrounding these decisions and the issues raised, see respectively Tony Blackshield, 'Tasmanian Dam Case' and 'Murphy Affair', and

In addition, Deane had contributed to, and often initiated, a re-conceptualisation of principles of tort, equity and contract.⁴⁴ In the field of constitutional law, particularly during the Mason Court era (1987–1996), Deane also consistently advocated the extension of constitutional rights, express and implied.⁴⁵ Some members of the press in 1995 noted the significance of Deane's role in these contexts.⁴⁶ However, most focused extensively, or exclusively, on *one* of Deane's decisions: *Mabo*.⁴⁷

The media's focus on Deane's role in *Mabo* was to be expected. The case had captured public attention at the time, its impact 'likened to the imposition of a peace treaty on the winning side in a war that had lasted more than two centuries.'⁴⁸ By highlighting Deane's involvement in this decision, the media both associated Deane with a well-known legal event and tapped into the controversy regarding the High Court's role in that context.⁴⁹ Further, the fact that Deane and Gaudron's joint judgment had elicited particular controversy opened the door for the commentators in 1995 to ask a number of questions: what was the motivation behind the Keating Government's appointment of Deane as Governor-General? Did the Government want Deane off the bench? Was there a tension between Deane's apparently shy public persona and his intellectual radicalism? Would he be a radical Governor-General or a lawyer's lawyer in that role? What values and principles would he bring to his new role?⁵⁰ Thus by highlighting Deane's *Mabo* decision, the media

Russell Hogg, 'Chamberlain Case' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 658, 486, 85.

⁴⁴ See, eg, the cases discussed in the entries by Rosalind Atherton et al 'Deane, William Patrick' and Michelle Dillon and John Doyle 'Mason Court' in Blackshield, Coper and Williams, above n 43, 195 and 461 respectively.

⁴⁵ Deane's rights jurisprudence is discussed below at Part II Section (b).

⁴⁶ See, eg, Farah Farouque, 'High Court Loses an Individual Thinker on Rights', *The Age* (Melbourne), 22 August 1995, 11 and Bernard Lane, 'Shy, Radical Judge Heads for Yarralumla', *The Australian* (Sydney), 22 August 1995, 13. Most of the press attention on Deane focused on his constitutional jurisprudence. As noted above, this article shares this emphasis.

⁴⁷ (1992) 175 CLR 1. See, eg, Steketee, above n 4.

⁴⁸ David Solomon, *The Political High Court* (Allen & Unwin, 1999) 27.

⁴⁹ At his press conference, Deane had dismissed criticism of the Court as 'making' law, and stated that in his view the *Mabo* decision had been misrepresented. It is unclear from the media coverage whether these remarks were unsolicited or in response to a media inquiry. Certainly Deane's reference to *Mabo* would have further encouraged the press to mention this decision in their commentary. On Deane's response to criticism of *Mabo* see, eg, Verge Blunden, 'New Man Judges his Words', *Sydney Morning Herald* (Sydney), 23 August 1995, 5.

⁵⁰ See, eg, Blunden, above n 49, 5; Don Greenlees, 'Deane Rules out a Repeat of Kerr's Dismissal', *The Australian* (Sydney) 23 August 1995, 1; Selva Kumar, 'Australia losing its most Libertarian Judge', *Business Times Singapore*, (Singapore), 31 August 1995; Chris Merritt, 'Judgement Day', *Australian Financial Review* (Sydney), 25 August 1995, 29; Innes Willox, 'Deane stays open to Ministerial Advice', *The Age* (Melbourne), 23 August 1995, 3. On the suggestion that the Government's intention was to remove Deane from the High Court because of his controversial decisions,

introduced colour and controversy to what might otherwise have been regarded as a conservative appointment: a(nother) white male lawyer to the post of Governor-General.⁵¹

However, in hindsight, the media's attention on Deane's role in *Mabo* was prescient. In *Mabo* Deane voiced opinions that would define his conduct as Governor-General, and exhibited a bold understanding of his role as a public official, at this time, as a High Court judge.

A *Deane and the Mabo Case*

In *Mabo* members of the Meriam people brought an action against Queensland claiming traditional native title over the Murray Islands.⁵² A majority of the Court (Dawson J dissenting) held that the common law recognised native title and that the title survived the acquisition of sovereignty by the Crown.⁵³ Under the so-called enlarged concept of the *terra nullius* doctrine, it had been long accepted that Australia lacked settled inhabitants or settled law.⁵⁴ However, after exploring the history of the contact between white settlers and the Indigenous peoples of Australia, Brennan J, author of the leading judgment in *Mabo*, recounted that this doctrine was 'false in fact and unacceptable in our society', resting on the 'discriminatory denigration of indigenous inhabitants, their social organization and customs.'⁵⁵ In finding for the claimants, the Court re-framed long-established principles regarding the legal consequences of white settlement and the foundations of Australian land law.

Within that controversial decision, Deane and Gaudron's reasoning attracted particular attention for the way in which they chose to recount the treatment of Indigenous peoples in Australia's history.⁵⁶ While a discussion of history was necessary in the majority's reasoning, Deane and Gaudron went beyond an account of that interaction between the cultures at settlement. Instead, their Honours

see Robert McCorquodale, 'Teoh's Case' in Blackshield, Coper and Williams, above n 43, 665.

⁵¹ Cf coverage of the need to appoint a female Governor-General, eg, Frith, above n 15. Of the four Governors-General preceding Deane (Hayden, Stephen, Cowen and Kerr), all had been legally trained.

⁵² The historical, political and personal context of the *Mabo* decision is outlined in the four entries on the case, and the further references listed therein, in Blackshield, Coper and Williams, above n 43, 446–52.

⁵³ A differently constituted Court had earlier decided *Mabo v Queensland (No 1)* (1988) 166 CLR 186. Deane was a member of the majority in that case holding that Queensland legislation designed to extinguish native title in that state, and so derail the litigation, was inconsistent with the Commonwealth's *Racial Discrimination Act 1975* (Cth).

⁵⁴ See *Mabo* (1992) 175 CLR 1, 32–3 (Brennan J).

⁵⁵ *Ibid* 40.

⁵⁶ As evinced by the continued interest in Deane's decision in 1995. See, eg, references above n 46.

characterised that history as a blot on Australia's identity, and reconciliation as a precondition to Australia's future.⁵⁷

As outlined in Part I above, the proposition that Australia as a nation and a people must own its history, both good and bad, was a key component of Deane's advocacy of reconciliation as Governor-General. Four years earlier, these views had entered Deane and Gaudron's reasoning in *Mabo*. In a noted passage from their *Mabo* decision, Deane and Gaudron reflected:

The nation as a whole *must remain diminished* unless and until there is an acknowledgement of, and retreat from, those *past injustices*.⁵⁸

Thus, as he would later express as Governor-General, Deane (and Gaudron) in *Mabo* characterised the interaction between white settlers and Indigenous Australians in moral terms, as 'injustice'. In statements that were later echoed by Deane in his vice-regal speeches, Deane and Gaudron also characterised these 'past injustices' of the history of dispossession of Indigenous Australian as '*the darkest aspect of the history of this nation*'.⁵⁹ This, they observed, was a history of

the conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and *leave a national legacy of unutterable shame*.⁶⁰

Deane and Gaudron recognised this language was 'unusually emotive' for use in a High Court decision, and asserted that it was *not* designed to attribute moral guilt. However, as Professor Berns has observed, the alliterative elements of this passage were 'intended to reach not the mind but the *heart*, to evoke not reasoned acknowledgment but *empathy*, evocative of a national holocaust which had gone for too long unremarked'.⁶¹ The very use of language of this kind ensured the ideas (and values) underpinning this aspect of Deane and Gaudron's reasoning were long remembered.⁶²

Language of this sort gave dramatic voice to Deane and Gaudron's distinctive understanding of their duties as High Court judges. In *Mabo*, in his leading judgment, Brennan J was influenced by the contemporary social context as one basis for rejecting the long-accepted principle of *terra nullius*. Thus, his perception of the community's response to a principle informed by discriminatory,

⁵⁷ See, eg, the detailed examination of the significance of the narrative employed by each of the judges in *Mabo* in Sandra S Berns, 'Constituting a Nation: Adjudication as Constitutive Rhetoric' in C Sampford and K Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 84.

⁵⁸ *Mabo* (1992) 175 CLR 1, 109 (emphasis added).

⁵⁹ *Ibid* (emphasis added).

⁶⁰ *Ibid* 104 (emphasis added).

⁶¹ Berns, above n 57, 107 (emphasis added).

⁶² Deane's repeated use of these phrases from the *Mabo* decision also ensured their continued place in public debate between 1996 and 2001.

racist assumptions, was one basis for enabling the Court to depart from the principle. While this too was the effect of Deane and Gaudron's decision, their 'acknowledgement' passage embraced a significantly broader role for the Court. Their decision offered historical and political commentary on Australia's past, and its future, in uncompromising terms. In their view, their role thus encompassed calling for Australia to *take action* to rectify injustice done to the Indigenous peoples, and, as a first step in that process, for the highest court in the land to admit to Australia's shameful past.

As these aspects of Deane's reasoning in *Mabo* were part of a joint judgment, how much can we attribute to Deane personally? Certainly there is always a tension when attributing the language, style, tone and values of a joint judgment to a single judge. By joining in the judgment, at the very least Deane can clearly be taken to have endorsed the decision's core features; its recognition of native title and the violent history of conflict between white settlers and Indigenous communities. However, two factors suggest that Deane was significantly invested in the language and sentiments of these passages in *Mabo*. First, as discussed above, his endorsement of the message of acknowledgment and action as essential for healing the Australian nation as Governor-General testifies to his continued and personal commitment to these views.⁶³ Second, for the reasons outlined below, Deane's earlier decision in the *Tasmanian Dam Case* suggests that Deane in fact authored these key passages in *Mabo*.

1 *Deane and the Tasmanian Dam Case: Clues for the Mabo Case*

Decided in July 1983, the *Tasmanian Dam Case* was one of Deane's earliest decisions as a member of the High Court. The case concerned the Hawke Labor Government's attempts to prevent the construction of a hydro-electric dam on the Gordon River below the Franklin River, in Tasmania's south-west region.⁶⁴ As a result of lobbying by environmental groups, the construction of the dam had become a central issue in the 1983 national election campaign. The then Hawke-Labor federal opposition promised to utilise Commonwealth legislative power, in conjunction with s 109 of the *Constitution*, to prevent Tasmania constructing the dam. In contrast, the federal Liberal Party's 'new federalism'⁶⁵ policy committed the Commonwealth to respecting State autonomy, including the State's right to balance issues of power generation and environmental protection within the State. Following its success at the national polls,⁶⁶ the Hawke government quickly prepared the promised legislative package. The resulting scheme,

⁶³ See, eg. above n 32.

⁶⁴ The history of the dispute, and the Court's decision, is explored in detail in Leslie Zines, 'The *Tasmanian Dam Case*' in H P Lee and G Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 262.

⁶⁵ See further Patrick Weller, *Malcolm Fraser PM: A Study in Prime Ministerial Power* (Penguin, 1989) 307–11.

⁶⁶ However, as Professor Zines observed, the acute federal issues were reflected in the electoral polls, as the Labor party failed to win a single Tasmanian seat in the House of Representatives in the 1983 election: Zines, above n 64, 265.

described by Deane as a complex ‘entanglement of provisions’,⁶⁷ relied on a suite of Commonwealth legislative powers to maximise the chance that at least one provision preventing the construction of the dam would survive the inevitable legal challenge. This technique ultimately proved effective as a majority of the Court upheld sufficient elements of the scheme to prevent the dam’s construction.

Deane’s reasoning contained important indicators of his judicial philosophy, particularly in his application of innovative interpretative approaches to strengthen the constitutional protection of individual liberty (such as proportionality reasoning).⁶⁸ However, for the purpose of pinpointing Deane’s contribution to the key passages of the later *Mabo* joint judgment, it was his analysis of the validity of the legislation under s 51(xxvi) (the ‘race power’) that warrants close attention.

Section 51(xxvi) of the *Constitution* empowers the Commonwealth to make laws with respect to ‘the people of any race for whom it is deemed necessary to make special laws.’⁶⁹ The Commonwealth’s argument was that aspects of the legislation operated to protect a site of particular significance to the cultural and spiritual heritage of Indigenous Australians and so were supported by s 51(xxvi). Deane agreed. He commenced this aspect of his judgment with an outline of the presence of the two ‘dismissive’⁷⁰ references to Indigenous Australians originally contained in the *Constitution*. Speaking of the motives behind the 1967 referendum, Deane observed,

it became increasingly clear that Australia, *as a nation, must be diminished* until acceptable laws be enacted to mitigate the effects of *past barbarism*.⁷¹

The highlighted language in this passage is strikingly similar to that of nine years later in *Mabo*. However, considered in context, the passion and moral tone of Deane’s remarks in the *Tasmanian Dam Case* were the more remarkable. In *Mabo* the rhetorical arc of Deane and Gaudron’s reasons, culminating in cataloguing the ‘barbarism’ of past acts towards Indigenous Australians, was employed as part of

⁶⁷ *Tasmanian Dam Case* (1983) 158 CLR 1, 250.

⁶⁸ The significance of this aspect of Deane’s reasoning in the *Tasmanian Dam Case* is discussed later in this article. See below n 94 and accompanying text. Deane’s discussion of the s 51(xxvi) issues in the case also extended the scope of that guarantee beyond that recognised by other judges in the case. His views on the meaning of an ‘appropriation’ in particular were influential in later cases in the 1990s. For further discussion of this aspect of Deane’s constitutional jurisprudence, see H J Roberts, *‘Fundamental Constitutional Truths’: The Constitutional Jurisprudence of Justice Deane, 1982–1995* (PhD, ANU College of Law, 2008) 190–8.

⁶⁹ On the framers’ intentions in drafting the section, the effect of the 1967 referendum on its meaning, and the Court’s interpretation of the race power generally, see Robert French, ‘The Race Power: A Constitutional Chimera’ in Lee and Winterton, above n 64, 180.

⁷⁰ *Tasmanian Dam Case* (1983) 158 CLR 1, 272.

⁷¹ *Ibid* 272–3 (emphasis added). See also *Gerhady v Brown* (1985) 159 CLR 70, 149.

a decision exploring Indigenous land rights in Australia, and in particular their interpretation of the Court's duty to modify the common law to recognise native title. However in the *Tasmanian Dam Case* the subject matter of the case did not lend itself to such a narrative: the 1983 case was a traditional federalism dispute, with the protection of indigenous cultural heritage being only one (arguably small) part of the legal and political questions raised. Further, in an otherwise dispassionate discussion of the s 51(xxvi) issues, Deane did not rely on the need to rectify past 'barbarism' to support his understanding of the head of power. In a Court arguably more conservative in style and approach than its 1992 counterpart, Deane's reference in 1983 to 'past barbarism' towards Indigenous peoples in Australian history, and the cloud under which the nation must continue until adequate steps were taken to rectify these wrongs, possessed a dramatic moral tone. In this way, the tone and language of the extract from the *Tasmanian Dam Case* indicates that as early as 1983 Deane considered it appropriate for a member of the Court to express such views in his reasons for decision and also signals Deane's heavy hand in the later *Mabo* joint judgment.

Other examples from Deane's High Court career manifest his understanding of his duty as a High Court judge to protect 'the people'. In particular, it was when Deane perceived legislative or executive interference with individual liberty that the strength of his beliefs regarding social justice, and the Court's obligation to utilise its powers creatively for that purpose, were dramatically illustrated.

B *Championing the Vulnerable:*

Deane and the Court's Role in Protecting the 'Weak ... the Poor ... and the Bad'

As is the custom for Australian High Court judges, Deane was sworn-in as a new Justice of the Court at a public ceremony in July 1982.⁷² Deane thanked those present for their support and reinforced the personal significance of the judicial oath by explaining that '[a]s witness to [the judicial] oath, *I have called upon the God in whom I profoundly believe*'.⁷³ Statements of spiritual conviction of this nature were uncommon in swearing-in speeches. For Deane this reference to his personal spiritual beliefs was particularly notable given his later decision to restrict his public remarks exclusively to his reasons for decision. At his swearing-in Deane did not take the further step of overtly connecting his judicial philosophy to his spiritual beliefs. However, he did explain his concept of the 'oath of service to the people of this country' with the following significant statement:

⁷² Despite the fame of Sir Owen Dixon's swearing-in speech as Chief Justice in 1952, these speeches remain largely unexplored. *Contra* H J Roberts, 'Fundamental Constitutional Truths', above n 68 (on the role of Deane's swearing-in speech as an indicator of his judicial philosophy) and Heather Jan Roberts, 'Women Judges, "Maiden Speeches" and the High Court of Australia' in Beverley Baines, Barak Erez and Tsvi Kahana (eds) *Feminist Constitutionalism* (Cambridge University Press, forthcoming) (on the insights of swearing-in ceremonies into gender and the law in Australia).

⁷³ Transcript of the Ceremonial Sitting of the Occasion of the Swearing-in of the Honourable Mr Justice Deane as a Justice of the High Court of Australia at Canberra, Tuesday 27 July 1982, 18 (emphasis added).

The source of law and of judicial power in a true political democracy such as Australia is the people themselves; the governed: the strong and the weak, the rich and the poor, the good and the bad: ‘all manner of people’. As the Australian Constitution itself makes clear, the Federation, in pursuance of which this Court was established, was not a federation between the States of the Commonwealth. It was a federation between the peoples of the States. Under that Federation, the grant of judicial power by the people was subject to what I see as fundamental constitutional guarantees, namely, that the power granted must primarily be exercised by an independent judiciary and that those exercising the power must act judicially.⁷⁴

This statement revealed a judge who, in 1982, had a keen interest in equality for all Australians. His speech referenced the strong *and the weak*, rich *and poor*, good *and bad*; categories of disadvantage and vulnerability Deane would later invoke in his *Encounter* interview in 2002 when explaining the touchstone of his Christian faith. As in 2002, Deane also recognised at his swearing-in a duty of action: on *Encounter* Deane indicated that Christians must act to alleviate disadvantage; in his swearing-in speech, Deane explained the grant of power from ‘all the people’ carried with it ‘guarantees’ regarding how the federal judiciary must behave.

Deane’s swearing-in speech encapsulated a powerful, innovative, vision of the authority of the *Constitution*, and the Court’s role as its interpreter. Conventional theory held that the *Constitution* derived its authority from its status as an Act of Imperial Parliament. Further, the Australian *Constitution* was regarded primarily as an instrument designed for the division of power by government, not for the protection of individual liberties.⁷⁵ Should ‘the people’ need protection, it was thus to Parliament and the democratic process, not the Courts, that they should primarily turn. As his later jurisprudence would confirm, Deane recognised the importance of representative democracy as a fundamental commitment of the *Constitution*.⁷⁶ However, from his first moments on the bench, Deane clearly embraced a different concept of the relationship between the people and the *Constitution*.

For Deane, the Court and judicial processes were the most important guarantees of individual liberties. This was because Deane regarded the judicial oath as an oath of service to ‘all the people’, and particularly to the vulnerable minorities in the community whose interests may be opposed to the passing majorities of the day. Viewing the *Constitution* through this lens led Deane to favour rights-

⁷⁴ Ibid 17–8.

⁷⁵ See, eg, Sir Owen Dixon, ‘The Law and the Constitution’ (1935) 51 *Law Quarterly Review* 590, 597. Deane’s some-time contemporary on the High Court, Lionel Murphy, held a different view of the Constitution. See further discussion in George Williams, ‘Lionel Murphy and Democracy and Rights’ in M Coper and G Williams (eds), *Justice Lionel Murphy: Influential or Merely Prescient* (Federation Press, 1997) 50.

⁷⁶ See, eg, Deane’s reasoning in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (*ACTV*) and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

sensitive interpretations of the *Constitution's* text, including the development of a number of controversial implied constitutional rights to limit governmental power. The balance of this Part explores three illustrations of these features of Deane's High Court decision-making and how these trends were consistent with his understanding of the 'touchstone' of Christian faith.

1 *The Dietrich Case: Forcing the Executive's Hand to Protect Indigent Accused*

Five months after the Court's decision in *Mabo*, Deane's reasoning in *Dietrich v The Queen*⁷⁷ again reflected his understanding of the Court's responsibility and powers to protect the disadvantaged and vulnerable in the Australian community.⁷⁸ *Dietrich* had been found guilty of the federal offence of importing trafficable quantities of heroin.⁷⁹ He appealed his conviction to the High Court on the ground that his 40 day trial represented a miscarriage of justice because he had been unrepresented. In an earlier decision,⁸⁰ the High Court had recognised that at common law an accused had a right to a fair trial and that a court could utilise its inherent powers to stay proceedings to prevent an abuse of process and avoid an unfair trial. Could this principle be extended to permit a Court to stay proceedings until representation could be obtained? Such a conclusion would effectively compel the executive to reassess and reallocate legal aid resources. Should the Court intrude into the realms of policy and governmental expenditure in this way?

For Deane the Court's duty was clear and paramount. The decision to bring criminal proceedings against an individual was one of compulsion by the executive. As such, the executive bore corresponding obligations to ensure fairness in such circumstances, including, where necessary, to provide appropriate legal representation at public expense. Further, Deane regarded the Court's processes as an essential guarantee of fairness and justice; guarantees of particular significance to individuals when faced with the power of the government. It was from that platform that Deane commenced his decision in *Dietrich*, stating the underlying principles at issue in this case in the following terms:

The fundamental prescript of the criminal law of this country is that no person shall be convicted of a crime except after a fair trial according to law. In so far as the exercise of the judicial power of the Commonwealth is concerned, that principle is entrenched by the Constitution's requirement of the observance of judicial process and fairness that is implicit in the vesting of the judicial power of the Commonwealth exclusively in the courts which Ch III of the Constitution designates.⁸¹

⁷⁷ (1992) 177 CLR 292 (*'Dietrich'*).

⁷⁸ For an overview of the significance of the Court's decision in this case, see Declan Roche, 'Dietrich v The Queen' in Blackshield, Coper and Williams, above n 43, 207.

⁷⁹ *Dietrich* was later convicted of more serious offences. See further Andrew Rule and John Silvester, 'Rich Man, Poor Man', *The Age* (Melbourne), 13 November 2009 <<http://www.theage.com.au/national/rich-man-poor-man-20091112-ick8.html>>.

⁸⁰ *Jago v District Court (NSW)* (1989) 169 CLR 23.

⁸¹ (1992) 177 CLR 292, 326.

According to Deane the right not to be tried unfairly in the federal system was constitutionally protected.⁸² *Dietrich* thus demonstrated his commitment to enforce the rights of the indigent — ‘the poor ... the weak ... [and] the bad’⁸³ in the Australian community — even in the face of significant delays in the administration of criminal justice, and the reallocation of scarce public resources.

An earlier High Court case had confirmed Deane’s heightened sensitivity to the relationship between the executive, the judiciary and the people, and the fair administration of justice in Australia. The incident occurred in 1988 in the context of an urgent application by the Commonwealth to prevent the publication by a reporter of a security agent’s identity and location.⁸⁴ Because the application was scheduled outside ordinary Court hours, Deane required Court staff to display a notice that indicated that the matter was being heard in open court. Given the location of the High Court in Canberra, and the hour of the hearing, it seems unlikely that persons without prior knowledge of the application would have seen the notice and so elected to attend the hearing. Nevertheless, Deane’s insistence that a notice be placed on the Court was an affirmation by the Judge of the principle of open justice and its importance in Australian society.

After the application was heard, Deane was informed that a member of the Commonwealth Attorney-General’s Department had recorded the names of individuals seated in the public gallery. Deane considered that this incident was a cause for concern and, as in *Dietrich*, relied on the Court’s inherent powers to take action in the matter. On this instance, Deane held a special sitting of the Court to interrogate the Commonwealth officials involved. Ultimately, Deane was satisfied by the Commonwealth’s explanation of its conduct and he decided that no further action was required. Nevertheless, Deane issued a statement defending the principle of open justice, including an affirmation of:

the importance of ensuring that *the right* of members of the public to attend the public sittings of the Court be not compromised and that *the independence of the court from the control of the Executive Government in the exercise of judicial power be vigilantly safeguarded and publicly proclaimed*.⁸⁵

In tone, this statement conveyed Deane’s outrage at the threat of executive overreach and its impact on individual liberty in Australia. Deane’s sensitivity to such issues should not have come as a surprise, even in 1988. In 1984, for example, Deane had remarked in *A v Hayden* that the case ‘illustrate[s] the abiding

⁸² Deane’s vision for the constitutional protection of this right was a minority view in *Dietrich*.

⁸³ See above n 73, 17.

⁸⁴ *Commonwealth v Brian Toohey* (Unreported, High Court of Australia, Deane J, 8 November 1988). An overview of the incident is provided in Rebecca Craske, ‘Open Court’ in Blackshield, Coper and Williams, above n 43, 511.

⁸⁵ ‘Orders in ASIS Secrets case’, (1988) 19 *Legal Reporter* 6, 7 (emphasis added).

wisdom of the biblical injunction against *putting one's 'trust in men in power'*.⁸⁶ From a serving judge, these were strong words regarding the conduct, character and motivations of the executive government. This strength of belief accompanied Deane's actions in 1988 too, as he fiercely asserted the principle of open justice and in *Dietrich* ensured the fairness of judicial proceedings for an indigent accused by invoking the Court's inherent power to protect 'the people' from the coercive effects of executive power.

A further notable feature of *Dietrich* was the difference in approach between Justices Deane and Brennan. Avid Court watchers would have observed many similarities between the reasoning of these two Catholic judges across their High Court careers. For example, looking only to cases decided in 1992, the year of *Dietrich*: both judges were in the majority in *Mabo*; both recognised the implied freedom of political communication as a constitutional guarantee (*ACTV*);⁸⁷ and, most controversially, both had sympathies for the implication of an implied constitutional guarantee of equality (*Leeth v Commonwealth*).⁸⁸ This one year confirmed a strong social justice commitment in the reasoning of both judges. However, in *Dietrich* Brennan's reasoning differed from Deane's in significant ways. Justice Brennan did not deny the fundamental importance of a fair trial in the Australian legal system, and the place of legal representation in achieving that end,⁸⁹ nor that the Australian community should bear the cost of legal representation in a 'civilized system of justice'.⁹⁰ Nevertheless, Brennan reasoned that it was for those who controlled 'the public purse strings', the federal executive and Parliament, to determine the allocation of funding from that limited resource.⁹¹ Accordingly, Brennan concluded that for the Court to allow an indefinite stay in such circumstances would constitute both an 'unwarranted intrusion into legislative and executive functions'⁹² and a failure for the Court to exercise its own constitutional duty.⁹³ In this way, *Dietrich* reflected Brennan and Deane's different visions of appropriate limits on the Court's power to protect the disadvantaged.

2 *Proportionality Reasoning: Balancing Minority Interests and Legislative Power*

Through the introduction of 'proportionality' reasoning in constitutional adjudication Deane created a further mechanism by which the Court could act to protect the interests of the vulnerable in Australian society. Deane's first use of the language of 'reasonable proportionality' was made in the *Tasmanian Dam Case*

⁸⁶ *A v Hayden* (1984) 156 CLR 532, 592 (emphasis added).

⁸⁷ *ACTV* (1992) 177 CLR 106. The differences between Brennan and Deane JJ's application of proportionality reasoning in this case is discussed further below n 103 and accompanying text.

⁸⁸ (1992) 174 CLR 455 ('*Leeth*'). See further discussion below n 120 and accompanying text.

⁸⁹ *Dietrich* (1992) 177 CLR 292, 316.

⁹⁰ *Ibid* 317.

⁹¹ *Ibid* 323. See also *ibid* 349–50 (Dawson J).

⁹² *Ibid* 323.

⁹³ *Ibid* 324.

when assessing whether parts of the Commonwealth legislative scheme could be supported by the external affairs power. In that case, Deane explained that for a law implementing treaty obligations to be supported by s 51(xxix) it must evince ‘a *reasonable proportionality* between the designated purpose or object and the means which the law embodies for achieving or procuring it’.⁹⁴

Deane’s test clearly required the Court to examine the relationship between the legislative means and ends.⁹⁵ He illustrated his test in the *Tasmanian Dam Case* with an ‘extravagant example’ of a Commonwealth law compelling the destruction of all sheep in Australia. Such a law would fulfil an objective to prevent the spread of disease amongst sheep but would fail the reasonable proportionality test as a draconian measure to achieve that end.⁹⁶ In the *Tasmanian Dam Case* Deane concluded that Parliament had assumed too great a degree of control over the designated area in the State (prohibiting all earthworks, from major excavations to small scale interference with native vegetation). Although the measures would ensure compliance with Australia’s international obligations to protect natural heritage, in their breadth much of the scheme could not satisfy the reasonable proportionality requirement.⁹⁷

Deane’s reasoning in the later case of *Richardson v Forestry Commission*⁹⁸ illustrated how his proportionality test could operate to strengthen the judicial protection of minority interests from the exercise of majority power. *Richardson* concerned a challenge to a Commonwealth law freezing development of an area of Tasmanian wilderness until an inquiry could be conducted into its environmental value. In addition to prohibiting construction (whether for roads or fire breaks) the legislation made it unlawful for land-owners to fail to take ‘reasonable steps’ to prevent prohibited acts occurring on their property. A majority of the Court, with Deane and Gaudron dissenting in separate judgments, held that it was within Parliament’s power to conclude that these measures were a reasonable mechanism to preserve the land until a determination of its status under the World Heritage Convention was made.⁹⁹ Thus, the majority judges considered that it was for Parliament to balance the adverse impact on land-owners against the fulfilment of the Commonwealth’s treaty obligations and the ensuing environmental benefits. However, Deane focused on the impact of the legislation on the small number of private land-owners affected by the scheme.

In a passage reflecting, in both substance and tone, his vision of the Court’s duty to stand *against* Parliament to protect the rights of ‘the people’, Deane remarked:

⁹⁴ *Tasmanian Dam Case* (1983) 158 CLR 1, 260 (emphasis added).

⁹⁵ On the balancing inquiry involved in proportionality analysis, see generally Jeremy Kirk, ‘Constitutional Guarantees, Characterisation and the Concept of Proportionality’ (1997) 21 *Melbourne University Law Review* 1.

⁹⁶ *Tasmanian Dam Case* (1983) 158 CLR 1, 260.

⁹⁷ *Ibid* 266.

⁹⁸ (1988) 164 CLR 261 (*Richardson*).

⁹⁹ *Ibid* 291–2 (Mason CJ and Brennan J); 303–4 (Wilson J); 328 (Dawson J); 336–7 (Toohey J).

Insignificant though those areas may be in the overall perspective from Canberra, their owners, few though they may be, are citizens whose lives and property are beyond the reach of the Parliament except to the extent authorized by a relevant grant of Commonwealth legislative power. Yet there was no effort by the Commonwealth to justify the application of the protective regime, with all its stringency, to those privately owned areas of freehold land.¹⁰⁰

According to Deane the interests of the vulnerable ‘few’ Tasmanian land-owners had been improperly sacrificed to the Commonwealth Parliament’s pursuit of policy objectives. Parliament had, in his view, given insufficient weight to the individual rights affected by the law.¹⁰¹ This was confirmed for Deane by the fact that the Commonwealth could not demonstrate that it had investigated how these ‘few’ land-owners would be affected by the regime: Parliament had sacrificed the interests of the vulnerable ‘few’ for the many.¹⁰² Deane therefore found that much of the legislative scheme in *Richardson* was not reasonably proportionate to the implementation of the Commonwealth’s treaty obligations, and so was invalid.

In *ACTV* Deane and Toohey, in joint judgment, also utilised proportionality reasoning to scrutinise the impact of Commonwealth legislation on individual rights, specifically, free speech.¹⁰³ In that case, the Commonwealth had imposed a prohibition on political advertising in the mainstream media. The Commonwealth then allocated free media time to those persons and parties already represented in Parliament. A majority of the Court in this case recognised that the *Constitution* contained an implied guarantee of political speech. As this freedom was not absolute, the Court then assessed whether the Commonwealth legislation could reasonably be regarded as proportionate to the pursuit of a legitimate end. Deane and Toohey concluded that the legislation was a disproportionate means of achieving its objective.¹⁰⁴ They reasoned that the implied freedom protected the ability of parliamentarians and all candidates for political office (not simply members of established political parties) to communicate with the electorate as well as the ability of ‘the people’ to communicate with each other about governmental and political matters. When assessing the effect of the legislation, Deane and Toohey were particularly influenced by the fact that the scheme reinforced the

¹⁰⁰ Ibid 316.

¹⁰¹ Compare Deane’s analysis with the reasoning of Mason CJ, Deane and Gaudron JJ in *Davis v Commonwealth*, also decided in 1988, where the concept of reasonable proportionality was utilised in the context of the incidental power of the Commonwealth. There, the impact of the Commonwealth’s measures on traditional common law rights was significant for their Honours’ assessment of the validity of the measures. These measures were found to be ‘grossly disproportionate to the need to protect the commemoration’ of the bicentenary of European settlement in Australia. See *Davis v Commonwealth* (1988) 166 CLR 79, 100.

¹⁰² *Richardson* (1988) 164 CLR 261, 316.

¹⁰³ This case has been subject to extensive commentary and critique. For an overview of its historical and doctrinal significance, see, eg, H P Lee, ‘The Implied Freedom of Political Communication’ in Lee and Winterton, above n 64, 383.

¹⁰⁴ *ACTV* (1992) 177 CLR 106, 174 (Deane and Toohey JJ).

status of those already in positions of political strength. How could groups previously unable to obtain representation in Parliament express their views and protect their interests if ‘free time’ depended on prior success at elections? In this way, the legislation reinforced the strength of the dominant political parties, and compounded the disadvantage of the minority voice in the Australian community.

In this conclusion in *ACTV*, Deane’s approach again stood in contrast to Brennan’s analysis. Justice Brennan reasoned that the Court must apply proportionality reasoning through the filter of an express ‘margin of appreciation’ to Parliament.¹⁰⁵ On Brennan’s approach, it was reasonable for Parliament to have come to the conclusion that in order to protect political processes from the corrupting influence of expensive media buys it was necessary to regulate and restrict political advertising in Australia. In particular, he emphasised that ‘the Parliament chosen by the people — not the Courts, not the Executive Government — bears the chief responsibility for maintaining representative democracy in the Australian Commonwealth’.¹⁰⁶ Brennan’s reasoning thus deferred to the motivations of the people’s current representatives while Deane and Toohey’s reasoning reflected Deane’s scepticism of majoritarian democracy as an adequate guarantee of the rights of ‘all the people’ in Australia.

3 *No ‘Bill of Rights’? No Problem*

In *Dietrich* and in his application of the proportionality test, Deane’s reasoning had exhibited a tendency to enlarge the ability of the Court to take action to protect individuals against governmental power in order to protect the ‘weak’ from the ‘strong’. These decisions stemmed from Deane’s vision of the Court’s duty to interpret the *Constitution* consistently with the principle that all power stemmed from ‘the people’. A dramatic statement by Deane of the breadth of his rights-vision came in 1989. In *Street v Queensland Bar Association*¹⁰⁷ Deane commenced his reasons with a rights ‘manifesto’,¹⁰⁸ in which he declared:

It is often said that the Australian Constitution contains no bill of rights. Statements to that effect, while literally true, are superficial and potentially misleading. The Constitution contains a significant number of express or implied guarantees of rights and immunities. The most important of them is the guarantee that the citizen can be subjected to the exercise of Commonwealth judicial power only by the ‘courts’ designated by Ch III (s 71). Others include: the guarantee that the trial on indictment of any offence against any law of the Commonwealth shall be by jury (s 80); the

¹⁰⁵ Ibid 159.

¹⁰⁶ Ibid 156. However, in its application to State elections, Brennan J held that the provisions were invalid on the basis that they imposed a burden on the capacity of the State to function. His conclusion relied largely on the same factors considered in his proportionality analysis.

¹⁰⁷ (1989) 168 CLR 461 (*‘Street’*).

¹⁰⁸ Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 3rd ed, 2002) 1100.

guarantees against discrimination between persons in different parts of the country in relation to custom and excise duties, and other Commonwealth taxes and bounties (ss 51(ii), 51(iii), 86, 88 and 90); the guarantee of freedom of interstate trade, commerce and intercourse (s 92); the guarantee of direct suffrage and of equality of voting rights among those qualified to vote (ss 24 and 25); the guarantees of the free exercise of religion (s 116); and the guarantee against being subject to inconsistent demands of contemporaneously valid laws (ss 109 and 118).

All of those guarantees of rights or immunities are of fundamental importance in that they serve the function of advancing or protecting the liberty, the dignity of the equality of the citizen under the Constitution.¹⁰⁹

Deane's decision in *Street* was delivered a year after the failure of a referendum designed to increase the guarantees of individual liberty in the *Constitution*. However, in *Street* Deane affirmed his vision that, even in its unamended form, the *Constitution* was a significant source of individual rights.¹¹⁰

To date, no member of the High Court has endorsed Deane's list of constitutional guarantees in its entirety.¹¹¹ As foreshadowed earlier in this article, this vision of the Australian *Constitution* sat at odds with the conventional understanding of the fundamental nature and purpose of the text. Sir Owen Dixon, for example, had famously remarked extra-curially that the lack of a Bill of Rights in the Australian context went 'deep in legal thinking.'¹¹² This understanding of the nature of the *Constitution* had also infused the reasoning of members of the Court in the key cases of Deane's era. For example, Mason CJ in *ACTV* reflected on the importance of the framers' decision not to include a Bill of Rights in the Australian *Constitution* in the following way:

In light of this well recognised background, it is difficult, if not impossible, to establish a foundation for the implication of general guarantees of fundamental rights and freedoms. To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and

¹⁰⁹ *Street* (1989) 168 CLR 461, 521–2 (emphasis added).

¹¹⁰ Deane had already implemented these guarantees in a number of decisions prior to 1989. For example, in *Kingswell v The Queen* (1985) 159 CLR 264 and *Brown v The Queen* (1986) 160 CLR 171 Deane had affirmed s 80 as a fundamental guarantee of trial by jury of serious federal offences.

¹¹¹ Justice Michael Kirby had perhaps gone furthest on this path. On Kirby's constitutional vision see Heather Roberts and John Williams, 'Constitutional Law' in I Freckelton and H Selby (eds), *Appealing to the Future: Michael Kirby and His Legacy* (Lawbook, 2009) 179.

¹¹² Sir Owen Dixon, 'Concerning Judicial Method' (1956) 29 *Australian Law Journal* 468, 469.

freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.¹¹³

It was against this philosophy that in 1989 Deane dared to proclaim the centrality of rights in the Australian *Constitution*.

In his rights' manifesto in *Street*, Deane referred to a vast and eclectic mix of constitutional provisions. Amongst these, ss 80, 116 and 117 had been traditionally regarded as constitutional rights, albeit of somewhat limited operation.¹¹⁴ However, Deane extended his catalogue to incorporate ss 90, 109 and 118 as guarantees of equality and the rule of law.¹¹⁵ As he explained in 1984 in *University of Wollongong v Metwally*:

the Australian federation was and is a union of people and ... whatever may be their immediate operation, the provisions of the Constitution should properly be viewed as ultimately concerned with the governance and protection of the people from whom the artificial entities called the Commonwealth and States derive their authority.¹¹⁶

Consistent with this understanding of the *Constitution's* purpose, Deane held that its text must be interpreted for the benefit of the people, and so restrictions on power conferred corresponding privileges and immunities on 'the people'.¹¹⁷ In *Metwally*, Deane's vision of the *Constitution* through the lens of its inherent benefit to 'the people' meant that s 109 was not to be interpreted solely as a provision designed to resolve disputes between Commonwealth and State laws. Rather, it was a guarantee, 'protecting the individual from the injustice of being subjected to the requirements of valid and inconsistent laws of Commonwealth and State Parliaments on the same subject'.¹¹⁸ It was by virtue of this understanding of the nature of the Australian *Constitution* that Deane could conclude in *Street* that it was 'misleading' to draw adverse comparisons between the Australian and American

¹¹³ *ACTV* (1992) 177 CLR 106, 136. See also in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 720 (McHugh J), decided two years after *Street*, in which McHugh J drew on the framers' failure to incorporate a guarantee against retrospective criminal laws as a factor precluding the implication of such a guarantee from Ch III.

¹¹⁴ *Street* (1989) 168 CLR 461, 521–2. It is surprising in this context that Deane did not include s 51(xxxi) in this catalogue, particularly as in 1983 in the *Tasmanian Dam Case* Deane had extended the definition of an 'acquisition of property' to expand significantly the scope of the 'just terms' guarantee. On the traditionally narrow interpretation of ss 80, 116 and 117, see generally Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 569–78.

¹¹⁵ Deane applied this vision of s 90, 109 and 118 prior to *Street* in *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599; *University of Wollongong v Metwally* (1984) 158 CLR 447 ('*Metwally*'); and *Breavington v Godleman* (1988) 169 CLR 41 respectively.

¹¹⁶ (1984) 158 CLR 447, 476–7.

¹¹⁷ Deane articulated this view of constitutional rights most clearly in his 1994 decision in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 168.

¹¹⁸ *Metwally* (1984) 158 CLR 447, 477.

Constitutions. Under Deane's list of constitutional guarantees, in number — if not in substance — Australia's *Constitution* surpassed its American counterpart.

In *Street*, Deane's catalogue of rights included reference to a number of implied protections. Although a proponent of implied constitutional rights throughout his High Court years, 1992 saw Deane at his most adventurous in this area. In *ACTV*, as discussed, Deane was part of a majority of the Court recognising the implied freedom of political communication. In *Dietrich and Chu Kheng Lim v Minister for Immigration*¹¹⁹ Deane confirmed the implication of guarantees protecting elements of judicial power from executive interference. However, in breadth, level of criticism, and connection to the core elements of Deane's constitutional philosophy, Deane and Toohey's recognition of an implied guarantee of legal equality in *Leeth* stood alone.¹²⁰

Leeth concerned a challenge to Commonwealth legislation requiring a court, when sentencing a federal offender, to have regard to the non-parole periods prescribed by the laws of the State or Territory where the offender was convicted. The provision was enacted in recognition of the fact that Commonwealth offenders were tried in State Courts and housed in State prisons. Although designed to reduce the administrative load on State prison facilities, a consequence of the Commonwealth's legislation was that offenders convicted of the same federal offence could serve different minimum terms depending upon the State in which they were convicted. In dissent, Deane and Toohey found the Commonwealth provision invalid.

Deane and Toohey's recognition of a legal equality guarantee in *Leeth* manifested Deane's willingness to adopt innovative interpretations of the *Constitution*.¹²¹ Their guarantee was premised on an interpretation of the *Constitution* as adopting, by implication, fundamental common law guarantees found to exist at the time of the federation. Amongst such guarantees, they concluded, was a guarantee that all persons would be equal under the law and before the courts. This guarantee was manifested by the incorporation of a number of constitutional provisions and fundamental doctrines in the *Constitution*. For example, they reasoned that the *Constitution*'s separation of powers at the federal level manifested the equality guarantee because the Court's duty to act 'judicially' included the obligation to provide 'equal justice'.¹²² Significantly, in terms echoing Deane's swearing-in speech, Deane and Toohey also relied heavily on the nature of the *Constitution* as a 'compact of the people' to endorse the existence of the guarantee. Deane and Toohey thus observed that the preamble made 'plain'¹²³ that the *Constitution*'s

¹¹⁹ (1992) 176 CLR 1.

¹²⁰ (1992) 174 CLR 455.

¹²¹ See also Toohey's extra-judicial remarks suggesting the breadth of his vision for implied constitutional rights in Toohey, above n 7.

¹²² *Leeth* (1992) 174 CLR 455, 486–7.

¹²³ *Ibid* 486.

conceptual basis was the free agreement of ‘the people’ — *all the people* — of the federating Colonies to unite in the Commonwealth under the Constitution. Implicit in that free agreement was the notion of the *inherent equality of the people as the parties to the compact*.¹²⁴

In this passage, Deane and Toohey appeared to rely on the extent of public participation in the constitutional referenda of the 1890s to support their understanding of the *Constitution’s* ‘conceptual basis’. However, three weeks before the decision in *Leeth* was handed down, Deane and Gaudron’s remarks in *Mabo* had underlined the limits of this interpretation of Australian history and constitutional meaning. In *Mabo* Deane and Gaudron stated that,

the Australian Aborigines were, *at least as a matter of legal theory*, included among the people who, ‘relying on the blessing of Almighty God’, agreed to unite in an indissoluble Commonwealth of Australia.¹²⁵

On its face, this statement in *Mabo* was not inconsistent with Deane and Toohey’s suggestion in *Leeth* that ‘all the people’ agreed, equally, to the terms of the Australian *Constitution*. However, in a judgment that was replete with allusion to the dichotomy between legal theory and practice,¹²⁶ Deane and Gaudron’s reasoning that the ‘Australian Aborigines’ united to form the Commonwealth ‘*at least as a matter of legal theory*’¹²⁷ invited the question of whether such a statement was true as a matter of practice.¹²⁸ By implication, Deane’s *Mabo* decision thus drew into question the accuracy of his claim in *Leeth* that in 1900 the *Constitution* effected the free agreement of ‘all the people’. Deane and Toohey’s failure, in *Leeth*, to acknowledge the historical inequalities in participation in the movement towards federation thus suggested a selective reliance on the historical record.¹²⁹ However, for Deane and Toohey this selectivity was consistent with their commitment to expanding the range of judicially protected rights, and to viewing the *Constitution* through a rights-protective lens.

¹²⁴ Ibid (emphasis added).

¹²⁵ *Mabo* (1992) 175 CLR 1, 106 (Deane and Gaudron JJ) (emphasis added).

¹²⁶ See further discussion in Berns, above n 57, 105–9.

¹²⁷ *Mabo* (1992) 175 CLR 1, 106 (Deane and Gaudron JJ) (emphasis added).

¹²⁸ See also Deane’s acknowledgment, while Governor-General, of the restrictions on qualification to be a delegate at a Constitutional Convention, and the significance of those qualifications on a sense of ‘belonging’ to the new nation; Sir William Deane ‘Opening of the Exhibition, “Belonging: A Century Celebrated” State Library of New South Wales’ Sydney, 3 January 2001, quoted in Deane, *Directions*, above n 2, 16.

¹²⁹ In the words of one commentator, other components of Deane and Toohey JJ’s reliance on history in *Leeth* had exhibited significant ‘judicial athleticism, if not a certain degree of gymnastic ability’. John Doyle ‘Courts Unmaking the Laws’ in Australian Institute of Judicial Administration (ed), *Courts in a Representative Democracy*, quoted in George Winterton, ‘Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?’ in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions* (Federation Press, 1996) 121, 132.

Deane and Toohey's conclusion on the facts of *Leeth* also demonstrated the degree to which their equality guarantee would enable the Court to scrutinise parliamentary action. In *Leeth*, Deane and Toohey recognised that 'almost all laws discriminate'. Accordingly, Commonwealth laws which could be regarded as reasonably capable of 'providing a rational and relevant basis for the discriminatory treatment' would be valid.¹³⁰ However, Deane and Toohey were heavily influenced by the fact that the executive could choose the venue of a prosecution, and so concluded that the provision breached the equality guarantee.¹³¹ In contrast, Brennan, who had displayed sympathy for the scope for the implication of an equality guarantee,¹³² concluded that the administrative complexity of housing offenders could reasonably be regarded as a 'rational and relevant basis' for the differential treatment between federal prisoners. In this way, *Leeth*, like *Dietrich* and *ACTV*, saw Brennan and Deane again display different visions of the role of the Court in protecting the individual against the coercive power of government in Australia. In these cases, both Catholic judges could be seen as supporting the judicial implementation of social justice principles. However, Brennan's understanding of deference to Parliament and the limits of judicial power stood in contrast to Deane's strong convictions regarding the purpose of the Australian *Constitution* to protect the Australian people and the role of the judiciary in implementing that purpose.

As commentators such as Zines observed in the 1990s, by drawing on 'fundamental' common law doctrines in their analysis in *Leeth*, Deane and Toohey's decision suggested the influence of natural law principles.¹³³ Certainly the doctrine of legal equality crafted by Deane and Toohey would have been sufficiently fluid to enable the Court to scrutinise a broad range of legislation for potential breaches of the fundamental rights and privileges of Australian citizens. Further, when searching for a 'rational and relevant' basis for discrimination, a judge's personal philosophy would inevitably influence their reasoning. As a consequence, by scrutinising the legislation against the principle of legal equality, the Court could 'censor' legislation by reference to those personal standards.¹³⁴ As *Leeth* demonstrated, for Deane those standards included a scepticism of Parliament's ability to, or interest in, protecting the vulnerable. That commitment was matched for Deane by his heightened sense of the Court's obligation to intercede on behalf of 'the people', in *Leeth*, through a novel interpretation of the *Constitution's* text and its fundamental principles.

¹³⁰ *Leeth* (1992) 174 CLR 455, 488–9.

¹³¹ Justice Gaudron also found the provision invalid, on the basis that it infringed the Constitution's guarantee of the separation of federal judicial power.

¹³² *Leeth* (1992) 174 CLR 455, 475.

¹³³ Leslie Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166, 183. See also Rachael Gray, *The Constitutional Jurisprudence and Judicial Method of the High Court of Australia: The Dixon, Mason and Gleeson Eras* (Presidian Legal Publications, 2008) 84–9.

¹³⁴ See further Zines, above n 133, 192–4.

IV CONCLUSION: DEANE, FAITH AND PUBLIC OFFICE

A study of Deane's public remarks from 1982 to 2002 tells of a man with a coherent vision for his roles in public office. For Deane, his oath to 'serve the people of Australia', first as High Court Judge, and then as Governor-General, was a sacred trust sworn before the God in whom he profoundly believed. Although the nature of his duties in those roles differed, Deane was consistent in his vision that his duty was underpinned by social justice principles and that he was required both to articulate and implement those principles in those roles. As Governor-General, he was outspoken on the topics of disadvantage in Australia and particularly the cause of Aboriginal reconciliation. As a High Court judge, Deane interpreted the *Constitution* so as to strengthen the power of the judiciary to protect minorities, and the most vulnerable of the Australian people, from the exercise of power by the executive or legislature. In both roles, although unelected to his position, Deane's scrutiny of governmental action was intense.

That Deane brought his vision of the role of a High Court judge with him, fully formed, to the Court in 1982 was reflected in his swearing-in speech and his many early decisions manifesting his social justice principles. However, only when he assumed office as Governor-General did Deane articulate a link between this understanding of his public office and his personal religious convictions. An ethos of Christian compassion meant that his duty was owed not to passing majorities but to 'all the people', and particularly the vulnerable and disadvantaged. For Deane, it was in his actions towards such people that the value of a Christian's life, a democratic nation, and his conduct as Governor-General and High Court Judge, would stand to be assessed.

THE MAN AND THE JUDGE: JUDICIAL BIOGRAPHIES AND SIR RONALD WILSON

ABSTRACT

Sir Ronald Wilson's life journey took him from humble beginnings to the top of the Australian legal system. But he was much more than a lawyer, holding positions and influence outside the law. His life journey is told in the biography *A Matter of Conscience*. This article discusses criticism of the biography and examines whether 'Wilson the man' explains 'Wilson the judge'.

I INTRODUCTION

In contrast to the United States, judicial biographies are not common in Australia.¹ As noted by Burnside, 'judicial biography has received little academic attention in Australia',² with only a small number of full-length

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¹ Judicial biographies abound in the United States: Sarah Burnside, 'Griffith, Isaacs and Australian Judicial Biography' (2009) 18 *Griffith Law Review* 151, 151. This is not surprising because US 'law makes giants of its judges': Norman Dorsen and Christopher L Eisgruber, 'Preface' (1995) 70 *New York University Law Review* 485, 485. As noted there by Dorsen and Eisgruber:

Jurists are central figures in the nation's politics, wielding considerable power and playing crucial roles in virtually every major policy dispute ... Yet in many respects judges are mysterious leaders: robed in black, ordinarily insulated from the public scrutiny of electoral campaigns, and expected to justify their acts by reference to legal principle rather than personal values or democratic will. It is no surprise that Americans should be curious about the lives of these people who participate so dramatically and yet so anonymously in the country's public life.

² Burnside, above n 1, 151.

biographies of High Court Justices:³ Griffith,⁴ Barton,⁵ Isaacs,⁶ Higgins,⁷ Evatt,⁸ Dixon,⁹ Barwick,¹⁰ Murphy,¹¹ Gibbs¹² and Wilson¹³ (although a biography on Justice Kirby by A J Brown is due for release by The Federation Press sometime in 2011).¹⁴

How much interest does the average public citizen have in reading about judges? Surely, the main interest comes from those within the legal system, the lawyers, legal academics, law students, and fellow judges. This can present difficulties for the biographer. Does the biographer focus on the most obvious audience — that is the legal fraternity — or seek a wider readership? Sometimes the prospective publisher may take matters out of the biographer's hand. Commercial imperative may demand a focus on the wider audience, and this may come at the expense of academic rigour. It is possible to satisfy both demands, but it is a challenge.¹⁵

I faced that challenge when researching and writing *A Matter of Conscience*, my biography on Sir Ronald Wilson. However, the details of that challenge are

³ Ibid. The following list is largely sourced from Burnside, above n 1.

⁴ A Douglas Graham, *The Life of the Right Honourable Sir Samuel Walker Griffith* (Law Book, 1939); Roger Joyce, *Samuel Walker Griffith* (University of Queensland Press, 1984).

⁵ John Reynolds, *Edmund Barton* (Angus and Robertson, 1948); Martha Rutledge, *Edmund Barton* (Oxford University Press, 1974); Geoffrey Bolton, *Edmund Barton* (Allen & Unwin, 2000).

⁶ Max Gordon, *Sir Isaac Isaacs: A Life of Service* (Heinemann, 1963); Zelman Cowen, *Isaac Isaacs* (Oxford University Press, 1967).

⁷ Nettie Palmer, *Henry Bournes Higgins: A Memoir* (Harrap, 1931); John Rickard, *H B Higgins: The Rebel as Judge* (George Allen & Unwin, 1984).

⁸ Allan Dalziel, *Evatt the Enigma* (Lansdowne, 1967); Kylie Tennant, *Evatt: Politics and Justice* (Angus and Robertson, revised ed, 1972); Peter Crockett, *Evatt: A Life* (Oxford University Press, 1993); Ken Buckley, Barbara Dale and Wayne Reynolds, *Doc Evatt* (Longman Cheshire, 1994).

⁹ Philip Ayres, *Owen Dixon* (Miegunyah Press, 2003).

¹⁰ David Marr, *Barwick* (George Allen & Unwin, 1980).

¹¹ Jenny Hocking, *Lionel Murphy: A Political Biography* (Cambridge University Press, 2000).

¹² Joan Priest, *Sir Harry Gibbs: Without Fear or Favour* (Scribblers, 1995).

¹³ Antonio Buti, *Sir Ronald Wilson: A Matter of Conscience* (University of Western Australia Press, 2007) (*'A Matter of Conscience'*).

¹⁴ A J Brown, *Michael Kirby* (Federation Press, forthcoming).

¹⁵ The eminent US jurist, Richard Posner, categorises biographies (in general) as 'ideological', 'scientific', or 'essentialist'. He views 'ideological' biographies as critical or hagiographical, where judges are presented as standing for a judicial philosophy. 'Scientific' biographies aim to answer specific questions, often of a causal nature. The aim of 'essentialist' biographies is to reveal the essential self of the biographical subject — 'the private self-concept that guides a given life': Richard A Posner, 'Judicial Biography' (1995) 70 *New York University Law Review* 502, 503. See also J Woodford Howard, Jr, 'Commentary' (1995) 70 *New York University Law Review* 533.

for another time. Rather, in this article I have two main objectives. First, I look at criticisms of and comments on Australian judicial biographies. I consider the work of James Thomson, who writes about what makes a good judicial biography generally,¹⁶ and the Hon Michael Kirby's review of *A Matter of Conscience*.¹⁷ Secondly, by referring to various aspects of *A Matter of Conscience*, I explore the question of whether individual traits, personality, childhood and professional experiences will determine what type of judge a person will be.

II COMMENT, CRITICISM AND REVIEW

A James Thomson

One can take many approaches to writing a judicial biography: it is a multi-faceted academic and literary pursuit. Some have described it as 'a unique, multidisciplinary form of scholarship, one that draws upon law, history, political science, and psychology but which integrates those fields by reference to comprehensible critical standards'.¹⁸ Others have postulated that one reason for judicial biography is 'to tell a tale with all the drama and suspense of a good novel, except that the plot happens to be true'.¹⁹

James Thomson remarks:

perceptive judicial biographies can assist in understanding whether any and, if so, what correlation exists between a judge's personal commitments and decision-making processes, for example through the revelation, use and evaluation of previously undisclosed information (including draft judicial opinions; correspondence; memoranda; diaries and working files and private papers).²⁰

Thomson goes on to say the biographer must delve deeper and wider than the usual materials such as law reports, scholarship in journals and books, speeches and private papers. The biographer needs also to search other sources such as draft judicial opinions, transcripts of argument, the judge's pre-appointment legal practice, and their personal library, not to mention family and friends.²¹ He

¹⁶ James Thomson, 'Biographies and Biographical Writing' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 63–5.

¹⁷ Michael Kirby, 'Review of *A Matter of Conscience: Sir Ronald Wilson, Antonio Buti* (2007)' (2009) 31 *Sydney Law Review* 331.

¹⁸ Dorsen and Eisgruber, above n 1, 487.

¹⁹ Philip B Kurland, 'Judicial Biography: History, Myth, Literature, Fiction, Potpourri' (1995) 70 *New York University Law Review* 489, 498.

²⁰ Thomson, above n 17, 63.

²¹ *Ibid* 64.

adds that while biographies of Australian judges have been written, none of these biographies is great.²²

I can take comfort in the fact that I wrote *A Matter of Conscience* after Thomson penned that lament. Even if his reading of *A Matter of Conscience* did not change his view, I hope he would be happy that I tapped into a wide variety of sources in my research.

Thomson's mention of the judge's personal library brought a grin to my face. I remember walking into Wilson's rather modest home (he lived by the motto: 'Living simply, so others may simply live'²³) and being ushered to his 'study'. Actually, calling it a study would be generous. It was merely an alcove, a mess of papers and magazines on the floor and desk (to be fair, he was in retirement). There was no filing or catalogue system that could be observed. Still, the 'mess' provided a rich source of letters and draft speeches.²⁴

Unfortunately, no draft judicial opinions were found in Wilson's study. It is uncertain whether any draft opinions even existed; Wilson did not think there were any stored away at home or elsewhere. This would no doubt disappoint Thomson, although in *A Matter of Conscience* I do provide some insights into Wilson's routine on the High Court and how he prepared for cases and wrote his decisions.²⁵ However, even though I do delve into some of Wilson's High Court decisions,²⁶ I believe Thomson would be disappointed that I did not provide more analysis of Wilson's High Court opinions and his time as a judge per se. The Hon Michael Kirby would agree.

B Kirby's Book Review²⁷

Overall, much to my relief, Kirby's review was complimentary. He had two major criticisms of the biography. First, that I did not devote enough space and analysis to what he saw as a conflict between Wilson's judicial and post-judicial remarks in relation to Aboriginal rights. Second, a lack of critical analysis on Wilson's judicial decision-making patterns. Kirby writes that while such analysis 'may not be all

²² Ibid.

²³ Buti, above n 13, 1. See also Linda Spearman, *Sir Ronald Wilson and the High Court* (unpublished supervised legal research paper, Murdoch University, 2004) 12. Allegedly Mahatma Gandhi first coined the aphorism.

²⁴ After the writing of *A Matter of Conscience* was concluded, Lady Leila Wilson donated her late husband's personal papers to the National Archives in Canberra.

²⁵ See Buti, above n 13, ch 9. Thomson writes on judicial biographies in general: 'Insight into institutional working arrangements, revealed through exposition of a judge's daily routine, would add a touch of reality to studies of the history, practice, procedure and organisation of courts': see Thomson, above n 17, 64.

²⁶ For example, a significant part of Chapter 10 of *A Matter of Conscience* deals with *Mabo v Queensland (No 1)* (1988) 166 CLR 186 (*'Mabo (No 1)'*), including Wilson's dissent.

²⁷ Kirby, above n 18.

that interesting to a lay reader of his life' the biography would mostly be read by lawyers who:

will feel short-changed by the section on the High Court years and the failure of the biographer to come to grips with the arguable weaknesses in Wilson's reasoning as a High Court Justice. That was an important matter because, after all, that office was the most significant and influential that Wilson held in his lifetime.²⁸

Kirby concludes his review:

For a country with few judicial biographies, Buti has chosen his subject well and presented a most readable text. The only real defect that I could see was the lack of sustained analysis of the values given effect during the subject's crucial years as a judge of the nation's highest court. Until we find biographers willing to do this, the myths of completely value-free judicial decision-making will persist in Australia. Sometimes, as possibly in Wilson's own case, they will be myths that the judges themselves are all too happy to express and even perhaps to believe in.²⁹

Kirby's criticisms have much merit and I do not dispute them. But, I cannot agree with Kirby that Wilson's time at the High Court was the most significant and influential period of his lifetime. Wilson would strongly dispute that to be the case. Wilson's tenure on the High Court did not loom large in his psyche. He never craved to be on the High Court. In fact, he declined his first invitation,³⁰ but accepted two years later out of a sense of loyalty to his State Premier, who had urged him to accept in the interests of Western Australia.³¹ That he accepted (even though, as he said later, it was the most unsatisfactory time of his professional career) is testament to his innate sense of duty and loyalty.

No doubt for Kirby, his own appointment to the High Court was the pinnacle of his career (he said as much at his swearing in ceremony) but it was not so for Wilson. In many respects, he was the accidental High Court Justice. Wilson might have gone so far as to describe the experience as incidental to his real life. I also believe Wilson's High Court period was not where he wielded his greatest impact, being on the High Court for only ten years out of a professional career of over 60 years. Some would say it was as a prosecutor that he made his true mark. I should add there were many other roles in which he exerted an influence in society to much greater effect than in his role as a High Court judge. I think it would be fair to say that for many others, particularly non-lawyers, it was Wilson's non-High Court

²⁸ Ibid 337.

²⁹ Ibid 340.

³⁰ Buti, above n 13, 175–6.

³¹ Ibid 182–6.

roles, particularly his role on the National Stolen Generations Inquiry³² and his subsequent advocacy of the *Bringing Them Home* report,³³ for which most will remember him.³⁴

It was with this in mind that I placed added weight in the writing of the biography on the Stolen Generations period, and gave as much space to his other roles as to his role as a High Court Justice. Moreover, because I made the judgment that Wilson's High Court tenure was not his major contribution to Australian society, I wanted the biography to be attractive to a lay audience as well as an audience of lawyers. However, the fact remains that Wilson was a Justice of the highest court in the land. Thus his judicial life was an important part or influence in the writing of *A Matter of Conscience*, but as I have already noted, some, such as Kirby, wish I had given it greater prominence.

I attempted to chronicle Wilson's life and some of the major influences that shaped his character and career. In many respects, that is the convention of the biographical genre. But, when writing about a judge (even one who served in other roles that arguably made a greater societal contribution), it becomes more than a convention. I believe that individual traits, personality, and upbringing play a significant part in

³² The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families ('National Stolen Generations Inquiry') was launched on 10 August 1995, in Adelaide. The National Stolen Generations Inquiry terms of reference were originally announced on 11 May 1995 by the then Attorney-General of Australia, Michael Lavarch. However, those terms of reference were revoked and replaced with similar but wider terms of reference, including the examination of compensation principles on 2 August 1995. The terms of reference of the National Stolen Generations Inquiry were: (a) tracing past laws, practices and policies that led to the removal of Aboriginal and Torres Strait Islander children from their families and the effects of those laws, practices and policies; (b) examining current laws, practices and policies with respect to services and procedures available to those affected by removal and recommending appropriate changes; (c) examining compensation issues; and (d) examining current laws, practices and policies with respect to child placement and care of Aboriginal and Torres Strait Islander children and recommending appropriate changes, taking into account the principle of self-determination: see Human Rights and Equal Opportunity Commission ('HREOC'), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Australian Government Publishing Service, 1997) 1–2.

³³ Ibid.

³⁴ Wilson, the then President of HREOC, like all other HREOC commissioners (ie Sex Discrimination Commissioner, Disability Discrimination Commissioner, Race Discrimination Commissioner, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights Commissioner, Privacy Commissioner) was a commissioner of the National Stolen Generations Inquiry. Additional female Indigenous commissioners were appointed for specific city and regional hearings. However, Wilson and Mick Dodson, the then Aboriginal and Torres Strait Islander Social Justice Commissioner, were the leading commissioners and both, particularly Wilson, were the public faces of the Inquiry report and the subsequent advocacy of the report's findings and recommendations.

determining the nature of the judge, and their approach to the role. A few excerpts from *A Matter of Conscience* will show why at least I believe this was the case with Wilson.

III THE MAN AND THE JUDGE: SIR RONALD WILSON

A Brief Profile

Wilson was a remarkable and complex man. Orphaned early in life, he left school at fourteen to work as a courthouse messenger in Geraldton — his hometown.³⁵ From here, his spectacular career was to take him to England as a Spitfire pilot in the Second World War,³⁶ then to the Crown Law Department where he served as Senior Crown Prosecutor, Senior Crown counsel and, ultimately, Western Australian Solicitor-General.³⁷ His impressive performances in that role gained him national recognition, resulting in his appointment as Western Australia's first High Court Justice.³⁸

A deeply religious man, he was a tireless worker for his church, rising to become Moderator of the Western Australian Presbyterian and Uniting Churches³⁹ and, later, President of the Uniting Church of Australia.⁴⁰ He later served as a royal commissioner investigating the 'WA Inc' period,⁴¹ deputy chair of the Council for Aboriginal Reconciliation,⁴² Chancellor of Murdoch University,⁴³ and President of HREOC.⁴⁴

However, it was as the main author of *Bringing Them Home* that Wilson aroused conflicting emotions within the Australian public. Perhaps this was inevitable. Above all else, Wilson was a powerful prosecutor of the case or cause that he was championing at any particular time. Advocacy was his life and his passion. So,

³⁵ See Buti, above n 13, ch 1.

³⁶ Ibid ch 2.

³⁷ Ibid chs 4–8.

³⁸ Buti, above n 13, 182–6.

³⁹ Ibid 139–46, 178–82.

⁴⁰ Ibid 217–8, 228, 241–56.

⁴¹ Ibid 267–76. 'WA Inc' refers to the commercial activities of the WA state governments from 1983 up to 1990. Refer to Hon Mr Justice Geoffrey Kennedy, *Report of the Royal Commission into the Commercial Activities of the Government and Other Matters*, Part 1 (Western Australia State Government, 20 October 1992) and Hon Mr Justice Geoffrey Kennedy, *Report of the Royal Commission into the Commercial Activities of the Government and Other Matters*, Part 11 (Western Australia State Government, 12 November 1992).

⁴² Buti, above n 13, 281.

⁴³ Ibid 200–1, 228–30, 257–61, 297–300.

⁴⁴ Ibid 261–6, 276–9, 289–97. Also see the chapters dealing with the Stolen Generations (Chapters 13–15), where throughout the National Stolen Generations Inquiry he was President of HREOC. His tenure as President of HREOC came to an end on 31 July 1997.

when he heard first-hand the stories of those who had suffered the consequences of Australia's misguided and inhumane separations policy, he brought his considerable advocacy skills to bear on the task of ensuring that all Australians became aware of the enormity of the injustice perpetrated on Aboriginal families and communities.

Wilson honed his advocacy skills in the Crown Law Department in Western Australia, where he gained a reputation as a forceful and, some have said, fearsome Crown prosecutor. He prosecuted in the now infamous trials of Darryl Beamish and John Button respectively in the 1960s. Almost fifty years later, the Western Australian Court of Criminal Appeal having overturned both convictions,⁴⁵ there are those who wonder if Wilson's articulate and possibly overzealous prosecution led to the convictions of these two innocent men.⁴⁶

Wilson rejected the notion that he was overzealous or insensitive.⁴⁷ As Crown prosecutor, he had a job to perform. He would countenance nothing other than performing the role entrusted to him to the best of his ability. There was never any doubt that he should keep separate his personal faith and his obligations to apply the law in the manner his role demanded.

On the other hand, he also rejected the view that his passionate advocacy of the Stolen Generations resulted from a Damascene experience, although he readily admitted that his involvement in the National Stolen Generation Inquiry was a liberating experience. Perhaps it was also a religious experience, compelling him to abandon technical legal reasoning and judicial constraint in favour of unrestrained advocacy for those who had entrusted their stories to him. He made no apologies for doing so; he simply believed he had no moral choice. Nor did he apologise for labelling the removal policies as genocide. He acknowledged that he may have been politically unwise, but he did not believe he was factually or legally wrong.⁴⁸

Because he loved advocacy, Wilson never craved appointment to the High Court. He described his period on the High Court bench as the most unsatisfying period of his professional life.⁴⁹ In many respects, Wilson was a tortured individual on the High Court: sitting on the bench day after day listening to counsel arguments rather than doing the arguing himself, then spending endless hours drafting and settling his judicial openings. This did not come easily to Wilson. He was foremost an advocate and he could not act as one from the bench, where he felt intellectually inferior to his brethren. As I write in *A Matter of Conscience*:

The roots of Wilson's self-doubt lay in his narrow formal education and his lack of study of the classics and philosophy. He believed this prevented him

⁴⁵ *Button v The Queen* [2002] WASCA 35; *Beamish v The Queen* [2005] WASCA 62.

⁴⁶ On his prosecution days, see Buti, above n 13, chs 4–6.

⁴⁷ Buti, above n 13, 43, 65.

⁴⁸ On the Stolen Generations period and Wilson's involvement and views, see Buti, above n 13, chs 13–15.

⁴⁹ Buti, above n 13, 187.

from developing a sophisticated and renaissance intellect. This personal view is reflected in his comments about the writing style of his colleagues. For example, he opined that Sir Gerard Brennan treated each judgement [sic] as a work of art and an academic treatise. Reflecting his unpretentious demeanour, Wilson remarked that ‘to write like Brennan takes far more intellect than I possess’.⁵⁰

His High Court colleagues were aware of his feelings of inferiority but thought Wilson was being too hard on himself. They valued his presence on the bench, and welcomed his expertise in criminal law and practice.⁵¹ Furthermore, they respected his sound practical decisions. Sir Anthony Mason did not think that Wilson had a profound philosophical mind, but that he did have ‘an extremely nimble, quick mind’.⁵² Significantly, Mason thought that Wilson best exhibited this attribute when he appeared as an advocate in the High Court.⁵³

Although Wilson did not enjoy his period as a Justice of the High Court, he took the office and the institution seriously. This was the mark of the man — a dedicated professional who always believed in the institutions he served, whether that be the Crown Law Department, the High Court, the church, HREOC, or the law. For him, it was important to be honest to his professional duties even if that went against what his heart was saying. As a judge, he felt compelled always to reach a decision based solely on reasoned analysis and the law as he saw it. This led him to make decisions about which he was often questioned, particularly decisions that affected Aboriginal people, such as his dissent in *Mabo (No 1)*.⁵⁴

B *Psychobiography*

It is interesting to postulate as to whether ‘Wilson the man’ determined or explained ‘Wilson the judge’? This section examines this question.

Wilson’s wife has said that sometimes she thinks she did not really know him.⁵⁵ He seemed to place things in compartments. In letters he wrote to a Mariele Kuhn while in England during the war, and from on board the ship that was returning him to Fremantle, Wilson mentioned that it was difficult for him to fully cast aside his reserve and maybe he would only be able to do so when he had fallen in love.⁵⁶ Even when he proposed, he told Lady Wilson that she would have to come after his job and church.⁵⁷ Then there was his period as a prosecutor where

⁵⁰ Ibid 190.

⁵¹ Ibid 190, 192.

⁵² Ibid 190.

⁵³ Ibid.

⁵⁴ (1988) 166 CLR 186.

⁵⁵ Buti, above n 13, 384–5.

⁵⁶ Ibid 27. As part of a friendship scheme organised by the Royal Commonwealth Society, Wilson became friends with the Kuhn family (Mariele Kuhn, her husband Heine, and their children) and often stayed with them in Oxford: ibid 22.

⁵⁷ Buti, above n 13, 38.

he was prosecuting people for whom the penalty was death. However, he held no position on the death penalty as a moral dilemma.⁵⁸ There seemed to be a sense of detachment from issues that did not directly affect the task at hand.

Did this have any bearing on Wilson as a judge? It may have, but it is difficult to be decisive or unequivocal about this. It certainly had an effect on him as a prosecutor, where he was able to block everything out of his mind but the task before him — to prosecute.

Perhaps this ability to consign things to their relevant compartments in his mind helped when he was a prosecutor. His duty was clear. He knew what the law required. His task was simply to see that the requirement was met. As a prosecutor, there was neither need, nor place for equivocal feelings. As for the other side in the adversarial contest, well, somebody else had to worry about that. As a High Court judge, he did not have that luxury. For the first time in his legal career, he had to impartially consider both arguments; he had to decide between the two sides

Both the church and the air force, each authoritarian institutions in their own ways, would have given him rules — to follow without question. Perhaps this is why he was happy in each. Is it any wonder that when, in the High Court, he had to throw philosophy into the mix, he felt he was not up to the challenge.

One indisputable fact is Wilson's loyalty to the institutions he served. Until his elevation to the High Court, he had spent all of his professional legal life in the Crown Law Department of Western Australia. He was trained and grounded in representing the State of Western Australia's interest. This made him sensitive to issues of state rights. He felt loyalty to the Crown Law Department and the interest of the states, particularly the smaller states and more so his home State of Western Australia.⁵⁹ He carried this to the High Court, where judgments in cases such as *Mabo (No 1)* and the *Tasmanian Dams Case*⁶⁰ attest to his states' rights perspective. He might say that he was just upholding the Constitution and being faithful to his oath as a Justice of the High Court to apply the law.⁶¹ Then again, all Justices of the High Court would say that (well hopefully they would). However, judges differ on their interpretation of the law, and on how they apply it to the particular situation that confronts them. That is why we have differing judgments

⁵⁸ Ibid 67. In response to this I wrote: 'It is surprising that an intelligent, deeply religious man, who was intricately involved in the death penalty cases, did not have or cannot recall having a particularly strong view. Maybe it was a way of coping with the issue at the time. He was a religious man, very much involved in the Presbyterian Church, which was part of a broad church movement opposing [the] death penalty; at the same time he played a significant role in sending people to death. Maybe he needed to detach himself from the religious and moral issues in order to do his job properly, while maintaining his strong commitment to his church.': ibid 67–8.

⁵⁹ Buti, above n 13, 189, 191, 239–40.

⁶⁰ *Commonwealth v Tasmania* (1983) 158 CLR 1.

⁶¹ Buti, above n 13, 238–9.

in appellate courts. Judges' own value systems must affect how they see the law, whether or not they are aware of it.

Wilson's loyalty to the institutions he worked for, and the people who worked within them, can also be seen in another aspect of his High Court period. Wilson had gone to the High Court with two pleas from the Western Australian legal profession ringing in his ears. One was to write succinct judgments. The other was for more joint judgments. Practising lawyers did not want seven versions of the law.⁶²

The general view was that Wilson's judgments were 'well crafted', displaying 'unusually careful attention to the argument of counsel'.⁶³ He also sought joint judgment whenever possible. He was more than happy to have other Justices add their names to his written decisions. He did not seek glory on the High Court.⁶⁴ Here too perhaps, he sought the same unity, order, and internal sense of security that institutions like the church and military offer.

Wilson prided himself on his professionalism and separating his personal views from the job at hand. He remarked: 'I didn't allow any personal views affect my professional role and duty.'⁶⁵ This is yet another example of the sense of detachment previously mentioned.

However, it is difficult not to think that Wilson's personal views significantly influenced his advocacy for reparations to be made to the Stolen Generations. As Wilson said himself:

I came to this inquiry [Stolen Generations National Inquiry] a couple years ago as a man over the hill at 73 with about 50 years or more behind me as a hardboiled lawyer mixing it with all sorts of antagonists and people in the courts here and in England and yet this inquiry changed me. The reason it changed me is that it penetrated the heart, it got away from my mind which I have had done for the rest of my life in all the briefs I have had.⁶⁶

Commenting on this period in Wilson's life, Kirby notes that Wilson acted differently than he did as a judge. He was emboldened to make different choices and 'with his considerable skills as an advocate to the fore, he set out to convince people of the rightness of his causes'.⁶⁷

⁶² Ibid 195.

⁶³ Ibid.

⁶⁴ Ibid 198.

⁶⁵ For example, see *ibid* 68, when discussing the death penalty.

⁶⁶ Buti, above n 13, 330, citing Ronald Wilson (Speech delivered at a community meeting, Old Parliament House, Canberra, 28 October 1997).

⁶⁷ Kirby, above n 18, 339.

Whatever Wilson's journey or 'transformation' from being a crown advocate, judge, to human rights advocate, he was contended with his life journey and works. He was happy and satisfied with his life and did not fear death. A year before he died, he said he would be content to die 'tomorrow'. But, he added that he hoped more people than not would regret his passing, and that they would think he had made a difference.⁶⁸

III CONCLUSION

I commenced this article by saying that satisfying the competing demands of academic rigour and of compelling true storytelling is challenging. I nevertheless took up that challenge with *A Matter of Conscience*. A judge is a person first, and who they are as a person will have some bearing (at least) on how they fulfil their role as judge. They will, of course, apply the law and honour the Constitution. However, the traits that define them as an individual will influence how they arrive at their judgment, and the level of emotional discomfort suffered along the way. Over the years, lecturers, law students, and others will read and make their own judgements on the judgments Wilson wrote. I will be satisfied as a biographer if my examination of Sir Ronald Wilson the man helps them read those judgments with a better understanding of how and why he arrived at them. I do not know whether that makes me a judicial biographer. If it does not, then I hope my approach will at least encourage future judicial biographers to look at the person before looking at the judge.

⁶⁸ Buti, above n 13, 390–1.

*Susan Magarey**

SHOULD vs CAN? ETHICS vs UNDERSTANDING?¹

ABSTRACT

My concern is with questions about public and private elements in biographies. My article opens with historical examples of disagreements over the inclusion of information that could be considered private in works which are, by definition, public. The disagreements are about whether or not private information is available, and if it is, whether or not it can or should be included in the publication. The examples range from Boswell's life of Johnson through some local Australian controversies in 2009 to Hazel Rowley's recent consideration of the lives of early twentieth-century French philosophers, Simone de Beauvoir and Jean-Paul Sartre. The second part of the article considers Dame Roma Mitchell's work as a Royal Commissioner on 'the Salisbury Affair' in South Australia in the 1970s and the different ethical conclusions that can be drawn about it from two distinct approaches to the inclusion of private information in an account of a public event.

My article has two parts. First, since the subject of our panel concerns questions about the public and the private, and possibilities of their mutual implication, I will begin with two stories about biographers and their decisions about what information about their subjects' private lives they *should* or *could* include in their published biographies. These are questions about ethics and understanding — my title. Secondly, I will address similar questions that Kerrie Round and I faced when we were researching our biography of Dame Roma Mitchell, in particular, questions about the role played by her private concerns in her public work as Royal Commissioner into what was popularly termed 'the Salisbury affair'.

The late months of 2009 saw the private lives of at least two prominent Australian politicians being blazoned across the media,² demonstrating some of the costs

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¹ Susan Magarey, 'Should vs Can? Ethics vs Understanding?' (Paper presented at 'A Judicious Life? Judicial and Political Biography', The University of Adelaide, 4 December 2009).

² Rhett Watson, 'Della Bosca Quits: Sex Scandal Claims Would-Be Premier', *Daily Telegraph* (Sydney), 1 September 2009, 1; 'Mike Rann Denies Sex with Former Waitress', *Advertiser* (online), 23 November 2009 <<http://www.news.com.au/national/mike-rann-denies-sex-with-former-waitress/story-e6frfkvr-1225801899754>>.

that can be associated with the private lives of public figures becoming generally known. Former Prime Minister Keating was concerned with a third instance, involving his daughter, when he pronounced:

Matters for which there is no public right to know ought to be the preserve of the citizenry in its privacy ... That includes details of their personal lives, altercations in marriages, love affairs, compromising photographs taken of them privately without their consent. These are all matters that should be off-limits for newspapers and other media.³

Should biographers agree with him?

There is a wonderful moment in English history when James Boswell, biographer of Dr Samuel Johnson, makes clear how he would have answered this question. It is in the autumn of 1790, a time when brilliant correspondent and novelist Frances ‘Fanny’ Burney was serving as second keeper of the robes to Queen Charlotte. At a gathering at Windsor Castle, in the midst of a multitude, Boswell causes her great embarrassment and discomfort. ‘Yes, madam’, he declares:

you must give me some of your choice little notes of the Doctor’s; we have seen him long enough upon stilts; I want to show him in a new light ... I want to show him as gay Sam, agreeable Sam, pleasant Sam: so you must help me with some of his beautiful billets to yourself.⁴

When she refuses, he intensifies his pleas, ‘[d]irectly in front of the Queen’s Lodge, “with crowds passing and repassing”’.⁵ Only the approach of the royal family rescues her from his importunity. Reporting this moment to her sister, Burney affirms that ‘nothing will convince her “to print private letters, even of a man so justly celebrated, when addressed to myself”’.⁶ She agrees with Keating. But what for her would have been a violation was, for biographer Boswell ‘a vindication — a vindication of his protagonist and a vindication of his biographical method’.⁷ Such letters would allow him to show us Johnson’s heart as well as his mind, the private as well as the public man.

Present-day Australian biographer, Hazel Rowley, would have agreed with Boswell. As, indeed, did the two subjects of her most recently published biography: Jean-

³ Emma Tom, ‘Keating Wants It Both Ways’, *Australian* (online), 7 November 2009 <<http://www.theaustralian.com.au/news/opinion/keating-wants-it-both-ways/story-e6f8g8l6-1225795218601>>.

⁴ Fanny Burney and Charlotte Barrett, *Diary and Letters of Madame D’Arblay: 1788 to 1796* (Bickers and Son, 1796) 299.

⁵ *Ibid* 300.

⁶ *Ibid* 301.

⁷ Bruce Redford, *Designing the Life of Johnson. The Lyell Lectures, 2001–2* (Oxford University Press, 2002) 113–4.

Paul Sartre and Simone de Beauvoir.⁸ These two French intellectuals were as famous for the irregularity of their union with each other, and their love affairs with other people, as for Existentialism, the mid 20th century philosophy that they developed. They wanted everyone to know all about them and their lives, especially their private relationships with each other and with other people. ‘Never for a second’, writes Rowley,

did Sartre and Beauvoir, in their relationship with each other, stop living as writers ... Turning life into narrative was perhaps their most voluptuous pleasure.⁹

Both, she continues, ‘were heavily imbued with what Sartre called “the biographical illusion” — the idea that “a lived life can resemble a recounted life”’.¹⁰ They also believed ‘passionately’ in telling the truth: ‘the notion of privacy was a relic of bourgeois hypocrisy’.¹¹ So they would keep all of their writings, deliberately and consciously making themselves into public myths, intending that the future would pore over narratives of their lives and find them ‘touching and strange’.¹²

It was not only the future who would read narratives of their lives, of course, since Beauvoir embarked on both works of fiction, which included disguised autobiography, and also on explicitly autobiographical writing. Her passionate relationship with Chicago writer, Nelson Algren, appears in both, with his own name in *Force of Circumstance*, its English translation heralded in the United States with appetiser extracts in *Harper’s Magazine* in November and December 1964.¹³ In the first extract, Beauvoir announces that she became attached to Algren towards the end of her stay in the United States, and goes on to meditate on where such a connection fitted in her pact with Sartre. Other couples have made such pacts, she notes, ‘to maintain throughout all deviations from the main path a “certain fidelity”’.¹⁴ If these are only ‘passing sexual liaisons’ she considers, ‘then there is no difficulty’.¹⁵ But passing liaisons were no real test of the pact. What she and Sartre wanted, by contrast, was to experience ‘contingent loves’.¹⁶ More difficult and demanding, no doubt. But also raising, as she does finally acknowledge, the ‘one question we have deliberately avoided: how would the third

⁸ Hazel Rowley, *Tête-à-Tête: The Lives and Loves of Simone de Beauvoir and Jean-Paul Sartre* (Chatto & Windus, 2006).

⁹ Ibid xi.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Simone de Beauvoir and Richard Howard, ‘The Question of Fidelity’, *Harper’s Magazine* (New York), November 1964, 57; Simone de Beauvoir and Richard Howard, ‘An American Rendezvous: The Question of Fidelity, Part II’, *Harper’s Magazine* (New York), December 1964, 111.

¹⁴ Simone de Beauvoir and Richard Howard, ‘The Question of Fidelity’, *Harper’s Magazine* (New York), November 1964, 57, 64.

¹⁵ Ibid.

¹⁶ Ibid.

person feel about the arrangement?’¹⁷ Unwarned, Algren was left out in the open, as Rowley notes graphically, swinging in the breeze.¹⁸

He responded. Writing in *Harper’s*, he quotes her passage about contingent loves with contempt: ‘Anybody who can experience love contingently has a mind that has recently snapped. How can love be *contingent*? Contingent upon what?’¹⁹ Fifteen years later, he replied to an interviewer like this (we might note his racism, too, in passing):

‘I’ve been in warehouses all over the world and the woman there always closes the door, whether it’s in Korea or India,’ he said. ‘But this woman flung the door open and called in the public and the press ... I don’t have any malice against her, but I think it was an appalling thing to do.’²⁰

But biographer Hazel Rowley did not think it was appalling. She had no need for any qualms as, by this time, it was all in print and public circulation anyway: Rowley not only could, but clearly should, include these exchanges in her narrative. Is this simply a matter of opinions changing as times change? Michael Holroyd considered, in Whiggish fashion, that the twentieth century had seen

the boundaries of biography ... enlarged, until its subject matter is pretty well now the whole range of human experience, insofar as it can be recovered. It is a matter not only of the legitimacy of subject matter, a new balance sheet containing the investment of income as well as sexual expenditure, but also of the variety of narrative modes ... We are beginning to grow up.²¹

More recently, prize-winning Australian historian, Peter Cochrane, argued for the mutual implication of private and public in an individual life, and at the same time contended that biographical narrative was crucial to historical and political understanding. ‘A dialogue between the public and the private spheres’, he wrote,

is an important part of good biographical narrative, and great biographers have set the standard in searching for a deep reading of the ‘humanity of the lived life’, and a vivid sense of the life once lived. What drives us? ... That was the story within the story.²²

So, to turn to the second part of my article, what did Kerrie Round and I think about the relationships between the private and the public, when we were

¹⁷ Ibid.

¹⁸ Rowley, above n 8, 299.

¹⁹ Ibid 301.

²⁰ Ibid 303.

²¹ Michael Holroyd, *Works on Paper: The Craft of Biography and Autobiography* (Little, Brown and Company, 2002) 26.

²² Peter Cochrane, ‘Stories from the Dustbin’ (2008) 19 *Griffith Review* 69, 74.

researching and writing our biography of Roma Flinders Mitchell?²³ And — to connect this discussion directly to the subject of this symposium — did it make any difference that Roma Mitchell had been a judge?

Just in case people are not familiar with her, our subject, Dame Roma Mitchell (1913–2000)²⁴ was probably the most decorated and distinguished woman in Australia's history — at least until the Rudd Government appointed Quentin Bryce as Governor-General. Our research on Roma Mitchell led us to believe that the principal formative influence in her life was her father's death in France in 1917 when Roma herself was just four years old. As I wrote,

It was as though a great gong had sounded, a note that would reverberate throughout her life. Her mother would now be the single most important adult in her world until she was herself grown up, and she would protect her mother, take care of her with all her heart and mind and soul, because her father was no longer there to do so.²⁵

It became a habit of the heart, far more than an effort of the will: a primary emotional impulse — to take care of people. And it grew to embrace her sister and brother-in-law, her cousins, her closest friends, her dearest colleagues, and her Associates — once she was a judge.

Miss Mitchell's elevation to the Bench of the Supreme Court occurred in 1965, an initiative of Don Dunstan, at that moment Attorney-General. Her response gives some indication of the difference that being a judge could make to an individual's private life. 'I didn't really want it at that stage',²⁶ Dame Roma was to recall. 'I was enjoying life as a Queen's Counsel and I really didn't want to go onto the bench. And I was very unhappy for the six weeks preceding my going on the bench ... And I thought I wouldn't enjoy it ... There's no excitement in connection with a judge's life'.²⁷ She thought that being a judge would lift her out of the gossip network, and she told an interviewer that she believed it would impose great constraints on her social life:

I remember a friend of mine who was and still is a bachelor who, when he heard the news said, 'oh, this'll be dreadful. There'll be so many things you

²³ Susan Magarey and Kerrie Round, *Roma the First: A Biography of Dame Roma Mitchell* (Wakefield Press, 2007).

²⁴ Commander in the Royal Victorian Order (2000), Companion of the Order of Australia (1991), Dame Commander of the British Empire (1982), Commander of the British Empire (1971), Queen's Counsel (1962–65), Justice of the Supreme Court of South Australia (1965–83), Founding Chair of the Human Rights Commission (1981–86), Chancellor of the University of Adelaide (1983–90), Governor of South Australia (1991–96).

²⁵ Magarey and Round, above n 23, 2.

²⁶ Ibid 159, citing Roma Mitchell, 'Reflections on a Career in Law' in J F Corkery (ed), *A Career in Law* (Federation Press, 1989) 207.

²⁷ Ibid 159–60.

won't be able to do', and I said 'oh I don't know. I've only thought of one. I don't think I'll be able to go to', and I named a restaurant, I can't even think of its name, perhaps just as well, and that's why I made you take me there last week. Because it was in the Hindley Street area and it ... was frequented by some of the lower life in Adelaide. I didn't go back there.²⁸

The Honourable Justice Mitchell was to serve for the ensuing seventeen years, as Sir William Deane was to remark, as 'a pivotal member of two of the landmark State Supreme Courts in our country's legal history', that is the courts of Chief Justice John Bray and Chief Justice Len King.²⁹

One of the trickiest moments during what could justly be called 'the golden years' of the South Australian justice system occurred in the second half of the 1970s when John Bray was Chief Justice and Don Dunstan was Premier of South Australia, and the Dunstan Government sacked their Police Commissioner Harold Salisbury. The 'Salisbury Affair' is too complex a story to tell in a brief article; there is an account of it in our book.³⁰ May I say, simply, that the government asked the Police Commissioner for information about the activities of Special Branch and its surveillance of South Australian citizens, and the Police Commissioner, Harold Salisbury, consistently failed to provide proper information in response to the government's requests. After a good deal of to-ing and fro-ing, during which Police Commissioner Harold Salisbury seemed obtusely unable to understand the illegality of his position, the Dunstan government sacked Salisbury. But Salisbury had, by then, become a focus for conservative anti-Dunstan opinion in Adelaide, and the conservatives mobilised in protest at the government's action. Eventually, Dunstan decided that the best solution was a Royal Commission, which would calm down the furore and prevent further discussion as the whole matter would be *sub judice*.

Of course, an important dimension of the panic about the information that Special Branch had was that it might, or might not, have concerned homosexual sex — rendered legal in South Australia only in 1975. This was before the Salisbury Affair, to be sure, but eight years after there had been a very considerable fuss among the police about the appointment of John Bray as Chief Justice, because the police believed him to be homosexual. There was also some concern about Dunstan's sexuality. And about the fact that all of the information recorded by the South Australian Special Branch would have been accessible to the Commonwealth government's equivalent body, ASIO.

In February 1978, the government appointed Justice Roma Mitchell as Royal Commissioner to inquire into and report upon whether Salisbury misled the

²⁸ Ibid 160.

²⁹ Sir William Deane, 'Memories' in Susan Magarey (ed), *Dame Roma: Glimpses of a Glorious Life* (Axiom Publishing and the John Bray Law Chapter of the Alumni Association of The University of Adelaide, 2002) 15.

³⁰ In this article the account of the Salisbury 'Affair' and Justice Mitchell's Royal Commission are taken from Magarey and Round, above n 23, chapter 6.

government about the nature and extent of the operations of Special Branch; whether the government's decision to dismiss Salisbury was justifiable; and whether there was reason to modify the prerogative rights of the Crown to dismiss the Commissioner of the Police. She submitted her report on 30 May. 'Yes', she wrote, Salisbury did mislead the government. 'Yes', the government's decision to dismiss him was justifiable in the circumstances. And 'yes', the *Police Act 1952* should be amended to provide for the Commissioner of Police to be removed from office by the government.

Roma Mitchell had worked extremely hard on this inquiry, consulting an array of authorities, interviewing everyone conceivably appropriate, and even going to visit Special Branch in the bowels of Police Headquarters to see the immense collection of cards and files kept there. She learned a lot. One thing was that the files which were supposed to record John Bray's homosexual activities in 1967 were nothing to do with Special Branch; they were ordinary police patrol reports. Another was that the card and file on Premier Don Dunstan did not contain all of the information that they might once have held. She reported that the officer examined about this card had said that 'one reason for culling the Premier's card [was] the possibility that the Premier might insist on seeing his own file'.³¹ Roma Mitchell had a sardonic wit. 'This is certainly a good reason', she observed, 'for removing from that file matter which might reasonably be considered to be scandalously inaccurate'.³² She ensured that John Bray was never mentioned by name and that the police patrol reports used to query his elevation were referred to only as an 'incident relating to a particular appointment in the '60s'.³³ And she interrupted a witness who seemed about to mention John Bray, saying firmly 'We do not want the details'.³⁴

After it was all over, Her Honour Justice Mitchell wrote to her colleague John Bray. They were very good friends; she recalled dancing with him at her sister's coming-out dance in 1931. She believed, she told him, that all her findings were 'inevitable upon the evidence', and she 'endeavoured to make them as mild as possible'.³⁵ But then she let him know of the tension that she had suffered in weighing her loyalty to him in a balance against her commitment to the law. 'My own wish', she continued:

would have been not to have accepted the Royal Commission. I knew that I must receive opprobrium from one quarter or another and this has not been entirely absent. But I hoped that I could avoid any adverse publicity for you which would have been monstrously unfair. And I was not confident that anyone who was not fully apprised of the disgraceful performance of the then

³¹ Magarey and Round, above n 23, 217, citing South Australia, Royal Commission into Dismissal of Harold Hubert Salisbury, *Report* (1978) 134.

³² Magarey and Round, above n 23, 217.

³³ Ibid 217, citing Transcript of Proceedings of the Royal Commission into Dismissal of Harold Hubert Salisbury, 693.

³⁴ Magarey and Round, above n 23, 218, citing Transcript of Proceedings of the Royal Commission into Dismissal of Harold Hubert Salisbury, 384–5.

³⁵ Magarey and Round, above n 23, 219, citing Letter from Roma Mitchell to John Bray, 9 June 1978.

Police Commissioner [JG McKinna] and others in 1967 would have done this. As it was, with the assistance of counsel, and by dint of interrupting one or two willing witnesses I succeeded in this and in my view any subsequent vilification was a small price.³⁶

As prize-winning journalist Penelope Debelles commented: ‘Dame Roma stood sentinel from the bench to ensure the name of John Bray was never uttered in open court’.³⁷

Debelles set this whole story in the context of:

the monstrous myth that has dogged Adelaide for so many years, that of a predatory ‘family’ of homosexual murderers whose dreadful practices flourished because they were protected by a secret cell of homosexuals in high places. This line of protective power and influence, so the rumours went, extended to the very top of government and the courts.³⁸

Investigative journalists have failed to prove this ‘urban fabrication’, Debelles continued. And towards the end of her article, she offered a justification for Roma Mitchell’s action: ‘Nothing worthwhile’, she wrote, ‘could have flowed from the public disgrace of the state’s most eminent jurist whose sin was to be homosexual before the law and morality allowed it’.³⁹ But then she returned to ‘the monstrous myth’ of ‘the family’ with which she began. ‘But was it also a cover-up by a person of influence wielding her authority with something less than fear or favour?’, she asks rhetorically.⁴⁰ ‘Yes’, she decided, ‘it was that too. Dame Roma, the straight-laced idealisation of respectability and the law, used her position to protect a friend in high office, just as the Adelaide rumour mill said’.⁴¹

Debelles’s account is drawn from the information provided in our book, *Roma the First*. We did not balk at including Justice Mitchell’s frank admission of how she protected John Bray, in her letter to him, given to us by Bray’s friend Peter Ward. But Debelles’s is different in tone and emphasis from the account that I wrote. For, in my concern to understand rather than to judge, I decided that my earlier decision about the principal emotional motive force in Roma Mitchell’s life — the desire to take care of those dear to her — was the chief determinant in this case. I concluded this chapter of our biography observing the retirement of first Bray and then Dunstan by the end of the 1970s, both going early on the grounds of ill health. ‘Roma Mitchell could only have been grieved at the damage done to such giants of those times by the longstanding prohibition on homosexual relations, and at the

³⁶ Ibid.

³⁷ Penelope Debelles, ‘Putting the “Family” to Rest’, *Adelaide Review* (Adelaide) 15–28 February 2008, 8, 9.

³⁸ Ibid 8.

³⁹ Ibid 9.

⁴⁰ Ibid.

⁴¹ Ibid.

limits to her ability to take care of them'.⁴² I would not claim that my account is better than Penny Debelles. On the contrary: Debelles draws on the social history context of these events, just as does, for instance Stuart Macintyre in his biography titled *Militant: the Life and Times of Paddy Troy*;⁴³ I have argued strenuously that such contexts are essential to biographical writing.⁴⁴ But it connects to our discussions at this symposium because, unlike Debelles, my account derives from a knowledge and interpretation of Dame Roma Mitchell's private life.

Hazel Rowley compared writing biography to 'being in love'. She modified that statement immediately; after all, a biographer has to 'keep her lucidity' and 'remain in control of her subject matter',⁴⁵ she noted, and being in love is not like that. But 'there are striking parallels'. I have no difficulty in agreeing with her. In particular, I agree with her observation that rather than judging her subjects, 'my energy goes into understanding them, which is something I am prepared to do only with people I love'.⁴⁶ My account of the Salisbury Commission is different from Penelope Debelles because I was endeavouring to understand Roma Mitchell.

Let me conclude with a story told often about Roma Mitchell and John Bray, a story that Sir William Deane related at Dame Roma's funeral. During an interview a somewhat brash journalist asked Justice Mitchell, 'You are not married?' 'I am not' she replied. 'And you do not drive a car?' 'I do not'. Undeterred by the terseness of her answers, the journalist pressed on. 'The Chief Justice, Dr Bray, is also unmarried. Is there a chance that the two of you might get together?' 'No', Roma replied, 'that would be no good at all. He doesn't drive a car either'.⁴⁷

⁴² Magarey and Round, above n 23, 219.

⁴³ Stuart Macintyre, *Militant: The Life and Times of Paddy Troy* (George Allen & Unwin, 1984).

⁴⁴ Susan Magarey, 'Three Questions for Biographers: Public or Private? Individual or Society? Truth or Beauty?' (2008) 4 *Journal of Historical Biography* 1.

⁴⁵ Hazel Rowley, 'The Ups, the Downs: My Life as a Biographer', *Australian Book Review* (Adelaide), 1 July 2007, 33.

⁴⁶ Ibid.

⁴⁷ Deane, above n 29, 17.

IT'S A RIPPING GOOD YARN! POLITICAL BIOGRAPHY AND THE CREATIVE IMAGINATION¹

ABSTRACT

In her reflections on ‘the limitations of history as a narrative form’, Cassandra Pybus presents an apparent literary divide between the creativity and narrative flair of fiction and the dreary, barren wasteland of history; contrasting the historical novelist, excitably working with ‘the rich possibilities of make-believe’, with the poor, impossibly constrained historian, forever weighed down by the burden of the record, ‘irrevocably tied to concrete evidence which is patchy at best and never allows access to the inner workings of the human psyche’.² Pybus states:

Not even a master of the popular history genre, ... can construct a past world as rich and satisfying as the parallel universe the novelist can imagine, nor create characters who are revealed to us in their most intimate moments and private thoughts.³

In this paper, Jenny Hocking refutes such an essentialist dichotomy between biography and creativity. Hocking argues that biography inhabits a world between history and literature: it is both a creative and a scholarly process, grounded in empiricism and brought to life through the same defining techniques of fiction — character and narrative — that Pybus identifies in the ‘seamless narrative arc’ of popular history. Biography is also one of the most creative forms – or at least it has the potential for creativity — through the construction of narrative, of compelling characters and universal themes from

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¹ This article was originally a speech delivered at ‘A Judicious Life? Judicial and Political Biography’, Australian Association of Constitutional Law Conference, The University of Adelaide, 4 December 2009.

² Cassandra Pybus, ‘Within Reasonable Doubt’, *The Australian* (online), 10 November 2009 <<http://www.theaustralian.com.au/news/arts/within-reasonable-doubt/story-e6frg8nf-1225796194925>>.

³ Ibid.

the historical record — what E.H. Carr termed ‘imaginative understanding’.⁴

Writing about a living subject such as Gough Whitlam can bring great benefits of personal communication, private papers and interviews — and some unexpected dilemmas. The extensive research towards the Whitlam biography unearthed a remarkable find about the Whitlam family that even Gough Whitlam did not know — that his grandfather had spent four and a half years hard labour in Melbourne’s Pentridge prison for forgery. How do you tell Gough Whitlam that his grandfather was a criminal?

From his grandfather’s time in Pentridge prison to Gough Whitlam’s childhood in the fledging city of Canberra, his father’s work as Commonwealth Crown Solicitor and Whitlam’s own extensive war service, marriage to the champion swimmer Margaret Dovey, rise through the bitterly divided Australian Labor Party and eventual leadership of the party into government, the Whitlam biography draws on archival sources, interviews and previously unseen private letters. It is a story as ‘rich and satisfying’ as any fiction could allow.

INTRODUCTION

John Howard had scarcely found time to vacate the Lodge before moves to secure his memoirs began. Announcing that the former Prime Minister was indeed working on his memoirs, Howard’s publisher, Amruta Slee of HarperCollins, assured us that as a writer ‘Howard is good’; that ‘he has an amazing eye for detail and remembers everything’.⁵ So good in fact, that Howard was due to finish his first draft of 200 000 words within two years and, as in politics, Howard has delivered. John Howard’s *Lazarus Rising* is the latest in a string of political memoirs, biographies and autobiographical reminiscences from Malcolm Fraser to Mark Latham and even, rather bizarrely, to relative newcomer Paul Howes.⁶

None of Slee’s brazen confidence in both the politician as author, and the public interest in his story, is really much of a surprise — coming as it does from Howard’s own publisher. What is, however, rather perturbing is the broader assessment of political biography implicit in Slee’s comment that Howard’s autobiography is ‘much more interesting than a straight political biography. It tells

⁴ Edward Carr, *What is History?* (Vintage, 1967) 26.

⁵ Stephen Romei, ‘Howard Joins The Political Book Club’ *The Australian* (Sydney) 4 August 2009, 3, quoting Howard’s publisher Amruta Slee.

⁶ John Howard, *John Howard: Lazarus Rising — A Personal and Political Autobiography* (HarperCollins, 2010); Malcolm Fraser and Margaret Simons, *Malcolm Fraser: The Political Memoirs* (The Miegunyah Press, 2010); Mark Latham, *The Latham Diaries* (Melbourne University Press, 2005); Paul Howes, *Confessions of a Faceless Man: Inside Campaign 2010* (Melbourne University Press, 2010).

us something about Australia at the time? What exactly is meant by a ‘straight political biography’ if — according to this conception at least — a political biography could *fail* to tell us something about Australia at the time? Clearly, characterised in this way, political biography is neither interesting, informative, nor creatively satisfying. It is this apparent dichotomy between political biography and the creative imagination that this article will explore and refute.

I CREATIVE NON-FICTION

In her recent reflections on ‘the limitations of history as a narrative form’, Cassandra Pybus — characteristically blunt and provocative — presents an apparent literary divide between the creativity and narrative flair of fiction and the dreary, barren wasteland of history.⁸ Pybus contrasts the historical novelist, excitably working with ‘the rich possibilities of make-believe’, and the poor, impossibly constrained historian, forever weighed down by the burden of the record, ‘irrevocably tied to concrete evidence’.⁹ In Pybus’s view:

Not even a master of the popular history genre ... can construct a past world as rich and satisfying as the parallel universe the novelist can imagine, nor create characters who are revealed to us in their most intimate moments and private thoughts.¹⁰

This is by no means an unheralded position. It can also be seen for instance, as Alex Miller has reflected, in Virginia Woolf’s admonition in *The Pargiters*:

If you object that fiction is not history, I reply that though it would be far easier for me to write history — “In the year 1842 Lord John Russell brought in the Second Reform Bill” and so on — that method of telling the truth seems to me so elementary, and so clumsy, that I prefer, where truth is important, to write fiction.¹¹

This is a crude, simple conservatism of form with which I absolutely disagree.

I have written three biographies. The first was of the late High Court Justice and former Attorney-General in Whitlam’s government, Lionel Murphy; the second of the Australian author and activist Frank Hardy; and the third and most recent was the first of a two-volume study of Gough Whitlam.¹² My relationship with

⁷ Romei, above n 5.

⁸ Pybus, above n 2.

⁹ Ibid.

¹⁰ Ibid.

¹¹ ABC Radio National, ‘Truth in Fiction and History’, *The Book Show*, 30 November 2006 (Alex Miller) <<http://www.abc.net.au/rn/bookshow/stories/2006/1800785.htm>>, citing Virginia Woolf, *The Pargiters* (Hogarth Press, 1978).

¹² Jenny Hocking, *Lionel Murphy: A Political Biography* (Cambridge University Press, 2000); Jenny Hocking, *Frank Hardy: Politics Literature Life* (Lothian Books, 2005);

each of these biographical subjects differed — I had never met Lionel Murphy and although I had met Frank Hardy, he had died a decade before I wrote about him. Gough Whitlam, however, had known both these men well. In some ways, the very different relationships he had with these two iconoclastic characters pricked my interest in him. Yet despite the obvious differences between the biographical subjects, each of these three biographies reflects a larger commitment — to Australian political history, to developments in democratic practice, and to the interstices between politics and the law.

II HISTORY THROUGH BIOGRAPHY

Looked at in this way, the biographical subject becomes a means through which to explore a broad sweep of Australian political history. You can understand then, why I consider rather baffling the suggestion that ‘straight political biography’ does not tell us much about Australia. The very nature of political biography — ‘straight’ or otherwise — rejects the narrow construction of the subject as a decontextualised and isolated actor. It is this broad contextualisation of the subject, its embedding in political and cultural life, that is both definitional of political biography and a marker of the broader public interest in the genre — an interest as much in the subject as it is in what the subject enables us to explore. For me, the ideal subject is one who presents these possibilities for understanding our culture, our politics, and ultimately ourselves, through biographical study: one whose personal narrative enables an exploration beyond their singular story and engages us intellectually, conceptually, and politically.

Yet despite its attractiveness to publishers and readers alike, within the academy biography remains an unusual, at times even disparaged, form in several respects. For one thing, it is popular — the classic ‘cross over’ text — appealing to both academic and general audiences alike. It is interdisciplinary and, perhaps most significantly, its form is outside the conventional parameters of most academic writing — driven more by character and narrative than overt theorisation;

Political biography sometimes sits uncomfortably with the more conventional writing and scholarship on politics and political science. It is often regarded as ‘less academic’, overly subjective, and too partial. It does not appear ‘explanatory’ in orientation or theoretical in approach; it does not articulate a rigorous methodology shared by likeminded scholars ... its standing as proper scholarship may even be suspect. Some biographers are not regarded as part of the ‘academic club’ or belong only at the margins.¹³

Biography inhabits a world between history and literature. It is both a creative and a scholarly process, grounded in empiricism and brought to life through the same

Jenny Hocking, *Gough Whitlam: A Moment in History* (Miegunyah Press, 2008).

¹³ Tracey Arklay, John Nethercote and John Wanna, ‘Preface’ in Tracey Arklay, John Nethercote and John Wanna (eds), *Australian Political Lives: Chronicling Political Careers and Administrative Histories* (Australian National University E Press, 2006) xi <<http://epress.anu.edu.au/ansog/auspol/pdf/auspol-whole.pdf>>.

defining techniques of fiction — character and narrative — which Pybus identified in the ‘seamless narrative arc’ of popular history¹⁴ and which, as Michael Holroyd described, make biography ‘a cousin to the novel’.¹⁵ Biography is a narrative construction of a life that can itself never be replicated and in which intellectual empathy is vital. Biography is also one of the most creative forms of non-fiction writing through the creation of narrative, compelling emblematic characters, and universal themes, through what E H Carr termed ‘imaginative understanding’.¹⁶

As with all non-fiction writing — large or small, and in any form — the capacity to move beyond the immediate circumstance of the individual subject underpins the strongest, most clearly framed, and ultimately the most readable biographies. The compelling subject reaches out to us not only (or even) in themselves, but because they and the trajectory of their life illuminate something critical — politically or intellectually revealing — beyond their own experience. This is what the Australian social realist writer Frank Hardy called ‘finding the universal in the particular’.¹⁷

It is this ‘universal’ which in turn becomes the key organising principle in structuring the biography, and it does so by providing the unifying rationale for those critical elements of themes, character, and narrative construction. The themes developed, the characters drawn, and the incidents chosen to illustrate them, will all be part of the exploration of the universal through the particular. There is an essential aspect of authorial choice in all biographies that so often goes unrecognised. The view that a ‘good biography’ leaves nothing out and conversely simply puts everything in, is remarkable only for its persistence. In reality, of course, and by a simple matter of logistical and structural necessity, the art in biography lies in precisely this — in the choices made and the picture painted. This is the difference between documenting a life, and writing a biography about it.

III LIFE AND MYTH

All public figures are suspended in myth — this is how we understand them, how we recognise them, and indeed how we define them as public figures. Of all public lives, political lives are the most hotly contested. They are recreated in literature, in media, and in daily commentary through a process of repetition and reiteration, constructing a public life that at times bears little resemblance to either the life as lived, or the person who lived it. In turn, the public myth creates its own protectors — and the more contested the life, the more determined these protectors are. As James Walter describes:

The question ‘who owns the life?’ seems self-evident initially. It does not really strike you until you start trying to unravel the story, but the difficulty

¹⁴ Pybus, above n 2.

¹⁵ Tracey Arklay, ‘Political Biography: Its Contribution to Political Science’ in Arklay, Nethercote and Wanna, above n 13, 17, citing Michael Holroyd, *Works on Paper: The Craft of Biography and Autobiography* (Counterpoint, 2002) 5.

¹⁶ Carr, above n 4, 26.

¹⁷ Hocking, *Frank Hardy*, above n 12, 40.

with any biography, particularly of a prominent politician is the need to reconcile the subject's own investment in their 'life myth'. People who are somehow engaged in power and power relations to effect forms of social change are of course concerned with their image, they are concerned with posterity and they are concerned with public perceptions.¹⁸

All of this is certainly true and no biographer could afford to ignore its obvious implications. However, this sense of 'ownership' of the life stems from more than just the subject themselves. What of those who *think* they own the life, who have their own intellectual (and in Whitlam's case often emotional) stake in the representation of the man and the politics? Those who were there at the time, those who first wrote about it, and those who remain passionate about it, all continue to claim ownership of the record, the legend, and how the history about it *ought* to be written. These contestations are at the core of the great challenges in writing about any public life — how to move beyond such firmly held positions. This is particularly so for one as widely recognised as Whitlam and whose political life remains so deeply polarising. Yet it would be well to acknowledge that for whole generations Gough Whitlam is now known more for the band 'The Whitlams' — 'my family band' as he calls them — or as 'the guy in the Leggo ad', than for his reforming style of government.¹⁹

In this way, Whitlam himself has passed into popular culture. From his earlier cinema appearance in the 1970s classic *Barry McKenzie Holds His Own*,²⁰ to his bit part in the 1937 melodrama *The Broken Melody*²¹ — chosen, along with other Sydney University students, because he could supply his own dinner jacket. In fact, Whitlam's first appearance as Prime Minister was in 1940 playing Neville Chamberlain in Sydney University's St Paul's College Revue. In a top hat, tails, and striped pants, Whitlam 'smoked the pipe of peace' for the League of Nations until, in between the dress rehearsal and the opening night, Neville Chamberlain was ousted from office. Undeterred by what might now be seen as a portentous event, Whitlam considered his first Prime Ministerial role a great success, albeit too brief — it had left his audience wanting more. He wrote to his parents in Canberra: 'I was really a big success as Chamberlain, although he was out of office after the first dress rehearsal ... I was fairly brief ... and many people said they thought I should have had more to do'.²²

¹⁸ James Walter, 'The 'Life Myth', 'Short Lives' and Dealing with Live Subjects in Political Biography' in Arklay, Nethercote and Wanna, above n 13.

¹⁹ Australian Broadcasting Corporation, *Gough Whitlam Announcing Winner of Triple J Hottest One Hundred 1997* (23 November 2010) <http://www.abc.net.au/triplej/30years/audio/hot100_1997.mp3>.

²⁰ *Barry McKenzie Holds His Own* (Directed by Bruce Beresford, Reg Grundy Productions, 1974).

²¹ *The Broken Melody* (Directed by Ken Hall, Cinesound Productions, 1937).

²² Letter from Gough Whitlam to his parents, Martha and Fred Whitlam, 23 May 1940 in *Whitlam Letters*, National Library of Australia MS 7653.

In some respects Whitlam appears a daunting subject — well-known, widely assessed, and still intensely polarising. What I found most daunting however, was not his iconic political (and physical) stature, not the legendary temper nor the inability to suffer fools, not the flashes of arrogance nor the impatience — although I have to say they are all still apparent — but his prodigious knowledge. Even now, well into his nineties, Whitlam's general knowledge is quite extraordinary in its breadth and detail, and he delights in showing it. After all, he was a two-time National Radio Quiz champion. He won the 1948 championship with his answer to the following question:

Now Mr Whitlam, who was the King who reigned from about 115-63 BC, who fortified himself so strongly against poison by the use of antidotes that he could not kill himself and had to get a Gallic mercenary soldier to stab him, as he preferred death to captivity?

Whitlam, barely hesitating, replied: Mithridates!²³

Whitlam won the National Radio Quiz championship again the following year, although in 1950 he had to accept second place.²⁴ 'I lost out to a Sydney solicitor', he told me rather ruefully — still despondent at the memory nearly 60 years later.²⁵

But what do we really know of Gough Whitlam? To my generation and older he is both the Labor Prime Minister who ended 23 years of conservative rule, and the only Australian Prime Minister ever dismissed by a Governor-General. It is these two totemic events that bookend the three year span of so much of the writings about Whitlam. What we know of Whitlam on a personal level is less substantial, but no less telling — the volcanic temper, the biting wit, his 'crash through or crash' approach, and the self-deprecating humour strangely coexisting with an undisguised healthy ego.

Perhaps surprisingly, Whitlam can also be socially awkward, shy and diffident. He is an extremely private man, reluctant to impart personal information, and hesitant to reveal his own emotional response to situations in both his family and professional life. Original interviews can help fill out some of these personal aspects, and their extensive reflections make them an important part of the research for the Whitlam biography — providing a colour and a passion the dry texts so often miss. Gough Whitlam,²⁶ Margaret Whitlam and all four Whitlam

²³ National Archives of Australia, *Australia's Prime Ministers* (23 November 2010) <<http://primeministers.naa.gov.au/primeministers/whitlam/before-office.aspx>>.

²⁴ Gough Whitlam personal communication 6 April 2006.

²⁵ Ibid.

²⁶ Interviews with Gough Whitlam (Melbourne, 16-17 March 2006; Sydney, 24-25 July 2006; Sydney, 14-15 August 2006; Sydney, 18-19 December 2006; Sydney, 27 November 2007; Sydney, 27 February 2008; Sydney, 3 June 2008).

children,²⁷ Whitlam's sister Freda,²⁸ office staff, political staffers — Graham Freudenberg,²⁹ Race Mathews,³⁰ John Menadue³¹ — and politicians from both sides of politics — Malcolm Fraser,³² Bob Ellicott,³³ Bill Hayden,³⁴ Moss Cass,³⁵ and Clyde Cameron³⁶ — all agreed to be interviewed for this biography. I spoke to Clyde Cameron, who was by then seriously ill, in what would turn out to be his final interview. As I left Cameron that day he made it abundantly clear to me that his legendary hatred for Whitlam remained undiminished, pausing in the hallway to proudly show me a personally inscribed photograph of Whitlam which he had turned to face the wall. However, without a doubt, the most disconcerting interviewee had to be Paul Keating, who greeted me with the words: 'If you repeat any of this, I'll cut off both your legs!'³⁷

IV POLITICS AND PERSONALITY

Now you might think — and this has been said to me more than once — that everything that can be written about Whitlam has surely already been written. It is true, there is simply no contemporary Australian political figure on whom more has been written than Whitlam, and certainly few governments have stimulated such controversy, commentary, and critique as that led by him. Even thirty years after the election of the first Whitlam government in December 1972, the extensive, fevered media debate and commentary marking that anniversary was nothing short of extraordinary. I noted at the time: 'It is difficult to imagine any other government or any other Prime Minister whose tenure [has] continued to attract such intense debate'.³⁸ Yet for all the words written about him, few have strayed from this unremitting focus on the brief but eventful period of governmental rise and fall — Whitlam's three years as Prime Minister, his truncated second government, and its unprecedented dismissal.

This unusual focus on such a narrow slice of Whitlam's life has simply eclipsed so much of what came before, and to a lesser extent, after that period in government. Unlike almost all former Prime Ministers — with the interesting exception of

²⁷ Interview with Margaret Whitlam (Sydney, 16 April 2007); Interview with Tony Whitlam (Sydney, 4 March 2008); Interview with Nicholas Whitlam (Sydney, 11 March 2008); Interview with Stephen Whitlam (Sydney, 27 February 2008); Interview with Catherine Dovey (Sydney, 18 April 2006).

²⁸ Interview with Freda Whitlam (Sydney, 3 March 2007).

²⁹ Interview with Graham Freudenberg (Melbourne, 12 July 2007).

³⁰ Interview with Race Mathews (Melbourne, 10 December 2007).

³¹ Interview with John Menadue (Sydney, 17 July 2008).

³² Interview with Malcolm Fraser (Melbourne, 19 June 2007).

³³ Interview with Bob Ellicott (Sydney, 21 September 2007).

³⁴ Interview with Bill Hayden (Brisbane, 8 June 2007).

³⁵ Interview with Moss Cass (Melbourne, 18 May 2007).

³⁶ Interview with Clyde Cameron (Adelaide, 3 September 2007).

³⁷ Interview with Paul Keating (Sydney, 22 May 2007).

³⁸ Jenny Hocking and Colleen Lewis in Jenny Hocking and Colleen Lewis (eds) *It's Time Again: Whitlam and Modern Labor* (Circa Books, 2003), 1.

Whitlam's great adversary Malcolm Fraser — Whitlam has perhaps increased in stature with the passing years as a national and international statesman of some note. More importantly, the urge to consider both Whitlam and the period which bears his name — through the prism of the events of November 1975 — of crisis and of turmoil, has left us always looking back to prior events through the Dismissal. Ultimately this prism has become a distorting one.

In focusing on the irresistible drama of these few years in office, crucial formative aspects in Whitlam's life have been too readily overlooked. The literature on Whitlam and the Whitlam government, extensive though it is, has failed to show us the richness of the years that came before — the Baptist family background, the childhood in Canberra, the schoolboy debater, the quiz champion, the air-force navigator with four years active war-service in the Pacific, the legendary temper — water thrown over Paul Hasluck in Parliament, telephones hurled through windows, chairs flying through the office door — the biting tongue and cruel wit, the hopelessly torn and riven Australian Labor Party of the post-Split years, the fiercely loyal office staff, the parliamentary decades in opposition, the modernisation of both an ailing, divided party and its policies, and the determined path to party leadership and government. It is 'deeply contested history in which grand themes, a compelling narrative, arrant characters and circumstance collide'.³⁹

That so much of this background to Whitlam's political career is only sketchily known has been a boon to me as biographer — providing not only a rich vein of inquiry but dynamic characters and incidents no novelist could surpass. What fiction could ever dream up Labor firebrand Eddie Ward chasing Whitlam through the corridors of Old Parliament House desperately swinging punches at his retreating frame? Eddie Ward later said: 'I knew my health was failing when I took a swing at Gough Whitlam and missed!'⁴⁰ What gift of imagination could send us the great, ageing Labor stalwart Arthur Calwell, who had come to loathe the man he called 'that elongated bastard',⁴¹ and who, burning with his hatred of Whitlam, would buttonhole anyone who would listen to him — Labor or Liberal — just to denigrate Whitlam.⁴² When Tom Uren chided him, 'Arthur you worry me. I thought you were a Christian', Calwell snapped, 'I'm not a Christian Tom, I'm a Catholic'!⁴³

Labor history is full of these marvellous, diverting, but ultimately poignant moments, stories which at base are less about personal animosities and more about the deeply held political positions they represent. Take for example, the White Australia Policy, state aid to non-government schools, the party's position

³⁹ Jenny Hocking, 'History by Numbers' in Sybil Nolan (ed) *The Dismissal: Where Were You on November 11, 1975?* (Melbourne University Press, 2005), 1.

⁴⁰ Ross McMullin, *Ward, Edward John (Eddie) (1899-1963)* (23 November 2010) Australian <Dictionary of Biography, <http://adbonline.anu.edu.au/biogs/A160579b.htm>>.

⁴¹ Hocking, *Gough Whitlam*, above n 12, 236.

⁴² Ibid 286–8

⁴³ Ibid 287.

on the Vietnam War and conscription. It is, certainly in the Australian instance, a peculiarly Labor party coincidence of politics and personality which partly explains the great popularity of political biography and personal memoir on that side of politics — it offers a brilliant canvas perfectly suited for biography.

These characters present not only great portraits in themselves. The identification and replication of central characters, and core themes serve as a means of creating order, consistency, and thematic coherence from the vast array of material political biographies entail. The interplay of characters and themes is critical in structuring a biography in such a way Pybus' 'seamless narrative arc', while engaging and compelling, remains true to the historical demands of accuracy and documentation. With Whitlam, several characters make significant appearances — his father Harry Frederick Ernest Whitlam, Commonwealth Crown Solicitor and 'one of God's most tolerant creatures',⁴⁴ H V 'Doc' Evatt, Margaret Whitlam (nee Dovey), her father Justice Wilfred Dovey, Eddie Ward, Arthur Calwell, Robert Menzies, and Garfield Barwick. These characters recur throughout in brief but important moments, both as significant players and as thematic articulators, to create a conceptual and narrative continuity through such a great range of material.

It is in the nature of political biography for it to be highly contextualised on several levels — political and historical of course, but also, depending on the subject, judicial, literary, social, economic, and across the subject's personal and family circumstance. This scope creates an immense amount of material to work through, not only the immediate biographical material on the subject, their family, and their background, but on Australian political development, party political developments, and international debates. Examining Whitlam's life took me from the nineteenth century Victorian goldfields around Castlemaine, to the history of the Baptist church in Australia; from Australia's early secular public education system to federation; from Fred Whitlam's membership of the Australian delegation to the Paris Peace conference in 1946, to his later role as Australia's delegate to the United Nations Human Rights Commission in New York; from the establishment of the national capital in Canberra and its urban construction, to Whitlam's extensive active service in the Pacific, his studies in law, and finally his twenty years in opposition — all before he even got into government!

The stock-in-trade of academic research is not only the research itself, but also the weighting, sifting and evaluating of evidence from all its sources: archival, personal papers, manuscripts, libraries, newspapers, oral histories, and original interviews. Far from the wide archival searches proving a deadening narrative hand, they will invariably provide some unexpected means of illustrating the core thematic concerns. Take the *Racial Discrimination Act 1975* (Cth) for instance. Nothing could give such a moving testament to the power of that singular piece of legislative reform (without which *Mabo v State of Queensland (No 2)*⁴⁵ could not have

⁴⁴ Cameron Hazlehurst, *Whitlam, Harry Frederick Ernest (Fred) (1884-1961)*, (23 November 2010) Australian Dictionary of Biography <<http://adbonline.anu.edu.au/biogs/A160643b.htm>>.

⁴⁵ (1992) 175 CLR 1.

succeeded), than an exchange between Whitlam's Attorney-General Lionel Murphy and Dr Fred Hollows, whose work on a trachoma eradication programme through the Bourke District Hospital in outback New South Wales was being severely compromised by the continuing discrimination shown towards its Indigenous team members. An outraged Hollows detailed to Murphy the local hotel's refusal to serve and accommodate his Indigenous colleagues, who were told they would only be served through a hatchery outside the pub, and who had nowhere to stay. Murphy replied:

When the Racial Discrimination Bill becomes law, it will be possible to commence legal proceedings under the legislation to obtain remedies for acts of racial discrimination ... and to seek an assurance against a repetition of the act of discrimination ... You will note that clause 8 of the Bill provides that everyone is entitled without any discrimination to the equal protection of the law.⁴⁶

Despite the frequent refrain that 'truth' in biography demands the simple representation of everything that the biographer uncovers in their meandering trails of research, nothing could be further from the reality of the biographical endeavour. At the heart of the biographer's task is judgement – judgements about sources, about information and about the subject. Through a process of weighting and evaluating from a mass of information from a range of vastly different sources, a life is constructed and their story told. Authorial discretion in making these judgments is neither partial nor evidence of crude bias, but a structural imperative, described by Janet Frame as 'an inviolate place where the choices and decisions, however imperfect, are the writer's own'.⁴⁷ As I have noted elsewhere:

[on one level] the entire nature of biographical endeavour is trickery: the compression of years into pages, the subtle elision of one summer into another years later, the gentle omission of years for which no material could be found, this is at once the creation of a fiction and yet the recreation of a life. This is the basis for what Janet Malcolm terms the 'epistemological insecurity' in which all non-fiction readers are suspended. ... Ultimately this is where we stand and fall as biographers.⁴⁸

V A FAMILY SECRET

No biographer chooses their subject out of thin air without some critical notion of the possibilities the subject can bring to them as a writer and to broader understanding. As with all inchoate biographies, I began this one believing I knew a reasonable amount about Whitlam — perhaps, I thought, I knew even quite a bit about Whitlam. It quickly became clear, however, that whatever I thought I knew,

⁴⁶ Hocking, *Lionel Murphy*, above n 12, 188.

⁴⁷ Janet Frame, *An Autobiography The Envoy from Mirror City* (George Brasiller, 1985) vol 3: *The Envoy from Mirror City*, 124.

⁴⁸ Jenny Hocking 'Marketing Frank Hardy: The Revival of Biography as Scandal' (2001) 68 *Journal of Australian Studies* 146, 148–9.

an unimagined amount — more fascinating and more surprising than I could ever have imagined — lay ahead of me. This is where the focus on the three years of the Whitlam government has left a wonderful void for a biographer to explore and, in doing so, to uncover a series of events, circumstances and characters which would not only do justice to the truism ‘truth is stranger than fiction’, but which are almost uncanny in their numerous intersections between the broader Whitlam family and key moments in our political history. The former Prime Minister Kevin Rudd noted the historical occlusion, that whilst the Whitlam family has served Australia for most of the nation’s history since federation,⁴⁹ this aspect of a shared family biography has remained almost entirely unknown.

Biography is, at its research-led best, a forensic exercise in which — we hope — our slightly eccentric and certainly passionate labours over dusty archives will one day lead to great exhilaration of the unexpected archival find — uncovering long forgotten private letters, personal diaries, or (we hope) some hidden family secrets. With Whitlam’s biography, I found all three.

In the voluminous files of the Victorian Public Records Office there is one marked ‘Henry Hugh Gough Whitlam. Prisoner’. This was Whitlam’s grandfather, a man he knew and whose name he carries, but about whom he did not know everything. In this long forgotten, poignant story, a young man of nineteen is left financially responsible for a family of five children and his mother in Melbourne as his father disappears into Victoria ostensibly looking for work. This was a literate family despite their lack of circumstance and Henry Whitlam could read and write while his employer, George Robbins of Robbins Stevedoring in Sandridge (Port Melbourne), could not. This social inversion, not uncommon in the decades after the gold rush, was the opportunity through which Henry Whitlam could forge his employer’s signature on three cheques and try to tide the family over until the money could be repaid. An anguished Henry Whitlam wrote to his peripatetic father, pleading with him to come home: ‘you are always talking of going here and there’, he wrote in an unmet cry for help:

I have been laid up for more than a week and confined to my bed most of the time. My Liver, Kidneys and whole system are out of order and it makes it pretty hard on me, the children are continually wanting something ... I begin to feel a dizziness in the head. I will conclude with love in which all join me.⁵⁰

Henry Whitlam put the letter in his pocket, intending to post it to his father. It was in his pocket when he was arrested and charged with forgery, and now lies in the Victorian Public Records Office in Melbourne.

⁴⁹ Kevin Rudd, Speech delivered at the Launch of *Gough Whitlam: A Moment in History* by Jenny Hocking. (New South Wales Parliament House, 6 November 2008).

⁵⁰ Letter from Henry ‘Harry’ Whitlam to Henry Whitlam (January 1877) cited in Hocking, *Gough Whitlam*, above n 12, 12–3.

The episode was one of those wonderful moments you hope for as a biographer — full of the narrative drive and character Pybus sees as the preserve of historical fiction — unknown yet firmly embedded in ‘concrete evidence’.⁵¹ The discovery of Henry Whitlam’s youthful crimes was also fundamental to understanding a critical aspect of Whitlam’s background. It had an important corollary as soon after his release from Pentridge Prison Henry Whitlam became a determined, pious Baptist, marrying into a respected Melbourne Baptist family for whom education and self-advancement were central. Henry Whitlam’s prison sentence and his spiritual conversion set in train a defining context for Whitlam’s own upbringing, in which religion, self-improvement, books, and politics were to be recurring themes.

I must admit it had never occurred to me that I would ever tell Gough Whitlam something he did not already know. It certainly had never occurred to me this might be something like a family secret of adolescent criminality and imprisonment in Pentridge Prison for five years hard labour. With the discovery of grandfatherly criminality, of ‘grandfather the felon’ as he is now fondly referred to in the Whitlam family, I was faced with a most interesting question: did Whitlam know of his grandfather’s youthful crime? I rehearsed for weeks each of what seemed to me to be the only two possible answers to this quandary: either Whitlam knew and he had not told me, or he did not know and now I was going to have to tell him!

This was without a doubt the most remarkable find in the vast research undertaken for this biography, and it illuminated our understanding of Whitlam in a way only the evidentiary record can do. As I travelled somewhat nervously to Sydney to tell Whitlam this unanticipated family news, I did so armed with his own words: ‘unpalatable truths will not diminish, but rather enrich, our common commitment to the research, the writing, the reading and the understanding of Australian history’.⁵²

In short, Whitlam did not know of his grandfather’s crimes. He was stunned and, for a brief time, uncharacteristically silent. His eventual response was, in many ways, vintage Whitlam — a socio-legal reflection: ‘Isn’t it interesting that in a single generation my family went from one side of the law to the other!’ After the critique came a more personal reflection, this time on his grandparents: ‘they must have been so proud of my father.’⁵³

⁵¹ Pybus, above n 2.

⁵² Gough Whitlam, ‘Go to the Documents’ (Speech delivered at the National Bi-annual Postgraduate History Conference, The University of Melbourne, 20 July 2001). For a transcript of the speech, see: Whitlam Institute, ‘Go to the Documents’, *National Bi-annual Postgraduate History Conference*, 20 July 2001 (Gough Whitlam) <<http://egwpmc.uws.edu.au/R?RN=>>.

⁵³ Interview with Gough Whitlam (Sydney, 27 February 2008).

CONCLUSION

In Pybus' essentialist view of the inevitable failure of the historical narrative, the non-fiction writer is always impossibly weighed down by the evidentiary burden: 'irrevocably tied to concrete evidence which is patchy at best and never allows access to the inner workings of the human psyche'.⁵⁴ Yet it is difficult to imagine how an exploration of such a cast of passionate, fallible and intensely committed individuals could do anything other than give us 'access to the inner workings of the human psyche'.⁵⁵ The human element in political history is everywhere and inescapable. The problem is not that concrete evidence renders it invisible, but that too few writers can find it.

⁵⁴ Pybus, above n 2.

⁵⁵ Ibid.

THE RELATIONSHIP BETWEEN THE LAWS OF UNJUST ENRICHMENT AND CONTRACT: UNPACKING *LUMBERS V COOK*

ABSTRACT

Although the High Court's recent decision in *Lumbers v W Cook Builders Pty Ltd (in liq)*¹ reinvigorated interest in the relationship between the laws of contract and unjust enrichment, reactions to the decision have largely centred around the Court's perceived reversion to the rigidity of the old forms of action. Putting that latter aspect of the decision largely to one side, this article seeks to identify more precisely the implications of *Lumbers* for the rights and obligations of contracting parties in unjust enrichment. Although the decision appears consistent with the view that liability in unjust enrichment cannot interfere with a contractual allocation of risk, the fact that this principle precluded restitutionary relief in *Lumbers* itself indicates that contractual relationships between the parties might be a greater bar to restitution than has been supposed. *Lumbers* also suggests that unjust enrichment's subsidiary status is based on the primacy of contract, rather than the inherent doctrinal nature of unjust enrichment. Finally, further observations on the relationship between the laws of unjust enrichment and contract are made, particularly in relation to unjust enrichment's status as an independent category of law.

I INTRODUCTION

A plaintiff may seek to establish that a defendant has been unjustly enriched in circumstances where there is, or has been, a contractual relationship between them. Where this occurs, issues arise concerning the 'notoriously difficult'² principles governing the relationship between the law of unjust enrichment and the law of contract. However difficult, the search for a principled doctrine governing the relationship between these laws is important since it is fundamental to the very boundaries within which they are permitted to operate.

On 18 June 2008, the High Court of Australia contributed to our understanding of the relationship between contract and unjust enrichment when it handed down its reasons in *Lumbers*. In this case, the High Court considered whether a

* BA/LLB(Hons) (Qld). I would like to thank Professor Charles Rickett, Stephen Knight, Brett Le Plastrier and the anonymous referees for their comments on this article in draft. Any errors and shortcomings remain my own.

¹ (2008) 232 CLR 635 (*'Lumbers'*).

² Andrew Burrows, 'Restitution from Assignees' [1994] *Restitution Law Review* 52.

subcontractor could recover payment on a *quantum meruit* basis from a landowner for work performed and money paid as part of the construction of a house where there were, at the time of performance, subsisting contracts between the subcontractor and the builder and between the builder and the landowner. In a unanimous decision, it held that it could not.

The High Court's judgment, particularly the joint judgment of Gummow, Hayne, Crennan and Kiefel JJ,³ has been criticised on several fronts, in particular for its attacks on restitution lawyers' 'top-down reasoning' and what is perceived as a regression to the formalism of the old forms of action.⁴ Nonetheless, the overwhelming reaction to the Court's reasons concerning the relationship between unjust enrichment and contract has been that the judgment is an application of orthodox principle 'perfectly in line with the law of unjust enrichment as understood by most commentators',⁵ the only surprise being 'how [the litigation] got so far'.⁶

Thus, despite calls that *Lumbers* 'clamours for scholars' measured attention⁷ there has been scant analysis of what exactly the decision may mean for the relationship

³ (*Joint Judgment*) (Gleeson CJ delivered separate reasons).

⁴ See James Edelman, 'Unjust Enrichment and Contract' [2008] *Lloyds Maritime and Commercial Law Quarterly* 444, 447–9; Joshua Getzler, 'Quantum Meruit, Estoppel, and the Primacy of Contract' (2009) 125 *Law Quarterly Review* 196, 208; Amy Goymour, 'Too Many Cooks: Three Parties, Contracts and Unjust Enrichment' (2008) 67 *Cambridge Law Journal* 469, 470; Michael Rush, 'The intersection between contract law and unjust enrichment', Unpublished, 21 October 2008, [42]; Kit Barker, 'Restitution Regional Digest—Australia' (2009) 17 *Restitution Law Review* 147, 162; Andrew Burrows, 'The Australian Law of Restitution: Has the High Court Lost Its Way?' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 67, 84; Michael Bryan, 'Lumbers v W Cook Builders Pty Ltd (in liq): Restitution for Services and the Allocation of Risk' (2009) 33 *Melbourne University Law Review* 320, 328–30. See also Romauld Andrew and Suzanne Kirton, 'Quantum meruit and unjust enrichment: Changing jurisprudence in the High Court' (2008) 24 *Building and Construction Law Journal* 370. For a defence of the Joint Judgment in *Lumbers*, see Joachim Dietrich, 'Quantum Meruit for Services Rendered in a Three-Party Context: (Implied) Contract, Restitution, or Unjust Enrichment?' (2009) 17 *Restitution Law Review* 98.

⁵ Lionel Smith, 'Enrichment – Restitution & Unjust Enrichment Legal Issues' on Restitution Discussion Group (18 June 2008) <<http://lists.mcgill.ca/scripts/wa.exe?A2=ind0806&L=enrichment&T=0&F=&S=&P=387>>. See also Barker, above n 4, 162; Goymour, above n 4, 470; Burrows, above n 4, 82; Christian Jennings, 'Bottom's Up: An Examination of *Lumbers v W Cook Builders Pty Ltd*' (2008) 32 *Hearsay: Electronic Journal of the Bar Association of Queensland* <http://www.hearsay.org.au/index.php?option=com_content&task=view&id=446&Itemid=48>; Dietrich, above n 4, 101–2.

⁶ Robert Stevens, 'High Court Decision in *Lumbers v Cook*' on Restitution Discussion Group (18 June 2008) <www.ucc.ie/law/restitution/rdg/kk0806004.htm>.

⁷ Doug Rendleman, 'Enrichment – Restitution & Unjust Enrichment Legal Issues' on Restitution Discussion Group (18 June 2008) <<http://lists.mcgill.ca/scripts/wa.exe?A2=ind0806&L=enrichment&T=0&F=&S=&P=472>>.

between unjust enrichment and contract. This article seeks to identify more precisely the significance of *Lumbers* on this issue. For present purposes *Lumbers*' references to 'top-down reasoning' and its alleged reversion to the old forms of action can largely, although, it will be seen, not entirely, be put aside.

The remainder of this article consists of three Parts. Part II provides an overview of the facts of *Lumbers* and the Court's reasons. Part III focuses on the consequences of the decision in *Lumbers* for arguments that the law of unjust enrichment is subsidiary to the law of contract. It will be argued that, on its face, the decision in *Lumbers* is consistent with the view that a claim in unjust enrichment cannot interfere with the contractual allocation of risk, but that such a claim is available between contracting parties where there is a 'gap' in that contractual risk allocation. However, the Court's finding that, on the facts in *Lumbers*, there was no such gap means that mere entry into a contract precludes a contracting party from pursuing restitutionary relief, not only against the other party to a contract but also against third parties.

It will also be argued that *Lumbers* is of consequence for the debate concerning the basis of the principle that unjust enrichment cannot interfere with a contractual allocation of risk. Whereas some commentators have argued that unjust enrichment's inherent doctrinal nature precludes it from operating where a contract governs the parties' relationship,⁸ others suggest that the principle is based on the primacy of the law of contract over that of unjust enrichment.⁹ Although the Court's reasons in *Lumbers* did not address this point explicitly, they are concerned with the particular rights and obligations voluntarily assumed by each party, and therefore suggest a preference for the latter view.

Part IV examines three other consequences of *Lumbers* for the relationship between contract and unjust enrichment. It will be argued that any claims that unjust enrichment no longer exists as an independent source of obligation alongside (or subsidiary to) the law of contract are exaggerated. It will also be argued that, although *Lumbers* can be seen as supporting some aspects of the 'implied contract theory', it does not resurrect this theory as the basis for restitutionary liability, as some commentators have feared. Finally, it is suggested that, somewhat ironically, the rejection of the notion of 'free acceptance' may mean that the 'enrichment' inquiry is more dependent than previously thought on the defendant's subjective valuation of the benefit.

II THE CASE

It is appropriate first to briefly describe the facts and the progress of the litigation, before turning to the Court's reasons.

⁸ See Ross Grantham and Charles Rickett, 'On the Subsidiarity of Unjust Enrichment' (2001) 117 *Law Quarterly Review* 273, 291; Ross Grantham and Charles Rickett, 'Property Rights as a Legally Significant Event' (2003) 62 *Cambridge Law Journal* 717, 742.

⁹ See, for example, Dietrich, above n 4, 102.

A *The Facts and the Litigation*

The Lumbers engaged W Cook & Sons Pty Ltd ('Sons'), a company of good repute, to construct an expensive house on their land. The contract was not written, and no price was agreed. During the course of construction, Sons entered into an arrangement with an associated company, W Cook Builders Pty Ltd ('Builders'), under which Builders was to perform much of the work under the original building contract between the Lumbers and Sons. There was some uncertainty as to the nature of the arrangement between Sons and Builders,¹⁰ but the basis on which the litigation was conducted in the High Court was that there was an oral contract between them.¹¹ Builders completed the work in accordance with its contract with Sons. The Lumbers were unaware that the contract between Sons and Builders had been made and it was accepted that at all relevant times they had no knowledge that Builders was involved in the construction. The Lumbers made certain payments to Sons, but Sons paid Builders less than the amount owed to it under the subcontract. The house was eventually completed to the satisfaction of the Lumbers, but Builders remained underpaid.

When Builders eventually went into insolvent liquidation, its liquidator commenced proceedings in the District Court of South Australia against both Sons and Lumbers. Prior to trial, its claim against Sons was stayed following a failure to comply with an order that it provide security for costs.¹² At trial, its claim against Lumbers, which at that stage was based on there being an assignment of Sons' contract with Lumbers to Builders, was dismissed.¹³ On appeal to the Full Court of the Supreme Court of South Australia, Builders changed tack and instead pursued a restitutionary *quantum meruit* for work or labour done or money paid. A majority (Sulan and Layton JJ; Vanstone J dissenting) upheld the claim.¹⁴ The Lumbers appealed.

B *The High Court's Reasons*

As foreshadowed, the Lumbers' appeal to the High Court was successful. In the Joint Judgment's view, there were two alternative, but interrelated, reasons why Builders' claim failed.¹⁵

First, Builders failed to establish that the facts yielded a *quantum meruit* claim for work and labour done or money paid,¹⁶ as Sons, not the Lumbers, had requested

¹⁰ The Joint Judgment left open whether there was a contract between Sons and Builders, finding that whilst there may have been a concluded agreement, Builders at least had a claim against Sons for work done and money paid since it was acting at Sons' request: see *Lumbers* (2008) 232 CLR 635, 670–1 (Joint Judgment).

¹¹ *Lumbers* (2008) 232 CLR 635, 654 (Gleeson CJ).

¹² *Ibid* 660 (Joint Judgment).

¹³ *Ibid*.

¹⁴ *Ibid*.

¹⁵ *Ibid* 662–4.

¹⁶ *Ibid* 664.

that Builders complete the relevant work.¹⁷ In their Honours' view, the existing authorities establish that a request by the defendant of the plaintiff was an essential element of a claim for reasonable remuneration for work and labour done.¹⁸ Acceptance of Builders' argument that the identity of the party to whom the request was made was of no consequence would have required an extension of the law and raised questions which it was not necessary to answer.¹⁹

It was unnecessary because, secondly, Builders' restitutionary claim, if allowed, 'would redistribute not only the risks but also the rights and obligations for which provision was made by the contract the Lumbers made with Sons'.²⁰ Their Honours rejected the approach of the Full Court, which had as its first step put to one side the contract between Sons and the Lumbers.²¹ However, whilst it is clear that the Joint Judgment (and the reasons of Gleeson CJ) saw the contractual regime between the Lumbers and Sons and between Sons and Builders as being of utmost importance, it is difficult to identify precisely where this importance stems from.²² It is suggested that there are two reasons contained in the judgments for the importance of the contractual regime.²³ Although the judgments themselves do not neatly distinguish between them, and although they are interrelated, each reason could have been an independent basis for the claim's failure.

First, the restitutionary claim was unavailable to Builders as allowing it would interfere with the contractual allocations of risk between the parties. On the last page, under a separate heading, 'The relevance of the contract between the Lumbers and Sons', the Joint Judgment stated that if any of the Lumbers, Sons or Builders had not performed their obligations under the contract(s) to which they were privy, that was a matter for the other party to the contract.²⁴ Thus, '[t]o now impose on the Lumbers an obligation to pay Builders would constitute a radical alteration of the bargains the parties struck and of the rights and obligations which each party thus assumed.'²⁵ That this is an independent ground for dismissing the claim also appears from the passage that immediately precedes it: 'Reference to whether the Lumbers "accepted" any work that Builders did or "accepted" the benefit of any money paid it is irrelevant ...'.²⁶ In his separate reasons, Gleeson CJ also held that, '[t]he contractual arrangements that were made effected a certain allocation of risk; and there is no occasion to disturb or interfere with that allocation. On the contrary, there is every reason to respect it.'²⁷

¹⁷ Ibid 671.

¹⁸ Ibid 664–7.

¹⁹ Ibid 667.

²⁰ Ibid 664.

²¹ Ibid 667.

²² Cf *Goymour*, above n 4, 471.

²³ Ibid.

²⁴ *Lumbers* (2008) 232 CLR 635, 674.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid 654.

It evidently did not matter that Builders' claim against Sons had been stayed due to its failure to provide security for costs.²⁸ This makes sense, at the very least because a stay of proceedings for failure to provide security for costs does not create a *res judicata*.²⁹

Secondly, the restitutionary claim was unavailable to Builders as the contractual regime between the parties meant that Builders was unable to make out the elements of a claim in unjust enrichment. On this point, some treatments of *Lumbers* suggest that the Joint Judgment and Gleeson CJ's emphasis are substantially similar.³⁰ However, there is arguably a divergence between them. The Joint Judgment appears to focus on the first element of the unjust enrichment framework, finding that the Lumbers were not enriched as either they had paid Sons or, if they had not, they were liable on their contract with Sons.³¹ The Lumbers' contract with Sons meant that, whether they had paid in full for the house or had not paid and therefore remained liable to Sons in contract, they could not be said to have received a windfall.³² In contrast, Gleeson CJ appeared to focus on the third 'at the plaintiff's expense' element; the contractual matrix between the parties meant that Builders were conferring a benefit on and at the request of Sons, not the Lumbers. The Lumbers had not requested or accepted any benefit from Builders.³³ If the Lumbers had been enriched, it was at the expense of Sons because Sons remained liable to Builders in contract.³⁴

Although the view of both the Joint Judgment³⁵ and Gleeson CJ³⁶ are supported by pre-*Lumbers* commentary, it has been said that Gleeson CJ's view is preferable

²⁸ See Getzler, above n 4, 208.

²⁹ See *Clout v Klein* [1985] 2 NSWLR 729.

³⁰ See, for example, Getzler, above n 4, 207.

³¹ It should be noted that the Joint Judgment does not use the language of 'enrichment' in this context, preferring to talk of a 'windfall' (*Lumbers* (2008) 232 CLR 635, 673). This would appear to be either to emphasise that the unjust enrichment conceptual framework does not apply due to the contractual allocation of risk and/or to avoid legitimising it if it did apply. However, as this article puts the broader normative issues about unjust enrichment to one side, the language of 'enrichment' may for present purposes be appropriately used in this context.

³² *Lumbers* (2008) 232 CLR 635, 673.

³³ *Ibid* 656–7.

³⁴ *Ibid* 657.

³⁵ Lionel Smith, 'Property, Subsidiarity, and Unjust Enrichment' in Johnston and Zimmerman (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge University Press, 2002) 588, 602; Dawson, 'The Self-Serving Intermeddler' (1974) 87 *Harvard Law Review* 1409, 1446–7; Burrows, above n 2, 55. See also Kit Barker, 'Restitution and Third Parties: The Trident Beauty' [1994] *Lloyd's Maritime and Commercial Law Quarterly* 305, 309.

³⁶ Peter Watts, 'Does a subcontractor have restitutionary rights against the employer?' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 398, 401; Daniel Friedmann, 'Valid, Voidable, Qualified, and Non-Existing Obligations: an Alternative Perspective on the Law of Restitution' in Andrew Burrows (ed), *Essays on the Law of Restitution* (Oxford University Press, 1991) 247, 274;

as it focuses on the sub-contract between Builders and Sons, rather than the head contract between Sons and the Lumbers.³⁷ It is probably true that, if the contract between the Lumbers and Sons had been the sole basis for dismissing the claim on the first ground mentioned above, namely, that restitution would interfere with the contractual allocation of risk, an emphasis on the contract between Builders and Sons would be preferred as it was that pursuant to which Builders transferred the wealth to the Lumbers. However, at this stage of the Joint Judgment, the focus is on the second ground identified above, that the Lumbers were not enriched. It is therefore not to the point to criticise the Joint Judgment for focussing on the wrong distribution of risk. Further, and in any event, the approaches of Gleeson CJ and the Joint Judgment are not logically mutually exclusive.

III THE SUBSIDIARITY OF UNJUST ENRICHMENT

This Part analyses the implications of *Lumbers* for suggestions that the law of unjust enrichment is ‘subsidiary’ to the law of contract. First, the concept of subsidiarity will be explained. In sections B and C of this Part, the implications of *Lumbers* are analysed.

A *The Concept of Subsidiarity*

The term ‘subsidiarity’ describes,

the relationship between two claims or doctrines where the scope and operation of one claim are constrained by another claim, even where all the elements of the former claim are made out. At its weakest, subsidiarity denotes the subordination of one claim where another claim in fact offers the plaintiff a basis of recovery. At its strongest, subsidiarity denies the availability of a claim because another claim is in principle available, even though on the facts it does not avail the plaintiff.³⁸

Smith, above n 35, 601; Peter Birks, ‘“At the expense of the claimant”: direct and indirect enrichment in English law’ in Johnston and Zimmerman (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge University Press, 2002) 493.

³⁷ See Burrows, above n 4, 82–4. In reply, see David Jackson, ‘The Australian Law of Restitution: Is Andrew Burrows Rights that the High Court Has Lost Its Way?’ Speech delivered at Seminar Series, Brisbane, 30 April 2009 <<http://www.law.uq.edu.au/documents/cli-sem-series/commentary/Restitution-Law-Paper-21-04-09.pdf>>. Note also that Burrows’ concern with the contract between the sub-contractor and the head contractor does not appear to be as evident in Burrows, above n 2, 55. See also Barker, above n 35, 309; Graham Virgo, ‘Demolishing the Pyramid — the Presence of Basis and Risk-Taking in the Law of Unjust Enrichment’ in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing, 2009) 477, 507–8.

³⁸ Grantham and Rickett, ‘On the Subsidiarity of Unjust Enrichment’, above n 8, 273. See also Smith, above n 35, who makes the same distinction between strong and weak subsidiarity, but then distinguishes further between two forms of weak subsidiarity.

The rule that the law of unjust enrichment is in some respect subsidiary to the law of contract is well-established in Australian, as well as English, law. In *Pavey & Matthews Pty Ltd v Paul*,³⁹ Deane J held that,

if there was a valid and enforceable agreement governing the claimant's right to compensation, there would be neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration.⁴⁰

This principle is supported by numerous Australian decisions,⁴¹ to say nothing of the wealth of similar English authority⁴² and academic commentary.⁴³ Consequently, it is generally accepted that a claim in unjust enrichment is available only where any relevant contract is void, rescinded *ab initio*, or discharged for breach or frustration.⁴⁴

³⁹ (1987) 162 CLR 221 (*Pavey & Matthews*'s).

⁴⁰ *Pavey & Matthews* (1987) 162 CLR 221, 256. See also Brennan J, 238.

⁴¹ See, for example, *Gino D'Alessandro Constructions Pty Ltd v Powis* [1987] 2 Qd R 40, 59; *Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd* (1990) 20 NSWLR 251, 275; *Ansett Transport Industries (Operations) Pty Ltd v Alenia Aeritalia & Selenia SpA* (1991) 105 FLR 169, 174; *Adamson v Williams* [2001] QCA 38, [4]; *Issitch v Worrell* (2000) 172 ALR 586, 592; *Foran v Wight* (1989) 168 CLR 385, 413–2; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 356, 385.

⁴² See Lord Goff and Gareth Jones, *The Law of Restitution* (Sweet & Maxwell, 7th ed, 2007) 54, 496. Principal among these are *Goodman v Pocock* (1850) 15 QB 576; *Thomas v Brown* (1876) 1 QBD 714; *Dimskal Shipping Co Ltd v International Transport Workers Federation* [1992] 2 AC 152; *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 WLR 161 (*'The Trident Beauty'*).

⁴³ See, for example, Goff and Jones, above n 42, 54, 496; Andrew Burrows, *The Law of Restitution* (Butterworths, 2nd ed, 2002), 323–4; Burrows, above n 2, 54; Peter Birks, *An Introduction to the Law of Restitution* (Oxford University Press, 1985) 46–7; Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd ed, 2005) 90; Lionel Smith, 'The Mystery of "Juristic Reason"' (2000) 12 *Supreme Court Law Review* 237; Smith, above n 35, 598; Graham Virgo, 'Failure of Consideration: Myth and Meaning in the English Law of Restitution' in Johnston and Zimmerman (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) 103, 109; Friedmann, above n 36, 247–8; Stephen Smith, 'Concurrent Liability in Contract and Unjust Enrichment: The Fundamental Breach Requirement' (1999) 115 *Law Quarterly Review* 245, 245; Carmel McLure, 'Failure of Consideration and the Boundaries of Restitution and Contract' in Degeling and Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook Co, 2008) 209, 233; Jack Beatson, 'The Temptation of Elegance: Concurrence of Restitutionary and Contractual Claims' in William Swadling and Gareth Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford University Press, 1999) 143, 161; Jack Beatson, 'Restitution and Contract: Non-Cumul?' (2000) 1 *Theoretical Inquiries in Law* 83. For a contrary opinion, see Andrew Tettenborn, 'Subsisting Contract and Failure of Consideration — A Little Scepticism' [2002] *Restitution Law Review* 1.

⁴⁴ See, for example, Goff and Jones, above n 42, 58, 496; McLure, above n 43, 210; Virgo, above n 37, 489–90. It is noted that the position in relation to discharge for breach is subject to some lingering controversy: see Rachel Mulheron, 'Quantum

However, despite the axiomatic status of these broad principles, prior to *Lumbers* the authorities contained at least two points of tension concerning unjust enrichment's status as subsidiary to the law of contract, each of which may be considered in turn.

First, the precise formulation of when an unjust enrichment claim would be available had not been settled.⁴⁵ Very strict formulations suggested that the mere existence of a contract between the parties automatically excludes any restitutionary claim.⁴⁶ Others suggested that restitution is excluded wherever the benefit is conferred in fulfilment of a contractual obligation, there being a need to, 'break the circularity of holding a party contractually liable to confer a benefit which the law of restitution requires the other to return'.⁴⁷ Others again were more flexible, suggesting the claim in unjust enrichment is precluded only where the contract governs the issue in dispute so that awarding restitutionary relief would in fact upset the contractual distribution of risks and benefits. On this view, a claim in unjust enrichment is permissible in a contractual context, but only where there is a 'gap' in the contract so that the contract does not govern the subject of the dispute.⁴⁸ Pre-*Lumbers*, it appeared that this latter view gained dominance both as a matter of principle and authority, especially since Birks and Smith, who had previously formulated the rule strictly,⁴⁹ later preferred it.⁵⁰ Any other view would also be difficult to reconcile with the High Court's decision in *Roxborough v Rothmans of Pall Mall Australia Ltd*,⁵¹ a point which will be returned to shortly.

Meruit upon Discharge for Repudiation' (1997) 16 *Australian Bar Review* 150, particularly at 154; Bryan, above n 3, 327–8.

⁴⁵ Stephen Waddams, 'Contract and Unjust Enrichment: Competing Categories, or Complementary Concepts?' in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing, 2008) 167, 169–70; Stephen Waddams, 'The Relation Between Contract and Unjust Enrichment' in Paula Giliker (ed), *Re-examining Contract and Unjust Enrichment* (Martinus Nijhoff Publishers, 2007) 15, 17–8.

⁴⁶ Birks, *An Introduction to the Law of Restitution*, above n 43, 46–7; Lionel Smith, above n 43; Graham Virgo, *The Principles of the Law of Restitution* (Clarendon Press, 2nd ed, 2006) 40; Kit Barker, 'Unjust Enrichment: Containing the Beast' (1995) 15 *Oxford Journal of Legal Studies* 457, 459–60.

⁴⁷ Burrows, above n 2, 54. See also Burrows, *The Law of Restitution*, above n 42, 323–4; Friedmann, above n 36, 247–8; Virgo, above n 43, 109.

⁴⁸ Beatson, 'The Temptation of Elegance', above n 43, 153–4; Beatson, 'Restitution and Contract', above n 43, 94–6; Peter Birks, 'Failure of Consideration and its Place on the Map' (2002) 2 *Oxford University Commonwealth Law Journal* 1, 5; Peter Maddaugh and John McCamus, *The Law of Restitution* (Canada Law Book, 2nd ed, 2004) [3.200.30]; Waddams, 'Contract and Unjust Enrichment', above n 45, 172; Smith, above n 35, 609; Geoffrey Mead, 'Restitution with contract?' (1991) 11 *Legal Studies* 172; Ralph Cunningham, 'Failure of Basis' [2004] *Lloyd's Maritime and Commercial Law Quarterly* 234, 250; Tettenborn, above n 43, 1–2.

⁴⁹ Birks, *An Introduction to the Law of Restitution*, above n 43, 46–7; Lionel Smith, above n 43.

⁵⁰ Birks, above n 48, 5; Smith, above n 35, 609.

⁵¹ (2001) 208 CLR 516 ('*Roxborough*'). Indeed, this was the context for Birks' change of heart: see Birks, above n 48, 5. See also Jack Beatson and Graham Virgo, 'Contract,

Secondly, the basis for unjust enrichment's subsidiary status had been little explored. In most of the above formulations, the reason for unjust enrichment's subsidiary status appears to be assumed to lie in primacy of contract, that is, a hierarchical prioritisation of the outcome the law of contract produces over that which the law of unjust enrichment would produce. Dietrich has said that,

At least two related principles are at work as to why existing contracts limit recovery, including recovery outside of contract. First, where obligations are freely entered into, by agreement, the parties' rights should be determined by such express or implied agreement; and, secondly and corollary to this, where parties have not agreed to accept an obligation that is normally only voluntarily assumed (e.g. to have a house built), then such obligation ought not to be imposed.⁵²

If this is the basis for unjust enrichment's subsidiary status, it would not be surprising given the primacy the Western legal tradition gives to the general principle of freedom of contract.⁵³

However, Professors Grantham and Rickett reject the view that the subsidiary status of unjust enrichment is a consequence of the priority the common law affords to the notion of primacy of contract. Grantham and Rickett's argument that unjust enrichment is subsidiary to contract advances from the premise that restitution is concerned with no purpose other than restoration of the *status quo ante* in situations where the plaintiff did not subjectively consent to the enrichment of the defendant.⁵⁴ In their view, this fact means that the law of unjust enrichment has no role to play where the restoration of the *status quo ante* is already provided for, for example by the law of contract. The reasons are doctrinal:

This conclusion ... does not turn merely on some ill-defined notion of the primacy of contract, but rather on the simple fact that, since the parties have already provided for the possibility of the restoration if the plaintiff's subjective consent was defective, there is no longer any call for the intervention of the law of unjust enrichment. The agreement means it is no longer the case that, but for the imposition of a restitutionary obligation, the

Unjust Enrichment and Unconscionability' (2002) 118 *Law Quarterly Review* 352, 356; Cunningham, above n 48, 250–1; Michael Bryan and M.P. Ellinghaus, 'Fault lines in the law of obligations: *Roxborough v Rothman's of Pall Mall Australia Ltd*' (2000) 22 *Sydney Law Review* 636, 661–3.

⁵² See also Dietrich, above n 4, 102.

⁵³ See Hugh G Beale (ed), *Chitty on Contracts* (Sweet & Maxwell, 30th ed, 2008) [1-011]-[1-012]. See also Grantham and Rickett, 'On the Subsidiarity of Unjust Enrichment', above n 8, 293–6.

⁵⁴ Grantham and Rickett, 'On the Subsidiarity of Unjust Enrichment', above n 8, 275–82; Grantham and Rickett, 'Property Rights as a Legally Significant Event', above n 8, 741.

defendant would be able to retain an enrichment in circumstances that make it unjust to do so.⁵⁵

Although Grantham and Rickett's view that unjust enrichment is subsidiary to the law of *property* has been the subject of intense scholarly debate,⁵⁶ there has been little, if any, engagement with their argument that the reasons for unjust enrichment's status as subsidiary to *contract* are not based in policy, but are doctrinal. The resolution of this debate may be important to the development of the principles which limit unjust enrichment's potential to overlap with and consume other doctrines; whereas some writers have urged that such principles should develop by reference to unjust enrichment's own characteristics,⁵⁷ the present tendency is to fetter unjust enrichment not according to its own characteristics, but by reference to those doctrines which compete with it.

In section B of this Part, the implications of *Lumbers* for these two points of tension are explored. It is argued, first, that *Lumbers* is consistent with the view that unjust enrichment can come to a plaintiff's aid where there is a gap in the contractual allocation of risk between the parties, although the findings in *Lumbers* suggest that the High Court will be quick to close any such gap. Secondly, it is argued that the Court's reasons in *Lumbers* are more consistent with the view that accords primacy to the law of contract over that of unjust enrichment, rather than the view that unjust enrichment is, by virtue of its inherent doctrinal requirements, redundant where there is a contract between the parties.

In section C of this Part, the implications of *Lumbers* for the ability of contracting parties to make out the elements of a claim in unjust enrichment will be explored.

B *Lumbers and the Contractual Allocation of Risk*

1 *The 'Gap Filling' Capacity of Unjust Enrichment*

In coming to its decision in *Lumbers*, the Court did not refer to or distinguish between the various formulations identified above concerning when the application

⁵⁵ Grantham and Rickett, 'On the Subsidiarity of Unjust Enrichment', above n 8, 291. See also Grantham and Rickett, 'Property Rights as a Legally Significant Event', above n 8, 742.

⁵⁶ See Peter Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] *New Zealand Law Review* 623; Ross Grantham and Charles Rickett, 'Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity?' [1997] *New Zealand Law Review* 668; Peter Birks, 'Property, Unjust Enrichment and Tracing' (2001) 54 *Current Legal Problems* 231; Andrew Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 *Law Quarterly Review* 412; Ross Grantham and Charles Rickett, 'Tracing and Property Rights: the Categorical Truth' (2000) 63 *Modern Law Review* 905; Grantham and Rickett, 'Property Rights as a Legally Significant Event', above n 8; Virgo, above n 46, 11–17.

⁵⁷ See Barker, above n 46, 463; Grantham and Rickett, 'On the Subsidiarity of Unjust Enrichment', above n 8, 299.

of law of contract will preclude that of unjust enrichment. However, it is submitted that the reasons in *Lumbers* are consistent with the view that a claim in unjust enrichment is permissible in a contractual context where there is a 'gap' in the contract so that it does not govern the subject of the dispute. The reference in the Joint Judgment to the 'rights and obligations which each party thus assumed'⁵⁸ under the contracts between them reflects a concern with those aspects of the parties' rights and obligations which were actually affected by the contracts. The same is true of Gleeson CJ's statement that, 'The contractual arrangements that were made effected a certain allocation of risk'.⁵⁹ Further, this interpretation of the reasons is the best means of reconciling *Lumbers* with the High Court's previous decision in *Roxborough*.⁶⁰

In *Roxborough*, a tobacco retailer purchased cigarettes from a wholesaler. The retailer paid just one lump sum for the cigarettes, but the contract itemised the total price in a way which distinguished between the wholesale price of the cigarettes and a 'tobacco licence fee' which was payable by the wholesaler under the *Business Franchise Licence (Tobacco) Act 1987* (NSW). In *Ha v New South Wales*,⁶¹ the High Court held that what was cloaked as a 'tobacco licence fee' was in fact an excise tax which was unconstitutional under s 90 of the *Constitution*. At the time the decision was handed down, the wholesaler had not yet paid the tax to the relevant NSW authority. Although the retailer had not suffered any loss, having recouped the tax through increasing the price to consumers, it sued the wholesaler for restitution of the moneys representing the payment of the tax on the grounds that there had been a total failure of consideration. By a 5:1 majority (Kirby J dissenting), the High Court allowed the claim.

The decision in *Roxborough* has been variously praised and criticised, and has importance for issues beyond the scope of this article. For present purposes, the relevant point is that the restitutionary claim for a total failure of consideration succeeded notwithstanding the retailer had paid the amount to the wholesaler under a valid contract of sale. At the time the action was commenced the contract had been discharged by performance, but it had never been suggested that discharge by performance obviated a conflict between restitutionary and contractual obligations.⁶²

Explaining this aspect of the decision in *Roxborough* is made difficult by the fact that the majority judges themselves do not do so. The majority must have turned

⁵⁸ *Lumbers* (2008) 232 CLR 635, 674.

⁵⁹ *Ibid* 654.

⁶⁰ *Roxborough* (2001) 208 CLR 516.

⁶¹ (1997) 189 CLR 465.

⁶² See Keith Mason and JW Carter, *Restitution Law in Australia* (Butterworths, 1995) 460; McLure, above n 43, 225; *Haxton v Equuscorp Pty Ltd* [2010] VSCA 1 ('*Haxton*'), [128], [144]. In the most recent edition of their work, the learned authors of *Restitution Law in Australia* appear to regard *Roxborough* as an anomalous exception to this principle: see Keith Mason, JW Carter and GJ Tolhurst, *Restitution Law in Australia* (Lexis Nexis Butterworths, 2nd ed, 2008) 486–7.

their mind to the issue as Kirby J dissented on this ground.⁶³ However, Callinan J was the only majority judge to consider it explicitly and his Honour's treatment of it is limited as his decision was based on the implication of a term in the contract, rather than a failure of consideration. The treatment he did give this issue has been criticised as unconvincing.⁶⁴

If this aspect of the decision is explicable (and this has been doubted⁶⁵), it must be because restitution did not disturb the 'legitimate hopes and fears in the bargain'.⁶⁶ In Birks' view, the crucial fact is that neither the payment of the tax itself nor its quantum was viewed as negotiable.⁶⁷ Or, in Bryan and Ellinghaus' view, the contract did not allocate the risk that the licence fees would be found to be unconstitutional.⁶⁸

It is submitted that Birks' view is strained as the retailer and wholesaler had clearly negotiated and then contracted to the effect that the retailer would pay to the wholesaler an amount representing the tax. Although the payment of the tax by *someone* was non-negotiable, as between themselves the retailer and wholesaler had clearly engaged in negotiation ending in an agreement that the retailer in effect pay the tax. However, Bryan and Ellinghaus' view is more persuasive. It would surely be far-fetched to suggest (at least in the absence of strong evidence to the contrary) that a contracting party agreed to pay to another an amount as consideration for an obligation which that other would later have to discharge knowing that that other would in fact never have to discharge it.

In summary, it is therefore suggested that *Lumbers* is consistent with the view that a claim in unjust enrichment is permissible between contracting parties where there is a 'gap' in the contract so that it does not govern the subject of the dispute, for two reasons. First, the reasoning in both the Joint Judgment and the reasons of Gleeson CJ is concerned with the particular allocation(s) of risk between the parties. Secondly, this reading of *Lumbers* is the only method of reconciling it with *Roxborough*. An interpretation which saw *Lumbers* forbidding an unjust enrichment claim wherever there is a contract involved would cause *Lumbers* to impliedly overrule *Roxborough*. It is not likely that Gleeson CJ, Gummow and Hayne JJ, who delivered majority judgments in both *Lumbers* and *Roxborough*, intended in the former to overrule their own decision in the latter.

⁶³ *Roxborough* (2001) 208 CLR 516, 577–8.

⁶⁴ Beatson and Virgo, above n 51, 356.

⁶⁵ Ibid; McLure, above n 43, 234; Virgo, above n 37, 490–1. See also *Haxton* [2010] VSCA 1, [128], [144]; Tang Hang Wu, 'Unjust Enrichment within a Valid Contract: a Close Look at *Roxborough v Rothmans of Pall Mall Australia Ltd*' (2007) 23 *Journal of Contract Law* 201.

⁶⁶ Birks, above n 48, 5.

⁶⁷ Ibid. See also Cunningham, above n 48, 250–1.

⁶⁸ Bryan and Ellinghaus, above n 51, 661–3.

2 *When is there a 'Gap' to Fill?*

If the true position is that a claim in unjust enrichment is permissible where there is a 'gap' in the contract, it is necessary to embark upon an analysis of whether such a 'gap' in fact exists. The Court in *Lumbers* was of the view that there was no such gap. It is submitted that the facts in *Lumbers* bore two characteristics which required the Court, in order to reach this conclusion, to 'read' the contractual risk allocation(s) 'into' the facts. First, there was in fact no contract between Builders and the Lumbers. The only contract to which Builders may have been privy was the subcontract with Sons.⁶⁹ Secondly, neither the contract between Builders and Sons nor that between Sons and the Lumbers made any precise stipulation as to price nor the available remedies in the event of a breach.

The first characteristic is not novel. Indeed, a case bearing a similar characteristic was decided by the House of Lords in *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 WLR 161 (*The Trident Beauty*). In this case, the charterer of a vessel, Pan Ocean, paid moneys in advance to the assignee of a shipowner in accordance with its contract with the shipowner, Trident. As it turned out, Pan Ocean paid more than was owing as there were some periods when no freight had been carried. The contract between Pan Ocean and Trident expressly imposed an obligation on Trident to return moneys so overpaid to Pan Ocean. As Trident was insolvent, Pan Ocean preferred not to rely on its contractual right and instead sued the assignee, Creditcorp, for restitution for total failure of consideration. In a unanimous decision, the House of Lords dismissed the claim. Although Lord Woolf (with whom Lords Keith of Kinkel and Slynn of Hadley agreed) made comments which arguably touched upon the relationship between contract and unjust enrichment,⁷⁰ his Lordship in essence dismissed the claim because Pan Ocean's position should not be improved simply because Trident had assigned its rights to a third party.⁷¹ However, in a separate speech, Lord Goff held that,

[a]s between shipowner and charterer, there is a contractual regime which legislates for the recovery of overpaid hire. It follows that, as a general rule, the law of restitution has no part to play in the matter; the existence of the agreed regime renders the imposition by the law of a remedy in restitution both unnecessary and inappropriate.⁷²

The reaction to this decision has been mixed. On the one hand, certain commentators consider the preclusion of restitutionary claims in a three-party context as orthodox parity of reasoning when compared to a two-party context.⁷³

⁶⁹ It is recalled that there was some uncertainty concerning the precise nature of the relationship between Sons and Builders: see the discussion at nn 10–11 above.

⁷⁰ See Burrows, above n 2, 53; Beatson, 'The Temptation of Elegance', above n 43, 165. See also Beatson, 'Restitution and Contract', above n 43.

⁷¹ *The Trident Beauty* [1994] 1 WLR 161, 171–2.

⁷² *Ibid* 192.

⁷³ Birks, *Unjust Enrichment*, above n 43, 92; Rush, above n 4, [40].

Others reject it outright.⁷⁴ Others again accept the outcome, but question the path taken to reach it. In particular, Burrows has argued that Lord Goff's reasons reflect an unduly 'pro-contract view' where restitution was rendered 'unnecessary and inappropriate' simply, apparently, because of the inclusion of the repayment clause. He notes that, 'Lord Goff's view produced the odd result that the payor is legally worse off by having provided for repayment'.⁷⁵ Barker makes the same point thus:

Certainly they contracted into a regime of recoupment with Trident, but does this really mean that they were thereby abandoning all other rights provided by the law of unjust enrichment? If I insure my goods against theft, does this show that I am thereby abandoning my rights to reclaim them from the thief? Surely not. The more natural inference is not that I am a 'risk taker' *vis-à-vis* the thief, but simply that I am prudent ...⁷⁶

This article is not the forum for a detailed analysis of Lord Goff's judgment in *The Trident Beauty*. The important point is simply that construing the contractual arrangements in a manner which closes the gap is made more complicated where there is in fact no contract between the parties to the claim in unjust enrichment.⁷⁷ In *The Trident Beauty*, Lord Goff did not see this obstacle as insurmountable, but his Lordship's speech is not without difficulty.

In *Lumbers*, identifying a contractual risk allocation is also made more difficult by the second of its characteristics mentioned above: namely, that neither the contract between Builders and Sons nor that between Sons and the Lumbers made any precise stipulation as to price nor the available remedies in the event of a breach. To the contrary, as the Court noted, there were significant procedural and evidentiary deficiencies. The Joint Judgment went so far as to find that the pleadings were embarrassing in the technical sense.⁷⁸ This is a significant point of distinction *vis-à-vis* *The Trident Beauty*, where there was a written contract which clearly provided Pan Ocean with a remedy in the event of overpayment. Yet the Court in *Lumbers* found that the evidence established a contractual arrangement which allocated risk in a manner which precluded the restitutionary claim.

It is difficult to identify why precisely this was so. One possibility is that the premise from which this analysis is operating is wrong—that their Honours considered that the mere fact that there are contract(s) between the parties precludes a restitutionary claim. However, for the reasons given above, this interpretation is not preferred.

⁷⁴ Tettenborn, above n 43.

⁷⁵ Burrows, above n 2, 55.

⁷⁶ Barker, above n 35, 310.

⁷⁷ The assignment by Trident to Creditcorp did not make Creditcorp a party to Trident's contract with Pan Ocean. There was therefore no privity of contract between Pan Ocean and Creditcorp: see JW Carter, *Carter on Contract* (19 September 2010) Lexis Nexis, [17-080].

⁷⁸ *Lumbers* (2008) 232 CLR 635, 659 (Joint Judgment), 648 (Gleeson CJ).

A second possibility is that the decision in effect makes freedom of choice a bar to restitution. In one commentator's view, 'Even if there were no contracts binding the respective parties, the Lumbers' freedom of choice would not be respected if a claim for restitution succeeded against them.'⁷⁹ However, this is strained as an interpretation of the reasons, and indeed the learned commentator does not explain how he arrives at this conclusion. If freedom of choice were accepted as a bar to a restitutionary claim, surely this would give rise to the possibility of almost all restitutionary claims being barred since restitution by its nature operates at law and few defendants would voluntarily restore a gain made if they could get away with it.

A third possibility is arguably suggested by Birks. In discussing 'leapfrogging' out of valid contracts, Birks states that,

[o]ne reason for not allowing [the subcontractor] to sue the [owner] is precisely that the [subcontractor] must not wriggle round the risk of insolvency inherent in its contract with the [builder]. Contracts entail the risk of insolvency.⁸⁰

However, it does not appear that Birks intended for this to operate as the exclusive exegetical principle for cases such as *Lumbers*. Further, in *Lumbers*, it was not Sons, but Builders, who was insolvent.

A final possibility is that *Lumbers* endorses the view that contracting parties are taken to be risk-takers not only vis-à-vis each other but also vis-à-vis third parties with whom the other has contracted because, by entering into a contract, they impliedly limit themselves to their rights under it. On this view, Builders were risk takers vis-à-vis Lumbers because they had completed the work expecting to be paid by Sons, thereby taking the risk that Sons would not pay.⁸¹ It has been suggested that analogies to the tort of negligence would provide a sound basis for the conclusion that the existence of a contractual matrix between the parties may restrict obligations so that they operate in accordance with that matrix even where there is no privity of contract between the parties.⁸² Although their Honours did not rely on these analogies, they may be the best way of understanding *Lumbers*.

It is immediately apparent that, if this explanation of *Lumbers* is accepted, the argument advanced in this article is torn in two directions. On the one hand, it was suggested above that, on its face, *Lumbers* was not authority for the proposition that the mere existence of a contract between the parties to litigation precludes

⁷⁹ Rush, above n 4, [27].

⁸⁰ Birks, *Unjust Enrichment*, above n 44, 90.

⁸¹ See Goymour, above n 4, 471; Virgo, above n 37, 507–8. See also Daniel Friedmann, 'Valid, Voidable, Qualified, and Non-Existing Obligations: an Alternative Perspective on the Law of Restitution' in Andrew Burrows (ed), *Essays on the Law of Restitution* (Oxford University Press, 1991) 247, 274.

⁸² Edelman, above n 4, 445; Barker, above n 4, 161; Barker, above n 46, 462. See also Daniel Friedmann, 'Restitution from an Assignee' (1994) 110 *Law Quarterly Review* 521, 523–4.

a claim in unjust enrichment. However, if the reason why there was no gap in the contractual allocation of risk is that contracting parties are taken to be risk-takers vis-à-vis each other, and also vis-à-vis third parties with whom the other has contracted, unjust enrichment may have an even smaller scope within which to operate than if the principle were that the mere existence of a valid contract precluded the unjust enrichment claim. There is therefore tension between the reasoning that *Lumbers* discloses on its face and one possible logical extension of it.

3 *Implications for the Basis of Unjust Enrichment's Subsidiary Status*

It remains to assess the implications of this aspect of the decision in *Lumbers* for the dispute concerning the basis of unjust enrichment's subsidiarity to the law of contract.

It is suggested that the Court's reasoning in *Lumbers* is not support for Grantham and Rickett's view that the reason why unjust enrichment is subsidiary to the law of contract is that unjust enrichment is redundant where the subject of the dispute is contractually provided for. Rather, the Court's concern in *Lumbers* was that unjust enrichment not disturb the 'operative distribution of risks and benefits'⁸³ inherent in the contracts between the parties. This appears plain from the above review of the Court's reasons; the reference in the Joint Judgment to the 'rights and obligations which each party thus assumed'⁸⁴ and Gleeson CJ's statement that, '[t]he contractual arrangements that were made effected a certain allocation of risk'⁸⁵ reflect a concern with giving effect to the rights and obligations assumed by the parties, not the doctrinal boundaries of the law of unjust enrichment. That is not to suggest that *Lumbers* is fatal to Grantham and Rickett's argument. The point is simply that there is a distinction between the mere status of unjust enrichment as subsidiary to contract and the reasons for that status. *Lumbers* could not be said to support those authors' reasons for the latter. What *Lumbers* does support is the principle that the outcomes afforded by contract law, which holds as a central concept the notion of freedom of contract, are not to be disturbed by the law of unjust enrichment.

C *Contractual Relationships and the Elements of an Unjust Enrichment Claim*

As explained above, the second significance the Court assigned to the contractual relationships between Builders and Sons and Sons and the Lumbers was that Builders was unable to make out the elements of a claim in unjust enrichment. According to the Joint Judgment, the Lumbers had not been enriched.⁸⁶ According to Gleeson CJ, if they had been enriched, it was at Sons' expense.⁸⁷

⁸³ Hector MacQueen, 'Unjustified Enrichment in Mixed Legal Systems' [2005] *Restitution Law Review* 21, 33.

⁸⁴ *Lumbers* (2008) 232 CLR 635, 674.

⁸⁵ *Ibid* 654.

⁸⁶ *Ibid* 673 (Joint Judgment).

⁸⁷ *Ibid* 657 (Gleeson CJ).

These findings appear to be authority for two propositions. First, a defendant to an unjust enrichment claim cannot be enriched where he has paid a third party for the goods or services conferred on her by the plaintiff or remains contractually liable to so pay. Secondly, an enrichment is not at the plaintiff's expense if a third party remains contractually liable to pay the plaintiff for the enrichment conferred on the defendant.⁸⁸

On one view, these propositions could be seen to support Grantham and Rickett's argument as they go to the 'inherent doctrinal nature'⁸⁹ of unjust enrichment. Indeed, Grantham, in an earlier article to those co-authored with Rickett, uses the fact that a defendant's accrued contractual liability to make payment (which survives discharge) would prevent the defendant from being enriched in support of the argument for subsidiarity.⁹⁰ However, as Smith notes, the argument for subsidiarity proceeds on the assumption that the plaintiff can in fact prove all the elements of his claim in unjust enrichment and that the presence of the plaintiff's contract is the sole reason for the claim being barred.⁹¹ Consequently, although this aspect of the Court's reasoning indicates that the doctrinal requirements of unjust enrichment may preclude it from operating where there is a contractual allocation of risk between the parties, it is not proof of unjust enrichment's redundancy where the subject matter of the dispute between the parties is governed by contract.

IV *LUMBERS'* TREATMENT OF *PAVEY & MATTHEWS*

As explained above, the Joint Judgment dismissed Builders' claim for a reason which, at first glance, may seem unrelated to its findings concerning the relationship between unjust enrichment and contract: namely, that Builders' claim for remuneration on a *quantum meruit* basis failed as the Lumbers had not requested that it perform the work.⁹² The Joint Judgment held that,

if Builders did whatever work it did and paid whatever money it paid at the Lumbers' request, Builders' claim for a reasonable price for the work and for the money it paid would fall neatly within long-established principles.⁹³

But this was not so. Although we have thus far been able to put this aspect of the decision to one side, it is now necessary to engage with it, at least to a limited degree, to explain potential implications for the relationship between the law of contract and the law of unjust enrichment.

⁸⁸ For further discussion of the difficulty of establishing the elements of an unjust enrichment claim in a three-party context such as *Lumbers*, see Dietrich, above n 4, 103–5.

⁸⁹ Grantham and Rickett, 'On the Subsidiarity of Unjust Enrichment', above n 8, 293.

⁹⁰ Ross Grantham, 'Security of Contract: the Challenge from Restitution' (2000) 16 *Journal of Contract Law* 102, 112–3.

⁹¹ Smith, above n 35, 601. Compare also Jackson, above n 37.

⁹² *Lumbers* (2008) 232 CLR 635, 671.

⁹³ *Ibid* 666.

In *Pavey & Matthews*, the High Court rejected the implied contract theory and held that the right to recover on a *quantum meruit* depends on the establishment of a claim based on unjust enrichment (in that case, a claim for work and labour done).⁹⁴ This confirmed a point that had been agitated since at least 1966,⁹⁵ and which the High Court⁹⁶ and the House of Lords⁹⁷ have endorsed subsequently. However, although the High Court adopted unjust enrichment as the explanatory principle for *quantum meruit* claims, it did not clearly identify the ‘unjust factor’ that, in that case, entitled the plaintiff to recover.⁹⁸ The reference by Deane J to an obligation, ‘to pay fair and just compensation for a benefit which has been accepted’,⁹⁹ amongst other judicial pronouncements,¹⁰⁰ has given rise to suggestions that a concept of ‘free acceptance’ may have two roles to play in the law of unjust enrichment.¹⁰¹ First, at the ‘enrichment’ stage of the inquiry, it may mean that a defendant is precluded from subjectively devaluing a benefit conferred on them which they have freely accepted. Secondly, it may be that ‘free acceptance’ operates as a stand-alone ‘unjust factor’.

In *Lumbers*, the Joint Judgment distinguished *Pavey & Matthews* in terms which have alarmed some commentators. It said:

First, there was no issue in that case about whether the plaintiff, a builder, had a claim for work and labour done and materials supplied ... the issue was whether the builder’s action on a *quantum meruit* was a direct or indirect enforcement of the oral contract the parties had made. The majority in *Pavey & Matthews* held that because ‘the true foundation of the right to recover on a *quantum meruit* does not depend on the existence of an implied contract’ the action was not ‘one by which the plaintiff seeks to enforce the oral contract’.

⁹⁴ *Pavey & Matthews* (1986) 162 CLR 221, 227 (Wilson and Mason JJ), 255–7 (Deane J).

⁹⁵ See Robert Goff and Gareth Jones, *The Law of Restitution* (Sweet & Maxwell, 1st ed, 1966) 3–5.

⁹⁶ *ANZ Banking Group Ltd v Westpac Banking Corporation* (1987) 164 CLR 662, 673 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ).

⁹⁷ See, eg, *Yeoman’s Row Management Ltd v Cobbe* [2008] 1 WLR 1752.

⁹⁸ Rush, above n 4, [33].

⁹⁹ *Pavey & Matthews* (1986) 162 CLR 221, 257.

¹⁰⁰ For a detailed review, see Peter Birks, ‘In Defence of Free Acceptance’ in Burrows (ed), *Essays on the Law of Restitution* (Oxford University Press, 1991) 105. More recently, see, eg, *Brenner v First Artists’ Management Pty Ltd* [1993] 2 VR 221; *Andrew Shelton & Co Pty Ltd v Alpha Healthcare Ltd* (2002) 5 VR 577.

¹⁰¹ Goff and Jones, above n 42; Birks, *Unjust Enrichment*, above n 43, 57; Birks, above n 100, 105; Greg Tolhurst and John Carter, ‘Acceptance of Benefit as a Basis for Restitution’ (2002) 18 *Journal of Contract Law* 52; John Carter, ‘Discharged Contracts: Claims for Restitution’ (1997) 11 *Journal of Contract Law* 130, 139–40. See also *Brenner v First Artists’ Management Pty Ltd* [1993] 2 VR 221, 261 (Byrne J); *Angelopoulos v Sabatino* (1995) 65 SASR 1. Cf Andrew Burrows, ‘Free Acceptance and the Law of Restitution’ (1988) 104 *Law Quarterly Review* 576.

The second point to be noted is that unjust enrichment was identified as a legal *concept* unifying ‘a variety of distinct categories of case’ ... *not* ... a principle which can be taken as a sufficient premise for direct application... Rather, as Deane J emphasised in *Pavey & Matthews*, it is necessary to proceed by ‘the ordinary processes of legal reasoning’ and by reference to existing categories of cases ...¹⁰²

The concerns about and implications of this passage can broadly be divided into three categories, each of which is dealt with below.

A *Unjust Enrichment as a Source of Obligation*

First, some commentators have argued that this passage, together with *Lumbers*' emphasis on the need for a request to make out a *quantum meruit*, has effectively ended a role for unjust enrichment in Australian law. Such assessments draw support from pre-*Lumbers* attacks on the unjust enrichment ‘principle’ in *Roxborough*¹⁰³ and *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*¹⁰⁴ as well as the subsequent decisions of *Friend v Brooker*¹⁰⁵ and *Bofinger v Kingsway Group Ltd*.¹⁰⁶ Writing before *Brooker* and *Bofinger*, Andrew and Kirton, in what, anecdotally, is a common perception, describe the combined effect of the High Court's decisions as being that, ‘...unjust enrichment can no longer be regarded as a unifying concept in Australian law. The top-down reasoning of Deane J has been rejected.’¹⁰⁷ Similarly, in its recent decision in *Haxton v Equuscorp Pty Ltd*,¹⁰⁸ the Victorian Court of Appeal found that, ‘[t]he High Court's post-*Pavey* elaboration of unjust enrichment signals a caveat against loose applications of overly general principles and associated “idiosyncratic notions of unfairness”’ in a way which ‘appears inconsistent with unjust enrichment as the independent category of law advocated by jurists exemplified by Professor Birks’.¹⁰⁹

If this interpretation of these decisions is accurate, the effect would be to abolish unjust enrichment's role as an independent source of obligation alongside (or perhaps subsidiary to) contract and tort, a map of the private law which has been accepted in England.¹¹⁰ The relationship, then, between unjust enrichment and

¹⁰² *Lumbers* (2008) 232 CLR 635, 664–5 (emphasis in original).

¹⁰³ See particularly the judgment of Gummow J in *Roxborough*, 540–51.

¹⁰⁴ (2007) 230 CLR 89 (*Farah*). See particularly in *Farah*, 148–59 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

¹⁰⁵ (2009) 239 CLR 129 (*Brooker*).

¹⁰⁶ (2009) 239 CLR 269 (*Bofinger*).

¹⁰⁷ Andrew and Kirton, above n 4, 374. See also Romauld Andrew, ‘The fabrication of unjust enrichment in Australian law: *Pavey & Matthews v Paul* revisited’ (2010) 26 *Building and Construction Law Journal* 324.

¹⁰⁸ [2010] VSCA 1.

¹⁰⁹ *Ibid* [127] (Dodds-Streeton JA, with whom Ashley and Neave JJA agreed).

¹¹⁰ *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 227 (Lord Steyn). This is similar to the taxonomy proposed by the late Peter Birks in *Unjust Enrichment* (Oxford University Press, 2nd ed, 2005). For a recent useful review of

contract would arguably be non-existent. If anything, unjust enrichment would be no more than a classificatory unit or an extrinsic norm denuded of legal force.¹¹¹ Before assessing whether this interpretation is valid, it is useful to review the High Court's most recent findings on the role and place of unjust enrichment in *Brooker* and *Bofinger*.

In *Brooker*, the Court held that the plaintiff was correct to disavow any reliance on the concept of unjust enrichment in an appeal concerning the equitable doctrine of contribution. The joint judgment of French CJ, Gummow, Hayne and Bell JJ, with which Heydon J relevantly agreed, drew on *Lumbers* in support of the proposition that:

... while the concept of unjust enrichment may provide a link between what otherwise appears to be a variety of distinct categories of liability, and it may assist, by the ordinary processes of legal reasoning, in the development of legal principle, the concept of unjust enrichment itself is not a principle which can be taken as a sufficient premise for direct application in a particular case.¹¹²

In *Bofinger*, the Court, in a unanimous judgment, held that the equitable doctrine of subrogation did not fall within the rubric of claims associated with the law of unjust enrichment. Their Honours re-iterated that, '... the concept of unjust enrichment was not a principle supplying a sufficient premise for direct application in a particular case,'¹¹³ and considered that if the law of unjust enrichment were otherwise treated it may, '... conflict in a fundamental way with well-settled equitable doctrines and remedies'.¹¹⁴ Their Honours appeared to identify two roles for unjust enrichment. First, it may 'provide a means for comparing and contrasting various categories of liability'.¹¹⁵ Secondly, '[t]he concept of unjust enrichment may also assist in the determination by the ordinary processes of legal reasoning of the recognition of obligations in a new or developing category of case.'¹¹⁶ On this second role, their Honours gave the example of *David Securities Pty Ltd v Commonwealth Bank of Australia*,¹¹⁷ where the Court expanded the availability of the restitutionary action for money had and received to include mistakes of law, that

issues concerning the taxonomy of the private law, see Kelvin Low, 'The use and abuse of taxonomy' (2009) 29 *Legal Studies* 355.

¹¹¹ See Kit Barker, 'Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons' in Jason Neyers, Mitchell McInnes and Stephen Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing, 2004), 84–90.

¹¹² *Brooker* (2009) 239 CLR 129, 141.

¹¹³ *Bofinger* (2009) 239 CLR 269, 299 (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

¹¹⁴ *Ibid* 300 (Gummow, Hayne, Heydon, Kiefel and Bell JJ). See also Hon. Justice WMC Gummow, 'Moses v Macferlan: 250 years on' (2010) 84 *Australian Law Journal* 756, 758–9.

¹¹⁵ *Bofinger* (2009) 239 CLR 269, 299 (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

¹¹⁶ *Ibid* 300 (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

¹¹⁷ (1992) 175 CLR 353 ('*David Securities*').

action having only previously been available for mistakes of fact.¹¹⁸ In *Bofinger*, unjust enrichment's assistance was not called for since '... the doctrinal basis of equitable subrogation in Australian law is not unsettled.'¹¹⁹

Where does this leave the Australian law of unjust enrichment? It is submitted, with respect, that interpretations of these decisions as rejecting any role for unjust enrichment are greatly exaggerated. All that the reasons in *Lumbers*, *Brooker* and *Bofinger* were doing was emphasising what Deane J said himself in *Pavey & Matthews*¹²⁰ and what has been accepted in England: that there is no, 'free-standing claim of unjust enrichment in the sense that a Claimant can get away with pleading facts which lead ... to an enrichment which he says is unjust'.¹²¹ The 'top down reasoning of Deane J'¹²² cannot be rejected as his Honour did not engage in any such reasoning. As Rush has pointed out, if there is any difference between the above-quoted passage from *Lumbers* and Deane J's own judgment in *Pavey & Matthews*, it is that Deane J did not expressly contrast a *concept* with a *principle*. But as he goes on to illustrate,¹²³ the same distinction had been made in *David Securities* to mean nothing more than that unjust enrichment is not itself a cause of action and that, in identifying an unjust factor, it is necessary to look down to the decided cases.¹²⁴ Even if there is some dispute as to whether unjust enrichment can be called a cause of action,¹²⁵ the view that it does not suffice to plead 'unjust enrichment' without identifying material facts giving rise to a particular 'unjust factor' is wholly orthodox.¹²⁶ It is also worth observing that the High Court's vitriol in *Farah* is unsurprising given that the restitutionary analysis was adopted by the NSW Court of Appeal without hearing any argument on it from the parties.¹²⁷

This is not to suggest that unjust enrichment currently or is likely in the future to play a similarly prominent role to that it currently enjoys and may continue to enjoy in English law. It is true that the High Court's reasons reflect a greater reluctance to develop the law by reference to unjust enrichment scholarship than those of the House of Lords and English Court of Appeal. In particular, the High Court has been particularly hesitant to develop equitable doctrines and remedies

¹¹⁸ See *Bilbie v Lumley* (1802) 2 East 469; *Brisbane v Dacres* (1813) 5 Taunt 143; *Dixon v Monkland Canal* (1831) 5 W & S 445; *Kelly v Solari* (1841) 9 M & W 54; *Aicken v Short* (1856) 1 H & N 210; *Morgan v Ashcroft* [1938] 1 KB 49.

¹¹⁹ *Bofinger* (2009) 239 CLR 269, 302 (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

¹²⁰ See *Pavey & Matthews* (1987) 162 CLR 221, 256–7 (Deane J).

¹²¹ *Charles Uren v First National Home Finance Ltd* [2005] EWHC 2529, [16] (Mann J).

¹²² Andrew and Kirton, above n 4, 374.

¹²³ Rush, above n 4, [56]-[58].

¹²⁴ *David Securities* (1992) 175 CLR 353, 358 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

¹²⁵ See the discussion in Mason, Carter and Tolhurst, above n 62, 78–9 [207].

¹²⁶ Barker, above n 4, 162; Mason, Carter and Tolhurst, above n 62, [2904].

¹²⁷ See *Farah* (2007) 230 CLR 89, 156–7. See also *Friend v Brooker* (2009) 239 CLR 129, 161–74 (Heydon J) and J D Heydon, 'How Far Can Trial Courts and Intermediate Appellate Courts Develop the Law?' (2009) 9 *Oxford University Commonwealth Law Journal* 1.

by reference to unjust enrichment and is insistent that equity operates according to its distinct conscience and has sufficient vitality to develop as appropriate without the intervention of the (traditionally common) law of unjust enrichment.¹²⁸ But that is not the same as sidelining unjust enrichment as, at worst, an academic fantasy or, at best, a mere classificatory unit or extrinsic norm with no legal force. Although unjust enrichment may be neither a cause of action nor a licence for the application of idiosyncratic notions of justice, it does not necessarily follow that unjust enrichment is not an independent category of law. It is entirely consistent with Professor Birks' original¹²⁹ conception that unjust enrichment exists as a category into which particular causes of action, particularly those listed by Lord Mansfield in *Moses v Macferlan*,¹³⁰ are grouped and thereafter consistently and coherently developed. Some English lawyers have sought to expand the role of unjust enrichment by adding further causes of action to that list of 'unjust factors' and/or altering the remedies available when an unjust enrichment is established. The High Court is unlikely to be sympathetic to submissions that Australia follow that example. However, as *David Securities* illustrates, litigants who plead within the territory marked out by Lord Mansfield in *Macferlan* and do not seek to interfere with established equitable remedies may turn to unjust enrichment in an appropriate 'new or developing category of case'.¹³¹

B *The Return of Implied Contract?*

Although the Court's emphasis on the point that unjust enrichment is not a cause of action does not strike unjust enrichment theory any great blow, the Joint Judgment's finding that a request by the recipient of services is both necessary and sufficient to establish a *quantum meruit* may. As noted above, it is this aspect of the Court's reasons which has been criticised as reverting to the formalism of the old forms of action.¹³²

¹²⁸ For a recent defence of preserving equity's distinct role and resisting the unifying tendencies of some unjust enrichment scholars, see Patrick A Keane, 'The 2009 WA Lee Lecture in Equity: The conscience of equity' (2010) 84 *Australian Law Journal* 92. See also Gummow, above n 114.

¹²⁹ In *Unjust Enrichment*, above n 43, Professor Birks called for his previous writings to be recalled and burnt and replaced by a new 'absence of basis' approach to restitutionary liability. The response to this new approach has been mixed, even in England. It was rejected in *Haxton* [2010] VSCA 1, [127].

¹³⁰ (1760) 2 Burr 1005 ('*Macferlan*'); '... money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.': *Macferlan* (1760) 2 Burr 1005, 1011–2 (Lord Mansfield).

¹³¹ *Bofinger* (2009) 239 CLR 269, 300 (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

¹³² See Edelman, above n 4, 447–9; Getzler, above n 4, 208; Goymour, above n 4, 470; Rush, above n 4, [42]; Barker, above n 4, 162; Burrows, above n 4, 83–84; Bryan, above n 4, 328–30. For a defence of this aspect of the Joint Judgment in *Lumbers*, see Dietrich, above n 4.

The form of action for a claim to a *quantum meruit* required the plaintiff to plead that, ‘the defendant, in consideration of some service rendered [by] the plaintiff at [the defendant’s] request, promised to pay to the plaintiff the reasonable value of that service’.¹³³ This form of action, along with that of *indebitatus assumpsit* and its other nominate subcategories, came to be explained on the basis of the now rejected¹³⁴ implied contract theory. The implied contract theory had developed from the 15th and 16th centuries with the triumph of the action of *indebitatus assumpsit*, a claim made on the basis of a fictional promise implied by the court from the defendant’s conduct.¹³⁵ Although initially understood as an implication made at law, the promise the plaintiff was required to plead came to be regarded as a genuine inference from the facts and recovery was denied where the plaintiff could not establish a real promise.¹³⁶ Under this theory, what is now described as the law of restitution or the law of unjust enrichment¹³⁷ was known as the law of quasi-contract and treated as an aspect of contract law.¹³⁸

Despite the fears of some, *Lumbers* cannot reasonably be said to require plaintiffs to plead the requirements of the old forms of action for all those claims which unjust enrichment theorists have come to explain by that principle. However, it is possible to interpret the Joint Judgment as appearing to, ‘... support the notion that implied contract ideas have a role in some (near contractual) restitutionary contexts’.¹³⁹ The question has been asked, if a request by the recipient of services is both necessary and sufficient to establish a *quantum meruit* claim, ‘[a]t what point does a claim for *quantum meruit* ... start to encroach on the space hitherto reserved for promissory estoppel, itself a form of contract?’¹⁴⁰ However, this is not the same as resurrecting the ‘web of falsehood’¹⁴¹ that was the implied contract theory. This theory involved the fictitious implication of a contract, and came to be so misunderstood that plaintiffs were denied recovery because they could not establish the existence of an express contract.¹⁴² In *Lumbers*, the essence of the

¹³³ D J Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999) 269–72.

¹³⁴ *Pavey & Matthews* (1986) 162 CLR 221, 227 (Wilson and Mason JJ), 255–7 (Deane J); *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] AC 669. For a convenient collection of further authorities, see Graham Virgo, ‘Restitution’ in H G Beale (ed), *Chitty on Contracts* (Sweet & Maxwell, 30th ed, 2008) [29-008].

¹³⁵ See *Slade’s Case* (1602) 4 Co Rep 92a.

¹³⁶ See *Sinclair v Brougham* [1914] AC 398.

¹³⁷ Whether it is more appropriate to refer to the law of restitution or the law of unjust enrichment is itself a current source of controversy: see, for example, Birks, *Unjust Enrichment*, above n 43, 279–80; Birks, ‘Property and Unjust Enrichment: Categorical Truths’ above n 56; Andrew Burrows, ‘Quadrating Restitution and Unjust Enrichment: A Matter of Principle?’ [2000] *Restitution Law Review* 257; M McInnes, ‘Restitution, Unjust Enrichment and the Perfect Quadrature Thesis’ [1999] *Restitution Law Review* 118.

¹³⁸ See Gummow, above n 114, 757.

¹³⁹ Dietrich, above n 4, 107.

¹⁴⁰ Rush, above n 4, [34].

¹⁴¹ Peter Birks, *Unjust Enrichment*, above n 43, 273.

¹⁴² See, for example, in *Sinclair v Brougham* [1914] AC 398.

requirement of a request appears to lie in the enforcement of legal obligations that have been voluntarily assumed. To those who take the view that the law gives effect to ‘almost contracts’ in order to fill the gap caused by the formalism of contract law, the identification of this overlap could warrant *quantum meruit* claims being categorised with other ‘almost contract’ doctrines such as estoppel and assumption of responsibility.¹⁴³

C *Free Acceptance*

Thirdly, the above-quoted passage from *Lumbers*¹⁴⁴ may have implications for the concept of free acceptance. It has been said that *Lumbers*’ treatment of *Pavey & Matthews* rejects any role for ‘free acceptance’ as either a stand-alone ‘unjust factor’ or a limitation on subjective devaluation.¹⁴⁵ In light of the above discussion, it is probably safe to assume that ‘free acceptance’ is not likely to be accepted by the High Court as a stand-alone unjust factor at any time in the near future. This has been said not to occasion any ‘great blow to restitutionary analysts’¹⁴⁶ since its proponents had already accepted a reduced role for it.¹⁴⁷ But if free acceptance cannot act as a limitation on subjective devaluation, there may be at least one minor implication for the relationship of unjust enrichment to contract. As explained above, in the context of the ‘enrichment’ inquiry, free acceptance operates alongside ‘incontrovertible benefit’ as a control mechanism on the defendant’s ability to argue that, subjectively, they did not benefit from the transfer of wealth or property to them.¹⁴⁸ Therefore, a rejection of this role for ‘free acceptance’ would mean that the ‘enrichment’ inquiry is more dependent than previously on the defendant’s subjective valuation of the benefit. This increased role for subjectivity juxtaposes with the law of contract, which focuses on objective standards. This could marginalise unjust enrichment’s role even further in the eyes of sceptics.¹⁴⁹

¹⁴³ See Ross Grantham and Charles Rickett, *Enrichment and Restitution in New Zealand* (Hart Publishing, 2000) 258–61; Grantham and Rickett, ‘On the Subsidiarity of Unjust Enrichment’, above n 8, 273; See also Grantham, above n 90, 113–22.

¹⁴⁴ At n 102, above.

¹⁴⁵ Barker, above n 4, 161–2. Contrast Gleeson’s CJ’s reasons where his Honour appears to accept the concept of ‘free acceptance’ but finds that it was not applicable since the *Lumbers* did not know that the work was being performed by Builders and therefore never had the opportunity to reject the building work: *Lumbers* (2008) 232 CLR 635, 657.

¹⁴⁶ Barker, above n 4, 162.

¹⁴⁷ See also Getzler, above n 4, 207. Birks originally argued that free acceptance operated as both an unjust factor and a test of whether services constituted an enrichment, but later conceded that free acceptance was a test of enrichment only: see Birks, above n 99, 105.

¹⁴⁸ Rachel Mulheron, ‘Quantum Meruit upon Discharge for Repudiation’ (1997) 16 *Australian Bar Review* 150, 163.

¹⁴⁹ For an argument that the objective law of contract renders the subjective law of unjust enrichment redundant, see Hang Wu, above n 65.

V CONCLUSION

The 21st century judgments of the High Court concerning unjust enrichment certainly reflect a concern for 'containing the [unjust enrichment] beast'.¹⁵⁰ However, whilst unjust enrichment has received much shorter shrift in Australia than it has in England, calls that unjust enrichment has been wholly rejected reflect a (perhaps not so well-meaning) 'sloppiness of thought'.¹⁵¹ The precise role of unjust enrichment in Australian law can only be determined by a careful reading of the High Court's future judgments in the area, which will no doubt continue to be a source of great comment.

However, what can be taken from *Lumbers* is High Court authority for the principle that restitutionary liability will not be allowed to upset contractual liability. In itself, this is unremarkable since that principle was already well-established. However, a deeper look at the Court's reasons in *Lumbers* suggested two related, and possibly more consequential, findings. First, the High Court's finding that restitutionary relief would interfere with the contractual allocation of risk in *Lumbers* itself, even though there was no privity of contract between Lumbers and Builders nor detailed evidence about the terms of the contracts which did exist, provides good reason to believe that the Court will be quick to close any gap that might otherwise have appeared in the allocation of risk between contracting parties. In particular, *Lumbers* may be read to support the view that mere entry into a contract implicitly limits the contracting parties' rights to pursue a restitutionary remedy against third parties.

Secondly, and although this point was not explicitly addressed in the Court's reasons, it has been suggested that *Lumbers* reflects a fundamental concern to give effect to the particular allocation of risks between the relevant parties. It does not give expression to the view that unjust enrichment's inherent doctrinal requirements render it redundant where a benefit is conferred pursuant to a contract. This apparent emphasis on primacy of contract may have important implications for the continued development of principles designed to limit unjust enrichment's scope. Whereas some writers have urged such principles to develop by reference to unjust enrichment's own doctrinal characteristics,¹⁵² it seems likely that the law will continue to fetter unjust enrichment by reference to those doctrines which compete with it.

¹⁵⁰ See Barker, above n 46.

¹⁵¹ To borrow the phrase from *Holt v Markham* [1923] 1 KB 504, 573.

¹⁵² See Barker, above n 46, 463; Grantham and Rickett, 'On the Subsidiarity of Unjust Enrichment', above n 8, 299.

IS THERE A PHYSICALITY REQUIREMENT AT COMMON LAW?: A SURVEY OF THE PRE-*NRDC* CASES DISCUSSING ‘MANUFACTURE’

ABSTRACT

One of the fundamental issues that remains unresolved in patent law today, both in Australia and in other jurisdictions, is whether an invention must produce a physical effect or cause a physical transformation of matter to be patentable, or whether it is sufficient that an invention involves a specific practical application of an idea or principle to achieve a useful result. In short, the question is whether Australian patent law contains a physicality requirement. Despite being recently considered by the Federal Court, this is arguably an issue that has yet to be satisfactorily resolved in Australia. In its 2006 decision in *Grant v Commissioner of Patents*, the Full Court of the Federal Court of Australia found that the patentable subject matter standard is rooted in the physical, when it held that an invention must involve a physical effect or transformation to be patent eligible. That decision, however, has been the subject of scrutiny in the academic literature. This article seeks to add to the existing literature written in response to the *Grant* decision by examining in detail the key common law cases decided prior to the High Court’s watershed decision in *National Research Development Corporation v Commissioner of Patents*, which is the undisputed authoritative statement of principle in regards to the patentable subject matter standard in Australia. This article, in conjunction with others written by the author, questions the Federal Court’s assertion in *Grant* that the physicality requirement it established is consistent with existing law.

I INTRODUCTION

There is a generally held belief that the patent system exists to promote the invention of new and useful physical machines and devices and new methods that physically transform matter from one state into another. What is not so well understood is whether, and to what extent, non-physical methods, being those that do not involve a machine or other physical device and those that do not involve a physical transformation of matter, are patent eligible. In other words, there is uncertainty as to whether patent law contains a physicality requirement.

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From its earliest days, the objective of patent law has been to encourage the introduction of new technologies by providing incentives to invent and invest in innovation.¹ In Australia, it has traditionally been thought that patents are the domain of engineering, applied science and industrial manufacturing. This traditional conception of the role of the patent system, inherited from mid-19th century British law, involves an assumption that patent protection is limited to the creation of physical articles and methods that involve a transformation of matter.² These expectations are arguably a consequence of our understanding of the notion of technology as being something necessarily tied to machines, physical devices and physically transformative methods.³ However, it is by no means certain that the law is concordant with these traditional expectations, for tying patentable subject matter to the physical in this way ties the patent system to industrial and pre-industrial notions of patentability in ways that are inconsistent with the need for the patent system to be able to respond appropriately to new and ‘excitingly unpredictable’ technologies as they arise.⁴

¹ This is a concept that dates back to the early patent custom in the Venetian Republic: Giulio Mandich, ‘Venetian Patents (1450–1550)’ (1948) 30 *Journal of the Patent Office Society* 166 (Frank D Prager, trans, 1936) [trans of *Rivista di Diritto Commerciale*]; Giulio Mandich, ‘Venetian Origins of Inventor’s Rights’ (1960) 42 *Journal of the Patent Office Society* 378 (Frank D Prager trans, 1958) 101 [trans of *Rivista di Diritto Industriale*]; Edward C Walterscheid, ‘The Early Evolution of the United States Patent Law: Antecedents (Part 1)’ (1994) 76 *Journal of the Patent and Trademark Office Society* 697, 709–10; Frank D Prager, ‘A History of Intellectual Property from 1545 to 1787’ (1944) 26 *Journal of the Patent Office Society* 711, 715, 750.

It is also evident in the early English custom of granting monopolies and the English common law: *Darcy v Allen (The Case of Monopolies)* (1603) 11 Co Rep 84b; 77 ER 1260; *Statute of Monopolies* 21 Jam 1, Ch 3 (1623) (Eng). It is also evident today: Fritz Machlup, *An Economic Review of the Patent System* (1958) US Senate, Committee on the Judiciary, 2d Sess., 36–8; Roberto Mazzoleni and Richard R Nelson, ‘The Benefits and Costs of Strong Patent Protection: A Contribution to the Current Debate’ (1998) 27 *Research Policy* 273 (who describe three different theories that address three different aspects of the broad incentive theory; Lionel Bently and Brad Sherman, *Intellectual Property Law* (Oxford University Press, 2001) 315 ([i]n this sense, patents act as a vector that links scientific and technical research with commercial spheres.’).

² *The King v Wheeler* (1819) 2 B & Ald 345, 349; 106 ER 392, 394–5; Bently and Sherman, above n 1, 310 (‘the image of the invention as the human intervention into nature that brings about a resulting physical change that underpins much contemporary jurisprudence, was well entrenched in British law by the mid-nineteenth century.’).

³ Ben McEniery, ‘The Patentability of Non-Physical Inventions: Lessons From the United States’ (2009) 35 *Monash University Law Review* 376, 377–8.

⁴ The need for the patent system to be able to respond appropriately to new and ‘excitingly unpredictable’ technologies as they arise is documented by the High Court of Australia in *National Research Development Corporation v Commissioner of Patents* (1959) 102 CLR 252, 271.

Increasingly, competitive commercial advantage in today's modern economies will come from new and innovative business processes. It is then of little surprise that this issue has come to the fore at the dawn of the Information Age, as it is highly likely that much of the groundbreaking innovation we are likely to witness in the 'knowledge economy' of the Information Age will involve the use and manipulation of information and data rather than the use and manipulation of physical matter.⁵ Whether Australian patent law will keep pace with this altered reality is as yet unknown. The early indication is that it will not, at least initially.

The Australian courts have to date had one dealing with attempts by patentees to expand the bounds of patentable subject matter beyond the realms of engineering, applied science and industrial manufacturing. In its 2006 decision in *Grant v Commissioner of Patents*,⁶ the Full Court of the Federal Court of Australia asserted that, if an invention is to satisfy the patentable subject matter test, it must result in the production or alteration of a physical object or produce a physically observable effect.⁷ While the Court accepted that business methods are not excluded from patent eligibility as a category subject matter, it found that a business method removed from any physical apparatus or other physical embodiment is not patentable.⁸

The alleged invention considered in *Grant* is a method to protect an asset from the claims of creditors. It comprises creating a trust, the person making a gift of money to the trust, the trustee lending a sum of money to the person, and the trustee securing the loan by taking a charge over the asset. The object is to establish in favour of the trustee a charge over the asset in priority to other creditors.⁹ This is an unconventional use of the patent system in that it seeks to reserve the ability to apply certain aspects of the law in a particular way to achieve a useful result to one individual. This is an alleged invention that does not disclose a physical aspect and does not involve a physical transformation of matter. In essence, the Court concluded that any method that does not produce a physical result is merely 'intellectual information', which has never been patentable.¹⁰

The *Grant* case has been criticised in the academic literature on the grounds that its reasoning is fundamentally inconsistent with the principles set out in the

⁵ John Maddox, *What Remains to Be Discovered: Mapping the Secrets of the Universe, the Origins of Life, and the Future of the Human Race* (Free Press, 1998) 375–6; James Canton, *The Extreme Future: The Top Trends that will Reshape the World in the Next 20 Years* (Plume Books, 2006) 75–8; Richard Watson, *Future Files: A History of the Next 50 Years* (Scribe Press, 2007).

⁶ (2006) 154 FCR 62 ('*Grant*') (Heerey, Kiefel and Bennett JJ). The matter was heard on appeal from a decision of a single judge of the Federal Court of Australia: (2005) 67 IPR 1 (Branson J).

⁷ *Grant* (2006) 154 FCR 62, 70 [30], [32], 73 [47].

⁸ *Ibid* 73 [47].

⁹ Australian Innovation Patent No. 2003100074 ('Asset Protection Method') (filed Feb. 7, 2003).

¹⁰ *Grant* (2006) 154 FCR 62, 66–8 [14]–[23].

High Court's landmark decision in *National Research Development Corporation v Commissioner of Patents*.¹¹ It has been argued that the High Court in *NRDC* explained that the patentable subject matter inquiry is a broad test that recognises all new and useful innovation as patent eligible, regardless of whether it involves a physical embodiment or a transformation of physical matter.¹²

In its reasons for decision, the Full Court in *Grant* asked whether the alleged invention before it is a proper subject of letters patent according to the principles which have developed over time to inform the application of section 6 of the *Statute of Monopolies*. The Court examined a line of cases dating back prior to *NRDC* and observed that the patentability of an invention that does not produce a physical effect or cause a physical transformation of matter has never been upheld.¹³ From its observations, the Court inferred that non-physical methods are categorically excluded from patent eligibility.¹⁴

¹¹ (1959) 102 CLR 252 ('*NRDC*').

¹² For a critique of the *Grant* decision see Ben McEnery, 'Patents for Intangible Inventions in Australia After *Grant v Commissioner of Patents* (Part 1)' (2007) 13 *Computer and Telecommunications Law Review* 70; Ben McEnery, 'Patents for Intangible Inventions in Australia After *Grant v Commissioner of Patents* (Part 2)' (2007) 13 *Computer and Telecommunications Law Review* 100. See also: Ann Monotti, 'The Scope of 'Manner of Manufacture' Under the *Patents Act 1990* (Cth) After *Grant v Commissioner of Patents*' (2006) 34 *Federal Law Review* 461; McEnery, above n 3; Charles Lawson, '*Grant v Commissioner of Patents* and Patenting Knowledge Inventions' (2008) 15 *Journal of Law and Medicine* 626. For a critique of the physicality requirement created by the Court of Appeals for the Federal Circuit in the United States in *In re Bilski*, 545 F3d 943 (Fed Cir Oct 31, 2008) (*en banc*), see Benjamin J McEnery, 'The Federal Circuit in *Bilski*: The Machine-or-Transformation Test' (2009) 91 *Journal of the Patent and Trademark Office Society* 254. Note that the Federal Circuit's physicality requirement was subsequently overturned by the United States Supreme Court in *Bilski v Kappos*, 561 US __ (2010).

¹³ The court considered: *Burroughs Corp (Perkins') Application* [1974] RPC 147; *Commissioner of Patents v Lee* (1913) 16 CLR 138; *Commissioner of Patents v Microcell Ltd* (1959) 102 CLR 232; *International Business Machines Corporation's Application* [1980] FSR 564; *International Business Machines Corporation v Commissioner of Patents* (1991) 33 FCR 218; *Neilson v Minister of Public Works (NSW)* (1914) 18 CLR 423; *Re Brown* (1899) 5 ALR 81; *Re Cooper's Application for a Patent* (1901) 19 RPC 53; *Re ESP's Application* (1944) 62 RPC 87; *Re Fishburn's Application* (1938) 57 RPC 245; *Re GEC's Application* (1942) 60 RPC 1; *Re Johnson's Application for a Patent* (1901) 19 RPC 56; *Re Lenard's Application* (1954) 71 RPC 190; *Re W's Application* (1914) 31 RPC 141; *Rogers v Commissioner of Patents* (1910) 10 CLR 701. The court noted that in *NRDC*, an artificial effect was physically created on the land, and that in each of *Welcome Real-Time v Catuity Inc*, *CCOM v Jiejing* and in the United States decisions of *State Street Bank & Trust Co v Signature Financial Group* and *AT&T Corp v Excel Communications, Inc*, there was a component physically affected or a change in state or information in a part of a device or machine.

¹⁴ McEnery, 'Patents for Intangible Inventions in Australia (Part 2)', above n 11, 102.

One question the existing literature does not systematically address is whether the Federal Court's finding in *Grant* is actually consistent with the decisions in the cases that preceded *NRDC*. This article aims to fill that gap by examining whether there is anything in the pre-*NRDC* case law to support the finding in *Grant* that Australian patent law contains a physicality requirement, or whether that case law supports a patent eligibility standard free of physical constraints.¹⁵ Its focus is the relevant case law from its inception in *Boulton and Watt v Bull*¹⁶ in the late 18th century until the decision in *NRDC*, and it questions whether the Federal Court's application of principle in *Grant* was justified in light of existing precedent. The purpose of conducting an analysis of this sort is to gain a better understanding of the law as it stood at the time *NRDC* was handed down and to uncover the principles of law that are of continuing significance today.

Conducting an analysis of this sort requires an examination of the history of patentability since the enactment of the *Statute of Monopolies*.¹⁷ Included in this discussion is a consideration of the pre-1977 case law from the United Kingdom,¹⁸ and the Australian case law to date. This is an inherently difficult undertaking since many of the earlier cases were decided at a time when it was thought technology is grounded in physical artefacts and today's computing and information processing technologies had not yet been imagined. Essentially, what is sought is language in the jurisprudence to indicate whether judges over time have been open to the possibility that patent eligible technology might exist in a form that is free of physical or corporeal embodiment.

II PATENTABLE SUBJECT MATTER: THE 'MANNER OF MANUFACTURE' TEST

The patentable subject matter inquiry in Australia finds its statutory basis in s 18(1) of the *Patents Act 1990* (Cth) and the definition of 'invention'.¹⁹

¹⁵ In actual fact, the author does not adhere strictly to this classification, as passing reference is made to cases that follow the 1959 *NRDC* decision, such as *Rolls-Royce Limited's Application* [1963] RPC 251. Although it is acknowledged that this case was decided after *NRDC*, the judicial approach it demonstrates is arguably consistent with pre-*NRDC* thinking on the nature of patentable subject matter.

¹⁶ (1795) 126 ER 651 (Eyre CJ, Buller, Heath, Rooke JJ).

¹⁷ 21 Jam 1, Ch 3 (1623) (Eng). The *Statute of Monopolies* is the short title of the Act. The long title is 'An Act Concerning Monopolies and Dispensations with Penal Laws and the Forfeiture Thereof'.

¹⁸ The reason for tracing United Kingdom law only to 1977 is that 1977 is the year the United Kingdom abandoned its *Statute of Monopolies*-based regime for a new patent system modelled on the *Convention on the Grant of European Patents*, opened for signature 5 October 1973, 13 ILM 268 (entered into force 7 October 1977) (EPC). See *Patents Act 1977* (UK) c 37.

¹⁹ *Patents Act 1990* (Cth) s 18 and Schedule 1 (which defines 'invention').

Section 18 provides that, where a standard patent is concerned,²⁰ an ‘invention’ is patentable if it: is a ‘manner of manufacture’ within the meaning of s 6 of the *Statute of Monopolies*; is novel; involves an inventive step, is useful; and has not been used in secret. Section 18 does not expressly require that an invention produce a physical effect or cause a physical transformation of matter, nor does it expressly exclude these things from the test for determining patentability.

Of the s 18 heads of patentability, the focus of this article is the ‘manner of manufacture’ requirement, which determines the scope of the subject matter for which a patent can be granted. Only if an invention is within the scope of patentable subject matter, does it then need to be tested against the remaining heads of patentability, such as novelty and inventive step. The requirement that an invention, to be a patentable invention, must be a ‘manner of manufacture’ stems from s 6 of the *Statute of Monopolies*. This section, purportedly in accordance with the common law in existence at the time of its enactment in 1623, rendered void all monopolies provided that the invalidating provisions of the statute:

shall not extend to any [letters] Patents and Graunt of Privilege for the tearme of fowerteene yeares or under, hereafter to be made of the sole working or making of any manner of new Manufactures within this Realme, to the true and first Inventor and Inventors of such Manufactures, which others at the tyme of makeinge such [letters] Patents and Graunts shall not use, soe as alsoe they be not contrary to the Lawe nor mischievous to the State, by raising prices of Commodities at home, or hurt of Trade, or generallie inconvenient.

The principal purpose of the *Statute of Monopolies* was to declare grants of monopolies void.²¹ However, while the *Statute of Monopolies* reflected the common law’s suspicion of monopolies, it recognised nonetheless that monopolies limited in duration have the potential to serve the public interest by providing an incentive to invent. Thus, the *Statute of Monopolies* is a prohibition on the Crown granting monopolies, other than those in respect of inventions.

²⁰ There are two types of patents in Australia: standard patents and innovation patents. Standard patents confer monopoly protection for a term of 20 years: *Patents Act 1990* (Cth) s 67. Innovation patents, which require a significantly lesser degree of inventiveness, are awarded for a term of 8 years: *Patents Act 1990* (Cth) s 68. The innovation patent is a second-tier patent introduced into Australian law by the *Patents Amendment (Innovation Patents) Act 2000* (Cth). The innovation patent replaced the petty patent and is designed to meet the needs of small and medium enterprises for inexpensive and easily acquired short-term patent protection for modest technological advances or incremental inventions.

²¹ Section 1 of the *Statute of Monopolies* provides that the central objective of the statute is to encourage free trade and competition by rendering void all monopolies, including those granted under the authority of letters patent. Section 1 provides: ‘All monopolies and all commissions, grants, licenses, charters and letters patent heretofore made or granted or hereafter to be made or granted to any person or persons, bodies politic or corporate whatsoever, of or for the sole buying, selling, making, working or using of anything within this realm ... shall be utterly void and of no effect.’

How the incorporation by reference of s 6 of the *Statute of Monopolies* in modern Australian patent statutes is to be interpreted was made clear by the High Court of Australia in the *NRDC* decision.²² In *NRDC*, the Court considered the operation of the *Statute of Monopolies* in relation to the former patents legislation, the *Patents Act 1952* (Cth). There the Court explained that the relevant question to be asked when determining whether an invention is patentable subject matter is: ‘Is this a proper subject of letters patent according to the principles which have been developed for the application of s 6 of the *Statute of Monopolies*?’²³ What the Court meant is that the scope of patentable subject matter is to be determined by reference to what has been deemed to be patentable by the courts over time. Therefore, any understanding and consideration of the concept and how it is to be applied to new forms of invention requires an analysis of that body of case law.

From its analysis of that case law, the Court embraced the view that ‘manner of manufacture’ is a broad, flexible and dynamic concept, the meaning of which has evolved, and will continue to evolve, over time.²⁴ It said that the principles are to be applied flexibly, as technological advancement is ‘excitingly unpredictable’ and that it is not appropriate to attempt to reduce the patentable subject matter test to ‘an exact verbal formula’:²⁵

The purpose of s 6, it must be remembered, was to allow the use of the prerogative to encourage national development in a field which already, in 1623, was seen to be excitingly unpredictable. To attempt to place upon the idea the fetters of an exact verbal formula could never have been sound. It would be unsound to the point of folly to attempt to do so now, when science has made such advances that the concrete applications of the notion which

²² *Grant* (2006) 154 FCR 62, 64 [7]. Barwick CJ in *Joos v Commissioner of Patents* (1972) 126 CLR 611, 616 described the case as a ‘watershed’. According to the Full Court of the Federal Court in *CCOM v Jiejing* (1994) 122 ALR 417, 443: ‘the decision changed the direction of the case law not only in Australia but also in the United Kingdom.’ See also, Sam Ricketson, ‘Business Method Patents: A Matter of Convenience? (The Stephen Stewart Memorial Lecture 2002)’ (2003) 2 *Intellectual Property Quarterly* 97, 107. According to Andrew Christie, *NRDC* should be labelled as a ‘bombshell’ rather than a watershed because it has completely annihilated the test for inherent patentability and that ‘there is no meaningful inherent patentability requirement operating under Australian law’: ‘Some Observations on the Requirement of Inherent Patentability in the Context of Business Method Patents’ (2000) 40 *Intellectual Property Forum* 16, 20.

²³ *NRDC* (1959) 102 CLR 252, 269.

²⁴ *Ibid* 270 (the court noted that in *Maeder v Busch* (1938) 59 CLR 684, 706, Dixon J said that a widening conception of the notion of patentable subject matter has been a characteristic of the growth of patent law). Similarly, the High Court in *Lockwood Security Products Pty Ltd v Doric Products Pty Ltd* (2007) 235 CLR 173, 201 [66], by way of obiter dicta, recognised that since the growth of patent law demands it, ‘any attempt to fetter the exact meaning of “a manner of new manufacture” could never be sound’ citing *Maeder v Busch* (1938) 59 CLR 684, 706 (Dixon J) and *NRDC* (1959) 102 CLR 252, 271.

²⁵ *NRDC* (1959) 102 CLR 252, 271 (cited and followed in *Grant* (2006) 154 FCR 62, 64–5 [7]–[8]).

were familiar in 1623 can be seen to provide only the more obvious, not to say the more primitive, illustrations of the broad sweep of the concept.²⁶

Instead, the Court said that the expression is a general title to be interpreted in accordance with the purpose of the *Statute of Monopolies* and in line with common law principles established for the application of that purpose:

The inquiry which the definition demands is an inquiry into the scope of the permissible subject matter of letters patent and grants of privilege protected by the section. It is an inquiry not into the meaning of a word so much as into the breadth of the concept which the law has developed by its consideration of the text and purpose of the *Statute of Monopolies*. One may remark that although the Statute spoke of the inventor it nowhere spoke of the invention; all that is nowadays understood by the latter word as used in patent law it comprehended in ‘new manufactures’. The word ‘manufacture’ finds a place in the present Act, not as a word intended to reduce a question of patentability to a question of verbal interpretation, but simply as the general title found in the *Statute of Monopolies* for the whole category under which all grants of patents which may be made in accordance with the developed principles of patent law are to be subsumed.²⁷

In explaining the scope of manner of manufacture, the Court said that to be patentable, an invention must be an artificially created state of affairs that is of economic significance, meaning that its value to the country must be in the field of economic endeavour, and that it must have ‘an industrial or commercial or trading character’.²⁸ Further, it said the invention must offer some advantage that is material in the sense that it must be part of the ‘useful arts’ rather than the ‘fine arts’.²⁹

The point is that a process ... must be one that offers some advantage which is material, in the sense that the process belongs to a useful art as distinct from a fine art.³⁰

The Court identified several categories of excluded matter to aid in distinguishing patentable from non-patentable subject matter. It made clear that patents protect new inventions and not discoveries, be they discoveries of the laws of nature,

²⁶ *NRDC* (1959) 102 CLR 252, 271.

²⁷ *Ibid* 269.

²⁸ *Ibid* 275–7.

²⁹ For a view on the prohibition on patenting the fine arts see: Ben McEniery, “‘Storyline Patents’: Are Plots Patentable?” (2009) 33 *Melbourne University Law Review* 291.

³⁰ *NRDC* (1959) 102 CLR 252, 275 citing *Re Virginia-Carolina Chemical Corporation’s Application* (1958) RPC 35, 36.

natural phenomena, or abstract ideas.³¹ In regard to the distinction between unpatentable discoveries and patentable inventions the Court said this:

There may indeed be a discovery without invention — either because the discovery is of some piece of abstract information without any suggestion of a practical application of it to a useful end, or because its application lies outside the realm of ‘manufacture’.³²

It has been argued in the literature that the *NRDC* Court’s broad and expansive statement of principle precludes any suggestion that the patentable subject matter test might involve a physicality requirement,³³ and that accordingly the Federal Court’s finding in *Grant* is inconsistent with the High Court precedent it was bound to follow.³⁴ The argument then is that the dividing line between what is a patentable invention and what is a non-patentable abstract idea is not physicality.

As the Court in *NRDC* intended to consolidate rather than rewrite the law,³⁵ a comprehensive exploration of relevant principle requires that regard be had not to *NRDC* alone, but also to the cases that preceded it. Addressing these earlier cases is the objective of this article. As stated above, this article examines the cases that preceded *NRDC* with a view to identifying statements of principle that shed light on the issue of whether Australian patent law contains a physicality requirement. That analysis of the case law follows in the next section.

³¹ *NRDC* (1959) 102 CLR 252, 262–4. In this regard, Australian law seems to replicate the United States position. Examples of laws of nature include Sir Isaac Newton’s observations on the law of gravity and Albert Einstein’s general theory of relativity, while abstract ideas include novel and useful mathematical formulae: *Diamond v Chakrabarty*, 447 US 303, 309 (1980); *Diamond v Diehr*, 450 US 175, 185 (1981). By way of a recent Australian example, in *Re Milton Edgar Anderson* (2008) 78 IPR 449 the Deputy Commissioner of Patents upheld the view that alleged inventions that relate to a mere scientific theory or discovery of the laws of nature without a specific practical and useful application are not a ‘manner of manufacture’. The application in question relates to ‘the new science of subtronics’ and ‘a new law of electric induction’. The applicant indicated that the inventive concept is the ‘revelation and utilisation of an antimatter voltage force that stems from the discovery of electrosubtronic fields and culminated in the new science of subtronics’. The Deputy Commissioner held that the invention claimed is a scientific theory or discovery of the laws of science without a specific practical and useful application and that, if a specific application were claimed, such an invention is not fully described.

³² *NRDC* (1959) 102 CLR 252, 264. Laws of nature and physical phenomena are not patentable because the discovery of a law of nature, a principle of physical science, or a natural phenomenon is not an invention made by man. Thus, a new mineral discovered in the Earth or a new plant found in the wild is not patentable subject matter. Also excluded are methods of calculation, theoretical schemes (including business schemes and abstract plans): *Grant* (2006) 154 FCR 62, 66 [16].

³³ McEniery, ‘Patents for Intangible Inventions in Australia (Part 1)’, above n 11.

³⁴ McEniery, ‘Patents for Intangible Inventions in Australia (Part 2)’, above n 11.

³⁵ *NRDC* (1959) 102 CLR 252, 269.

III PRE-NRDC CASES DISCUSSING ‘MANNER OF MANUFACTURE’

A *Boulton and Watt v Bull*

Judicial consideration of inherent patentability begins with the 1795 decision of *Boulton and Watt v Bull*,³⁶ the first substantive English law decision to consider what an invention is and what the limits of the scope of patentable subject matter are.³⁷ Chief Justice Eyre noted that the law at the time did not contain guidance to inform this issue.

Though we have had many cases upon patents yet I think we are here upon ground which is yet untrodden, at least was untrodden till this cause was instituted, and till the discussion were entered into which we have heard at the bar, and now from the court. Patent rights are no where that I can find accurately discussed in our books.³⁸

The case involved a challenge to a patent held by James Watt, which broadly claimed a method of reducing the consumption of steam, and consequently, fuel in steam engines (then called fire-engines).³⁹ The invention was an improvement on existing steam engine technology. Watt’s improvement was to have the condenser in a separate vessel from the steam cylinder. The method was described in the specification as the application of certain principles of nature in way to achieve its purpose. The method involved keeping the engine cylinder hot by insulating it, and by providing a separate vessel, which was kept cool, and within which the steam was to be condensed. This new method avoided the heat loss suffered when the steam was condensed in the cylinder itself.⁴⁰

The Court construed the issue to be resolved as being whether the alleged invention is a patentable process or merely an unpatentable ‘principle’. If the alleged invention were nothing more than a principle, the patent would be invalid for lack of patentable subject matter. This was a contentious question as the patentability of processes, as opposed to new machines or chemical substances, had not previously been considered and upheld in a court of law. The judges of the Court of Common Pleas who heard the case were divided equally 2–2 on this point. Chief Justice Eyre along with Rooke J held the patent to be valid, while Heath and Buller JJ held it to be invalid.

³⁶ (1795) 126 ER 651 (Eyre CJ, Buller, Heath, Rooke JJ).

³⁷ Prior to *Boulton and Watt v Bull*, questions as to patentable subject matter had arisen in two cases that concerned additions to known machinery, but did not expressly consider whether an invention must have a physical aspect: *Morris v Bramsom* (1776) G 311 (NP); *R v Arkwright* (1785) 1 Web Pat Cas 64 (KB).

³⁸ *Boulton and Watt v Bull* (1795) 126 ER 651, 665 (Eyre CJ).

³⁹ *Ibid* 667 (Eyre CJ).

⁴⁰ *Ibid* 668.

While the judges all appeared to agree that there can be no patent for a mere principle, they differed as to how this rule was to be applied. Chief Justice Eyre understood a ‘principle’ to be an ‘abstract notion’,⁴¹ as distinct from a ‘practical manner of doing’,⁴² while for Rooke and Buller JJ, it was an elementary truth of the arts and sciences.⁴³ Heath J was alone in taking the view that the prohibition on patenting ‘principles’ extends to preclude patenting methods of production and even patents on the application of a principle.⁴⁴

On the physicality front, the involvement of some physical substance was for Heath and Buller JJ the basis for determining whether the invention is an abstract principle or patentable subject matter. According to Heath J, the term ‘manufacture’ is reducible to two classes: vendible machines or (chemical) substances,⁴⁵ both of which are objects of definite physical form. For Heath J, unless the method resulted in a vendible machine or substance, a patent could not be supported, and if it did so result, the patent would be for the vendible machine or substance and not the method itself.⁴⁶ By way of example, his Honour regarded ‘patents for chemical processes’ as being in truth ‘for a vendible substance’.⁴⁷ In a similar fashion, but excluding the requirement for vendibility, Buller J agreed, opining that the scope of patent eligibility extends only as far as inventions embodied in mechanical and chemical forms.⁴⁸ Both Heath and Buller JJ, whose views would not accommodate the patentability of processes that make use of an existing engine, found the patent to be invalid.⁴⁹

In contrast, Eyre CJ considered that the expression ‘any manner of new manufacture’ bore a much wider meaning. The Chief Justice held that it would apply to things made, the practice of making (thereby endorsing the patentability of processes), and principles reduced to practice in a new manner (thereby endorsing the patentability of non-physical processes).⁵⁰

It was admitted in the argument at the Bar, that the word manufacture in the statute was of extensive signification, that it applied not only to things made, but to the practice of making, to principles carried into practice in a new manner, to new results of principles carried into practice. Let us pursue

⁴¹ Ibid 667 (Eyre CJ).

⁴² Ibid.

⁴³ Ibid 659 (Rooke J), 662 (Buller J).

⁴⁴ Ibid 661 (Heath J).

⁴⁵ Ibid 660–1.

⁴⁶ Ibid 661.

⁴⁷ Ibid.

⁴⁸ Ibid 662–3.

⁴⁹ Ibid 660–1 (Heath J), 664–5 (Buller J).

⁵⁰ Ibid 666. See also *ibid* 667, at which Eyre CJ regarded the view that methods of production were unpatentable as contradicted by the evidence in the patents granted since 1623, ‘three-fourths’ of which were likely to have been for methods of operating and manufacture ‘producing no new substances and employing no new machinery.’.

this admission. Under things made, we may class, in the first place, new compositions of things, such as manufactures in the most ordinary sense of the word; secondly, all mechanical inventions, whether made to produce old or new effects, for a new piece of mechanism is certainly a thing made. Under the practice of making we may class all new artificial manners of operating with the hand, or with instruments in common use, new processes in any art producing effects useful to the public.⁵¹

Chief Justice Eyre, unlike Heath J, noted that a patent for a method involving no new ‘mechanism’ and producing no new result would necessarily be for the method itself, that is, for the ‘method detached from all physical existence whatever’.⁵² He endorsed the view that abstract principles are not patentable and drew a connection between patentable subject matter and physical or corporeal objects or substances:

Undoubtedly, there can be no patent for a mere principle, but for a principle so far embodied and connected with corporeal substances as to be in a condition to act, and to produce effects in any art, trade, mystery, or manual occupation, I think there may be a patent. ... It is not that the patentee has conceived an abstract notion that the consumption of steam in fire-engines may be lessened but he has discovered a practical manner of doing it; and for that practical manner of doing it he has taken this patent. Surely this is a very different thing from taking a patent for a principle; it is not for a principle, but for a process.⁵³

Although the focus of his Honour’s judgment is upon mechanical and chemical devices and methods, there is nothing to indicate that he considered the concept to be limited to those objects. Indeed, his Honour’s explanation of patentable processes (‘the practice of making’) was so broad as to include ‘any art producing effects useful to the public’.⁵⁴ The extent of the Chief Justice’s reasoning in this regard is that processes involving principles embodied in physical or corporeal objects or substances are patentable subject matter, rather than abstract ideas. This however, does not mean his Honour contemplated that patent eligibility was so limited. There is nothing in his reasoning that indicates that non-physical processes are necessarily abstract ideas or principles, or that non-physical processes are for any other reason excluded from patentability. At no stage did his Honour attempt to explain exhaustively what an abstract idea or principle is, other than to say that reduction to practice is what distinguishes an abstract idea or principle from a patentable process.⁵⁵

Accordingly, his Honour’s view cannot be interpreted as favouring a physicality requirement. In fact, there is nothing to suggest that his Honour contemplated the exclusion of non-physical inventions from patentability. Instead, both the Chief

⁵¹ *Boulton and Watt v Bull* (1795) 126 ER 651, 666.

⁵² *Ibid* 667.

⁵³ *Ibid*.

⁵⁴ *Ibid* 666.

⁵⁵ *Ibid* 667.

Justice and Rooke J indicated that patent eligibility turns on a principle being reduced to a specific practical application capable of producing effects that are of benefit to the public.⁵⁶ This is a position, which is as true today as it was then, that leaves open the possibility that non-physical inventions have been recognised as being patent eligible since the earliest judicial consideration of the ‘manner of new manufacture’ standard.⁵⁷

Justice Rooke saw no difficulty with process patents or patents to improvements on existing technologies.⁵⁸ By focusing on the mechanical nature of the improvement, he allowed the patent, having determined that the invention claimed is more than a mere principle. Rather, Rooke J considered the claimed invention to be a principle reduced to a practical application.⁵⁹ His Honour said nothing to indicate that producing a physical effect or causing a physical transformation of matter is what distinguishes the abstract from the non-abstract.

The same James Watt patent considered in *Boulton and Watt v Bull* was re-litigated four years later in an action on the case in *Hornblower v Boulton*.⁶⁰ There the Court unanimously found in favour of the patentee and upheld the patent and confirmed the reasons and decision of Eyre CJ.

In the words of Kenyon CJ, the Court rejected the principal objection that the patent claimed is a patent for a ‘philosophical principle’ only.⁶¹ Kenyon CJ understood ‘manufacture’ as meaning ‘something made by the hands of man.’⁶² Grose J agreed, finding that ‘Mr. Watt had invented a method of lessening the consumption of steam and fuel in [steam] engines’, and this was ‘not a patent for a mere principle, but for the working and making of a new manufacture within the words and meaning of the statute.’⁶³

Despite the finding in *Hornblower v Boulton*, it is widely accepted that it was not until 1842 that it was finally settled in *Crane v Price*,⁶⁴ that the term ‘manufacture’

⁵⁶ Ibid 659–60 (Rooke J), 668 (Eyre CJ).

⁵⁷ This view is supported by Justine Pila, ‘Inherent Patentability in Anglo-Australian Law: A History’ (2003) 14 *Australian Intellectual Property Journal* 109, 116.

⁵⁸ *Boulton and Watt v Bull* (1795) 126 ER 651, 659.

⁵⁹ Ibid 659–60.

⁶⁰ (1799) 8 TR 95; 101 ER 1285.

⁶¹ *Hornblower v Boulton* (1799) 101 ER 1285, 1288 (Kenyon LCJ).

⁶² Ibid (Kenyon LCJ) (‘But having now heard everything that can be said on the subject, I have no doubt in saying that this is a patent for a manufacture, which I understand to be something made by the hands of man.’).

⁶³ *Hornblower v Boulton* (1799) 101 ER 1285, 1290–1 (Grose J). Watt’s steam engine patent was extended for 25 years by an Act of Parliament in 1775: 15 Geo III c 61: An Act for vesting in James Watt, engineer, his executors, administrators, and assigns, the sole use and property of certain steam engines, commonly called fire engines, of his invention, described in the said Act throughout His Majesty’s dominions, for a limited time.

⁶⁴ (1842) 4 Man & G 580; 134 ER 239.

used in the *Statute of Monopolies* is used in a dual sense, which comprehends both a process and a product.

B *The King v Wheeler*

The distinction between patentable manufactures and unpatentable ‘principles’ articulated in *Boulton and Watt v Bull* and *Hornblower v Boulton* was confirmed in the nineteenth century in *The King v Wheeler*.⁶⁵ The patent considered in *The King v Wheeler* concerned a new method of drying and preparing malt. It was controversial because no new machine was involved. The patent in question was declared void on the ground that the specification did not adequately describe the claimed invention.⁶⁶

In the course of giving judgment for the Court, Abbott CJ described the concept of ‘manufactures’ in the following terms.

Now the word ‘manufactures’ has been generally understood to denote either a thing made, which is useful for its own sake, and vendible as such, as a medicine, a stove, a telescope, and many others, or to mean an engine or instrument, or some part of an engine or instrument, to be employed, either in the making of some previously known article, or in some other useful purpose, as a stocking frame, or a steam engine for raising water for mines. Or it may perhaps extend also to a new process to be carried on by known implements, or elements, acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better and more useful kind. But no merely philosophical or abstract principle can answer to the word ‘manufactures’. Something of a corporeal and substantial nature, something that can be made by man from the matters subjected to his art and skill, or at the least some new mode of employing practically his art and skill, is requisite to satisfy this word.⁶⁷

⁶⁵ (1819) 2 B & Ald 345; 106 ER 392. For further nineteenth century consideration of the distinction between patentable inventions and abstract ‘principles’, see *Househill Iron Co v Neilson* (1843) 9 Cl & Fin 78; 8 ER 616, where the House of Lords confirmed the approach taken by Alderson B in *Jupe v Pratt* (1837) 1 Web Pat Cas 145 that all abstract principles may be patentable, subject to their having been directed to a practical application (which was described as being having been ‘turned to account’ through ‘direction to the actual business of human life’). The House of Lords drew a distinction between an abstract principle and the same principle when connected with some ‘special purpose or practical operation’, which was capable of supporting a patent. Only when an abstract principle had been ‘clothed with the language of practical application’ could it be regarded as ‘an invention, in the patent law sense of the term’.

⁶⁶ *The King v Wheeler* (1819) 2 B & Ald 345 351–2.

⁶⁷ *The King v Wheeler* (1819) 106 ER 392, 394–5.

From this statement it is clear that his Honour considered new physical objects and physically transformative processes as the basis of what has been ‘generally understood’ to constitute patentable subject matter. However, as with Eyre CJ in *Boulton and Watt v Bull*, it cannot be said that he saw the involvement of a physical substance as a prerequisite to patentability.

In this respect, his Honour considered the distinction between patentable subject matter and an unpatentable ‘philosophical or abstract principle’ as involving something broader than a physicality requirement. In the quote above, his Honour gave three distinct examples of patentable subject matter, namely, ‘[s]omething of a corporeal and substantial nature’, ‘something that can be made by man from the matters subjected to his art and skill’, and ‘or at the least of some new mode of employing practically his art and skill’.⁶⁸ By his Honour’s use of the conjunction ‘or’ it is clear that these three examples are alternatives, rather than an aggregate. It is the inclusion of the last of these examples, which indicates that his Honour considered that the concept of manufacture might extend beyond things of a ‘corporeal and substantial nature’ such as processes devoid of physical elements.

C *Cooper’s Application*

Re Cooper’s Application for a Patent,⁶⁹ decided in 1901, involved a patent application for an improved form of newspaper featuring a blank space along which the page could be folded to avoid the trouble of reading over the folded part of the paper.⁷⁰

In allowing an appeal from the decision of the Comptroller-General below, the Attorney-General Sir Robert Finlay held the invention to be patentable subject matter because it involves an ‘invention with reference to a manufacture’ that results in ‘a material product of some substantial character’.⁷¹ In reaching his conclusion, the Attorney-General approved the Comptroller’s direction that:

A Patent may be properly refused in any case in which no material product of a substantial character is realised or effected by the alleged invention, or in which the only material product is a printed sheet, or its equivalent, and the only alleged invention an arrangement of words, or the like, upon such sheet.⁷²

⁶⁸ Ibid.

⁶⁹ (1901) 19 RPC 53 (*Cooper’s Application*).

⁷⁰ Ibid 54.

⁷¹ Ibid.

⁷² Ibid. For a statement as to the correctness of the Attorney-General’s quotation see *Re an Application for a Patent by Fishburn* (*Fishburn’s Application*) (1938) 57 RPC 245, 246–7 (which involved a patent being allowed for an invention that consisted of arranging information on each end of a cinema ticket so that it could be torn in half).

In response to this direction, he distinguished a manufacture resulting in a material product from what might be described today as an unpatentable abstract business idea:

You cannot have a Patent for a mere scheme or plan — a plan for becoming rich; a plan for the better Government of a State; a plan for the efficient conduct of business. The subject with reference to which you must apply for a Patent must be one which results in a material product of some substantial character. The specification must show how some such material product is to be realised or effected by the alleged invention.⁷³

He then said that a patent might be properly refused if:

the case is one in which the only material product is a printed sheet, or its equivalent, and the only alleged invention an arrangement of words or the like upon such sheet.⁷⁴

However, he held that the application before him was of a different kind, being more than just a literary arrangement of words on a page.

The present Applicant in no way proposes to arrange printed matter for its more convenient use from a literary point of view. What he proposes is a particular way of manufacturing a newspaper; and the alleged utility of his supposed invention is purely mechanical. It in no way is analogous to the arrangement of an index, or the arrangement of any other production of a literary kind, which may enable the reader more readily to appreciate the sense of the author.⁷⁵

Thus, he focussed on the fact that ‘the alleged utility of [the] supposed invention is purely mechanical’.⁷⁶ He described the invention as a new type of newspaper, which is clearly a physical article of manufacture and an artificial product.⁷⁷ The Attorney-General pointed out that he did not see any difference between this new form of newspaper and ‘a proposal for so binding a book that it opens comfortably and conveniently for the reader’ so as to make it ‘physically more convenient for use’.⁷⁸

The Attorney-General’s judgment contains three statements of legal principle. The first is a general exclusion of abstract plans and schemes from patentability. The second is that excluded from patentability are processes not involving something

⁷³ *Cooper’s Application* (1901) 19 RPC 53, 54.

⁷⁴ *Ibid.*

⁷⁵ *Ibid* 54–5.

⁷⁶ *Ibid* 54.

⁷⁷ *Ibid* 55.

⁷⁸ *Ibid.*

‘which results in a material product of some substantial character’.⁷⁹ The third is that an alleged invention will be patentable if it is something of a mechanical nature.

Given that the word ‘material’ comes from the Latin ‘materialis’, adjective of the Latin ‘materia’, meaning matter, it could be that by his reference to the need for a ‘material product’, the Attorney-General was in favour of a physicality requirement. This view is supported by Pila, who contends that Attorney-General saw the concept of ‘manufacture’ as being something that requires ‘the production of a physical artificial object’.⁸⁰ The alternative is that ‘a material product of some substantial character’ merely indicates that something other than an abstract principle is required. Given the ambiguity that exists, it cannot be said one way or the other whether the Attorney-General was in favour of a physicality requirement.

D *Rogers v The Commissioner of Patents*

Rogers v The Commissioner of Patents,⁸¹ is an example of the tensions that exist between narrow conceptions regarding the patentability of methods and the emergence of contemporary notions of broad subject matter. The case involved a method of burning timber by causing a self-feeding slow fire to act continuously against the side of a tree.

The High Court by majority denied the patent, seemingly on the basis that it considered the invention to be trivial. Chief Justice Griffith was of the view that the patent ought to be denied because the method claimed is merely ‘a direction how best to use materials in everyday use to achieve an everyday object’.⁸² Justice O’Connor objected to the patent on the basis that he considered that it produced nothing new. In his view, the result of the process is that ‘no machine is made—nothing is invented, nothing is produced’⁸³ and that is absurd to describe an improved method of building a log fire as a patentable invention.⁸⁴ Justice

⁷⁹ Ibid 54.

⁸⁰ Pila, above n 57, 135. According to Pila the view expressed by the Attorney-General in *Cooper’s Application* was consistently confirmed in subsequent cases heard prior to 1959. Pila also cited two early cases which effectively pre-empted modern decisions which found that there is no business method exception to patentability, namely: *Fishburn’s Application* (1938) 57 RPC 245, 248 (finding that whilst a ‘mere scheme or plan’ is inherently unpatentable, an alleged invention does not become such a scheme or plan merely because the mechanical purpose it serves is a purpose that has useful results in the carrying on of a branch of business); and *Re an Application for a Patent by Cobiانchi (Cobiانchi UK)* (1953) 70 RPC 199, 200 (finding a collocation of playing cards to be more than a mere ‘idea or plan’ by virtue of its possession of ‘something more than the sum of its individual parts.’).

⁸¹ (1910) 10 CLR 701 (Griffith CJ and O’Connor J, and Isaacs J dissenting).

⁸² Ibid 709 (Griffiths CJ).

⁸³ Ibid 710 (O’Connor J).

⁸⁴ Ibid 712 (O’Connor J).

O'Connor was seemingly of the view that the law requires that an invention disclose a physical aspect to be regarded as patentable.⁸⁵

The decision, however, is of interest because it contains the strong dissent of Isaacs J, who rejected the majority's conception of patentable subject matter and took the view that the ingenuity of the method claimed in conjunction with its economic and practical significance made it patentable subject matter.⁸⁶ In doing so, his Honour dispelled any notion that an invention might not be deserving of a patent on subject matter grounds, without having recourse to its novelty, on the suggestion that what is claimed is an 'attempt to claim an every day practice'.⁸⁷

Why is this contrivance not of the nature of an invention? Why is it to be treated as if it were an absurd attempt to claim an every day practice, say of lighting the kitchen fire, or striking a match? ... It involves an idea, and a modus operandi ... It is objected that to grant Rogers a patent for this would prevent a land owner from adopting the expedient. If this is an objection a great proportion of the patents in existence should never have been granted ... The mere fact of simplicity, and that the expedient looks obvious now to those who have become acquainted with it for the first time, does not destroy its inventive character.⁸⁸

It would appear that his Honour was aware of the significance of the majority's narrow conception of the patentable subject matter standard when he said, 'the principle upon which this case is decided appears to me to affect not merely the present and future applications, but also the possible validity of many existing patents'.⁸⁹

His Honour's dissent arguably brought to light new thinking about the patent system and its ability to reach into what might be thought to be everyday activities that would later be adopted by the courts, namely that the focus of the patentable subject matter inquiry is on new and ingenious subject matter, rather than physically-observable results.⁹⁰

⁸⁵ Ibid ('The proposition that a patent may be granted for a new method of producing an old result in a more efficient and more economical manner must therefore be qualified by the condition that the new method must either produce some vendible article or must be carried out by some mechanical contrivance or some substance the use or adaptation of which for the purpose of working the new method is part of the invention.').

⁸⁶ *Rogers v The Commissioner of Patents* (1910) 10 CLR 701, 718 (Isaacs J) (dissent).

⁸⁷ Ibid 715–6.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ See also, *Commissioner of Patents v Lee* (1913) 16 CLR 138 (Isaacs J).

E Re C & W's Application

*Re C & W's Application*⁹¹ was the first case in which a medical procedure patent was considered in England. It concerned a method of extracting lead from people suffering lead poisoning.

The Solicitor-General, Sir Stanley Buckmaster, held that the method was ineligible for patent protection because he believed that it did not involve the manufacture or sale of a 'commercial product' or something of 'commercial value'.⁹²

A manner of new manufacture may be a thing newly made, or a substance which, if made before, is improved in its manufacture; or, quite apart from that, it may be a machine or a process that can be used in making something that is, or may be, of commercial value.⁹³

Rather than focussing on a physicality requirement, the Solicitor-General was concerned only that an invention be 'in some way associated with commerce and trade'.⁹⁴ It is arguable that by his use of the word 'may', he viewed patentable subject matter as being of broad compass. While the words, 'something newly made' and 'substance' indicate a reference to physical objects, the use of the word 'may' indicates that the Solicitor-General merely gave examples of patentable subject matter, rather than a hard-and-fast rule.

The Solicitor-General did not consider that policy arguments against the patenting of methods of treating the human body ought to affect the decision in a case such as this:

It has been urged, and I think quite rightly, that the question of humanity ought not to affect the decision in such a case as this. I agree. Of course, it is well known that the medical profession do all in their power to discourage members of their body from obtaining protection for any discovery that has for its object the alleviation of human suffering, and it is impossible to speak too highly of such conduct, but it cannot affect my judgment in arriving at a conclusion upon the terms of the Section of the Act of Parliament, and I have altogether excluded such considerations from my mind.⁹⁵

However, in the Solicitor-General's opinion, the fact that a human being could be considered to be something that could be improved by the method did not make it one 'of manufacture or of trade', even though a human may be a better working

⁹¹ (1914) 31 RPC 235.

⁹² Ibid 235–6.

⁹³ Ibid.

⁹⁴ Ibid 235.

⁹⁵ Ibid 236. See also *A & H's Application* (1927) 44 RPC 298, 298 (dealing with the patentability of a contraceptive device) ('I am a Court of Law, and not a Court of Morality').

organism when a poisonous quantity of lead is extracted.⁹⁶ Although, he thought that if the process were applied ‘for the purpose of removing lead from animals in order to make them better marketable products, it might be that different considerations would apply’.⁹⁷ Arguably, the Solicitor-General here confused the vendibility of the subject of the process with the vendibility of the process itself.

In any event, regardless of the propriety of the exception to patent eligibility of methods of medical treatment of humans, the Solicitor-General’s opinion does seem to support the absence of a physicality requirement in favour of an association with ‘commerce and trade’.

F Maeder v Busch

In *Maeder v Busch*,⁹⁸ the High Court of Australia considered a patent for a cosmetic method of treating the human body to cause a permanent waving of human hair. The method was rejected for want of novelty by reason of prior common knowledge and prior public use, in accordance with the trial judge’s findings.⁹⁹ None of the judges hearing the case considered that the issue of whether the subject matter of the invention was patentable was one that needed to be decided.¹⁰⁰

Despite this, the decision contains obiter dicta of Dixon J on the manner of manufacture issue. His Honour made known his opinion that the result of a patented method must be the production, treatment of, or effect upon, some tangible thing:

Applications of old things to a new use, accompanied by the exercise of inventive power, are often patentable though there be no production of a new thing. But in every case the invention must refer to and be applicable to a tangible thing. A disembodied idea is not patentable.¹⁰¹

In applying the law to the patent at hand, Dixon J put the question, ‘[c]an the discovery or improvisation of a mere process or method of treating any corporeal

⁹⁶ *Re C & W’s Application* (1914) 31 RPC 235, 236. The Solicitor-General’s reasoning in this regard is now seen as being too narrow after the High Court’s *NRDC* decision: *Anaesthetic Supplies Pty Limited v Rescare Limited* (1994) 122 ALR 141; *Bristol-Myers Squibb Co v F H Faulding & Co Ltd* 97 FCR 524, 563 [114], 567 [130]–[131] (Finkelstein J); cf *Schering AG’s Application* [1971] RPC 337 (in which Graham and Whitford JJ expressed as obiter an opinion that the decision in *Re C & W’s Application* was correct, but held that a contraceptive process could not be described as a treatment of disease and thus the claim fell outside the prohibition on patenting methods of medical treatment of humans).

⁹⁷ *Re C & W’s Application* (1914) 31 RPC 235, 236.

⁹⁸ (1938) 59 CLR 684 (Latham CJ, Dixon, Evatt, McTiernan JJ).

⁹⁹ Ibid 699 (Latham CJ), 699–700 (Dixon J), 707 (Evatt J), 708 (McTiernan J).

¹⁰⁰ Ibid 699 (Latham CJ), 700 (Dixon J), 707 (Evatt J), 708 (McTiernan J).

¹⁰¹ Ibid 705 citing Lewis Edmunds and Herbert Bentwich, *Copyright in Designs* (2nd ed, 1908) 20, 21 (citations omitted).

part of the human being afford subject matter for a patent?'¹⁰² While his Honour left this question unanswered, he did explain the arguments in favour of distinguishing treatment of the human body for an increase in 'pride or appearance' say 'for use in ordinary trade or business such as that of hairdressing, manicure, pedicure', and surgical methods to improve 'physical welfare'. He hinted that the first would be patentable subject matter as they reflect a manual art or craft even though no 'substance or thing forming a possible subject of commerce or a contribution to the productive arts is to be brought into existence by means of or with the aid of the process'. He ruled, following *Re C & W's Application*, that the second would not be patentable as they were thought to be essentially non-economic.¹⁰³

G *Fishburn's Application*

*Re an Application for a Patent by Fishburn*¹⁰⁴ is an early case that pre-empted the modern decisions refuting the business method exception to patentability.¹⁰⁵

The case concerned a patent entitled, 'Improvements related to tickets and the like.' It involved the design of a printed ticket in such a way as to be capable of being divided into at least two portions, either transversely or longitudinally, such that each portion would bear all the essential printed information of the ticket including an identifying serial number. This design would allow a doorman or a machine to tear the ticket in half and return one half to the ticket holder and retain the other, leaving both parties with ticket stubs that contain all the essential information commonly printed on tickets.

In reaching the conclusion that the ticket design is patentable subject matter, Morton J held, in respect of printed matter, that Sir Robert Finlay's judgment in *Cooper's Application*:

should not be read as a direction that a patent should be refused in every case in which the only material product is a printed sheet, ticket, coupon, or its equivalent and the only alleged invention is an arrangement of words or the like upon that sheet.¹⁰⁶

¹⁰² *Maeder v Bush* (1938) 59 CLR 684, 705.

¹⁰³ *Ibid* 706–7 citing *Re C & W's Application* (1914) 31 RPC 235.

¹⁰⁴ (1938) 57 RPC 245 (Morton J) ('*Fishburn's Application*').

¹⁰⁵ The business method exception to patentability was rejected in the United States in *State Street Bank & Trust Co v Signature Financial Group, Inc* 149 F3d 1368, 1375 (Fed Cir, 1998) aff'd in *AT&T Corp v Excel Communications, Inc* 172 F3d 1352 (Fed Cir, 1999) and *In re Bilski*, 545 F3d 943, 960 (Fed Cir, 2008) (*en banc*). The *State Street* decision was followed and its 'useful, concrete and tangible result' test was endorsed by the Federal Court of Australia in *Welcome Real-Time SA v Catuity* (2001) 113 FCR 110, 137 [125]–[126] (Heerey J) and *Grant v Commissioner of Patents* (2006) 154 FCR 62, 69 [26].

¹⁰⁶ *Fishburn's Application* (1938) 57 RPC 245, 246.

In his Honour's opinion, the decisive factor was that the alleged invention served a 'mechanical purpose' and it did not lose this character merely because it had utility in carrying on a business.¹⁰⁷ He indicated that while a mere scheme or plan is inherently unpatentable, an alleged invention is not a mere scheme or plan merely because the mechanical purpose it serves has useful results when used in connection with a business.¹⁰⁸

Given that Morton J relied heavily on the decision in *Cooper's Application* and did not specifically mention physicality as an issue, no firm conclusions can be drawn from this opinion as to his Honour's views on the issue.

H Re GEC's Application

However, his Honour's views were quite apparent in *Re GEC's Application*.¹⁰⁹ In this case, Morton J upheld an opposition to a patent for a method of extinguishing fires using a known chemical substance because he did not consider that its application would result in the production, improvement, restoration or preservation of some vendible product.

Morton J sought to create a convenient formula for describing the 'manner of manufacture' concept. While not claiming to lay down a hard and fast rule applicable to all cases, his Honour made the oft-cited proposition, known now as Morton J's rule. Morton J's rule is that a method or process will be a manufacture if it:

- (a) results in the production of some vendible product; or (b) improves or restores to its former condition a vendible product; or (c) has the effect of preserving from deterioration some vendible product to which it is applied.¹¹⁰

In regard to a physicality requirement, as his Honour did not claim to lay down a hard and fast rule, it could be said he was giving only an indication as to the scope of patent eligible subject matter. While this formulation is a useful starting point, it has been said that if applied literally, it would have a narrowing effect on the law.¹¹¹ The narrow focus of Morton J's rule was considered by the High Court of Australia in *NRDC* as having been substantially qualified by the comments made in relation to it by Evershed J in *Re Two Applications for Patents by The Cementation Company, Limited*¹¹² and in *Re an Application for a Patent by Henry*

¹⁰⁷ Ibid 247–8.

¹⁰⁸ Ibid.

¹⁰⁹ (1942) 60 RPC 1 (Morton J).

¹¹⁰ Ibid 4.

¹¹¹ *NRDC* (1959) 102 CLR 252, 276.

¹¹² (1945) 62 RPC 151.

Barnato Rantzen,¹¹³ and by Lloyd-Jacob J in *Re Elton and Leda Chemicals Ltd's Application*.¹¹⁴

I *The Cementation Company's Application*

In *Re Two Applications for Patents by The Cementation Company, Limited*,¹¹⁵ processes for treating a stratum of subterranean soil to prevent subterranean combustion by drilling holes in the ground and injecting certain chemical substances into them were held to be patentable.¹¹⁶

In allowing the patent, Evershed J was careful not to confer upon Morton J's rule anything near the narrow construction a literal interpretation of its words would give. He observed that Morton J had not intended to create a form of words applicable in all cases.¹¹⁷ He also noted that Morton J had not intended to limit the understanding of 'product' that results from a 'manufacture' to its common meaning, but that it should be construed much more broadly. Making reference to the Oxford Dictionary, Evershed J thought that the term 'product' is wide enough to encompass 'that which is produced by any action, operation or work: a production; the result.'¹¹⁸

Evershed J also observed that Morton J directed his attention to whether, and to what extent, the manner of manufacture concept extends to processes not resulting in the creation of some new articles or material which did not previously exist; and that the emphasis in Morton J's rule was upon the three activities of production, improvement or restoration, and prevention from deterioration. Evershed J noted that Morton J used the word 'product' in a sense which denoted the subject matter of each of the three forms of activity referred to, rather than placing any emphasis on the literal meaning of the particular words he used.¹¹⁹

In keeping with his view that patentable subject matter should be interpreted broadly, Evershed J was careful that the applicant should be given the benefit of the doubt in contentious cases in which the patentability of subject matter is in issue. In allowing the patent, he said, 'it cannot be asserted that [the subject matter of the application] is beyond reasonable doubt not a "product" within the terms'

¹¹³ (1946) 64 RPC 63.

¹¹⁴ [1957] RPC 267.

¹¹⁵ (1945) 62 RPC 151 (*The Cementation Company's Application*).

¹¹⁶ *Ibid* 152 ('the process consists of a method of so treating "a subterranean formation containing material liable to combustion" so as to prevent the occurrence of such combustion.')

¹¹⁷ *The Cementation Company's Application* (1945) 62 RPC 151, 153. Evershed J, referring to Morton J in *Re GEC's Application*, commented that 'nothing was further from his intention than to lay down a rigid form of words which would govern—in substitution, as it were, for the language of the Act of Parliament—the grant of protection in all cases of methods or processes.'

¹¹⁸ *The Cementation Company's Application* (1945) 62 RPC 151, 153.

¹¹⁹ *Ibid* 154.

of Morton LJ's rule.¹²⁰ Thus, his Honour clearly envisaged a broad compass of patentable subject matter and that the critical test for denying a patent should lie within establishing that the invention is new. While he did not say so directly, or even consider the issue, such a broad view would be consistent with the view that the scope of patentable subject matter is not limited to inventions that produce a physical effect or cause a physical transformation of matter.

J Re Rantzen's Application

In *Re an Application for a Patent by Henry Barnato Rantzen*,¹²¹ Evershed J allowed a claim to a method of producing a complex electrical oscillation on the ground that it would not be right to hold that an electrical oscillation is not a vendible product.¹²² This is a purely non-physical invention. The only 'thing' affected is electrical energy when transmitted by wire or wirelessly.

His Honour noted the difficulty of considering electricity as a 'product', given its intangibility and lack of 'material content' and that its transmission does not require any 'material media', as the oscillation does not require a movement or vibration of a medium. It only requires the variation in the momentary voltage from a positive to negative charge.¹²³

Notwithstanding this difficulty, Evershed J interpreted Morton J's use of the word 'product' as being wide enough to incorporate electrical energy, despite its non-material character, because of its analogy in commercial respects with material commodities. Evershed J said that where he spoke of a 'vendible product' the proper emphasis of such an expression lies upon the trading or industrial character,¹²⁴ rather than physical or material character, which he regarded as not essential:

I conclude, therefore, that it would not be right, nor, as I think, in accordance with *Morton*, J's intention, to give to the term 'vendible product' a narrow or rigid construction by placing undue emphasis on the material requirements

¹²⁰ Ibid. This is consistent with the view taken by the High Court of Australia in *Commissioner of Patents v Microcell Ltd* (1959) 102 CLR 232, 244–5, in which it decided that the Commissioner ought not refuse an application unless it appears practically certain that a patent granted would be held invalid.

¹²¹ (1946) 64 RPC 63 (*Re Rantzen's Application*).

¹²² Ibid 67. See also *The Electric Telegraph Co v Brett* (1851) 10 CB 838; 138 ER 331 (a method of giving duplicate electric signals) and *Re Philips Electrical Industries Ltd's Application for a Patent* [1959] RPC 341 (treating visible light as a 'product'). This decision is clearly inconsistent with the majority's opinion in the United States Federal Circuit decision in *In re Nuijten*, 500 F3d 1346 (Fed Cir, 2007). It is, however, arguably consistent with the dissent expressed by Linn J in that case.

¹²³ *Re Rantzen's Application* (1946) 64 RPC 63, 66.

¹²⁴ Ibid. See also the use of the expression, 'industrial or commercial or trading character' by Lloyd-Jacob J in *Re Lenard's Application* (1954) 71 RPC 190, 192.

of what may otherwise fairly be regarded as the outcome of a process of manufacture.¹²⁵

His Honour held that the notion of a 'vendible product' is not confined to things that can be passed from one to another upon a transaction of purchase or sale, but rather encompasses anything that might 'fairly be regarded as the outcome of a process of manufacture'.¹²⁶ Thus, his Honour said:

Nor, when regard is had to everyday usage and terminology, can it be said that the notion of electricity as a product which is paid for is, however metaphorical, wholly inappropriate and insensible.¹²⁷

Thus, Evershed J held that the method of producing a complex electrical oscillation is indeed a manufacture, in spite of its non-physical nature.

K *Re An Application for a Patent by Bovingdon*

*Re an Application for a Patent by Bovingdon*¹²⁸ involved a method of fumigating enclosed spaces to control pests by forming a film of insecticide on the walls and other articles located within the space that would cause the destruction of insects and other pests therein.

In a curious decision that is difficult to reconcile with his earlier opinions in *The Cementation Company's Application* and *Re Rantzen's Application*, Evershed J took a narrow literal construction of Morton's rule and determined that the invention at issue needed to fit within one of the branches of that rule, being whether the method improves or protects from deterioration some product. His Honour held that this invention did not, and accordingly, found it not to be a manner of new manufacture. Evershed J held that such a method did not involve an 'alteration in the structure of the enclosing walls of the space or of the articles within it; so that it may be said, within the phrasing of the well known *GEC case*, that it improves or protects from deterioration ... some 'product'.¹²⁹

In what can only be described as a short, vague and unsatisfactory judgment, his Honour said that this invention may perhaps fairly be said to lie somewhere between *The Cementation Company's Application* on the one hand, and *Re GEC's Application* on the other, and that 'the inclination is towards the latter rather than the former'.¹³⁰

¹²⁵ *Re Rantzen's Application* (1946) 64 RPC 63, 66.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.* 67.

¹²⁸ (1946) 64 RPC 20 (*'Bovingdon's Application'*).

¹²⁹ *Ibid.* 21.

¹³⁰ *Ibid.* 22.

It would appear that his Honour sought to distinguish *The Cementation Company's Application* on the basis that the application at issue does not result in any improvement in or alteration of the structure itself. The decisive factor for his Honour appeared to be that no substances were impregnated with the insecticide. Instead, his Honour appears to have thought that if the process had involved the impregnation of the fabric it would have been a manufacture.¹³¹

Evershed J's careless reasoning in *Bovingdon's Application* was followed in *Re Standard Oil Development Co's Application*¹³² and *Re the Dow Chemical Company's Application for a Patent*,¹³³ unnecessarily confusing the law. It could be inferred that his Honour's reasoning in this case may have been responsible for the mistaken belief that patents were not available for agricultural and horticultural methods.

L. *Re Standard Oil Development Co's Application*

In *Re Standard Oil Development Co's Application*,¹³⁴ a patent similar to that considered in the NRDC decision was sought for a selective herbicide used in the treatment of soil to improve its ability to bear crops. The invention involves applying to land and vegetation a herbicidal composition of stated ingredients and amount (mixed at a stated temperature) to kill the weeds, but leave the vegetables substantially unharmed in order to obtain an improved tract of substantially weed-free land.¹³⁵

Two contentions were put forward to support the application. The first contention was that the method resulted in the production, improvement, or prevention from deterioration, of a vendible product, namely the growing crop. Lloyd-Jacob J, heavily influenced by Morton J's formulation, disposed of this by pointing out that the treatment did not produce the crop; secondly, that while there was an improvement, it was not the crop but the cultivation that was improved, which might ultimately be reflected in the quality and condition of the crop; and thirdly,

¹³¹ Ibid 21–2.

¹³² (1951) 68 RPC 114.

¹³³ [1956] RPC 247.

¹³⁴ (1951) 68 RPC 114 (Lloyd-Jacob J).

¹³⁵ See also *Re Lenard's Application* (1954) 71 RPC 190 (pruning to reduce mortality from disease in clove trees) and *NV Philips' Gloeilampenfabrieken Application* (1954) 71 RPC 192 (a method for producing a new form of poinsettia). Both seem to depend on the view that the process in question was only one for altering the conditions of growth, so that the contemplated end result would not be a result of the process but would be 'the inevitable result of that which is inherent in the plant': (1954) 71 RPC 192, 194. See also *BA's Application* (1915) 32 RPC 348, 348 (the Solicitor General rejected a claim to a 'process of fertilizing the ground "consisting in applying urea nitrate thereto"' on the grounds that it was nothing but a claim to a new use of an old substance'); *Re the Dow Chemical Company's Application for a Patent* [1956] RPC 247; *Re Canterbury Agricultural College's Application* (1958) RPC 85.

that since the only direct effect of the process was to remove weeds it did not directly preserve the crop from deterioration.¹³⁶

The other contention was that the process is a ‘manufacture’ because it results in a product consisting of ‘arable land treated with selective herbicides for the raising of vegetables’. In answering this, his Lordship said that the statutory requirement of a manner of manufacture is understood to be:

the making of an article or material by physical labour or applied power. Unless and until a product of such a making is identifiable it is unnecessary to consider by what manner of making it comes into existence.¹³⁷

His Lordship rejected the contention, first, because the invention does not result in land being made; and secondly, because the land would remain unimproved as a result of the process.¹³⁸ His Lordship did not consider that a process for obtaining weed-free land might be a commercially valuable vendible product.

Accordingly, Lloyd-Jacob J refused the patent, but was criticised by the High Court in *NRDC* for doing so. The High Court in this regard said the following:

But it seems hardly sufficient to treat a case like this as if it were covered by the reasoning of *Bovingdon’s Case* (1946) 64 RPC 20 and to dismiss it by saying that, since the structure of the soil is unaffected by the killing of weeds, the process of converting a weed-infested area into a weed-free area is not within the notion of ‘manufacture’. Why is it not as completely within it as the process of converting a combustible subterranean formation into a non-combustible formation, or making a building fire-proof? Once it is conceded that land may be a ‘product’ within the sense of Morton J.’s ‘rule’ as now understood, and that accordingly a process for improving it may be a ‘manufacture’ in the relevant sense of the word — and Lloyd-Jacob J. did not question this — a considerable step seems to have been taken towards establishing that an artificial process for suppressing unwanted forms of growth which impede the profitable use of land may be within the concept.¹³⁹

Re Standard Oil Development Co’s Application has been cited as authority for the proposition that an invention must involve a tangible product if it is to be a ‘manner of manufacture’.¹⁴⁰ It would, however, appear that this is not a correct reading of the law given the more expansive view of the term ‘vendible product’ that came

¹³⁶ *Re Standard Oil Development Co’s Application* (1951) 68 RPC 114, 115.

¹³⁷ *Ibid* 115–6.

¹³⁸ *Ibid* 116 (‘In the present case, the land remains unaltered. Some of the herbs in or upon it are affected’, but the land is ‘merely the carrier both of crop and herbage and plays no part in the operation by which they are selectively affected.’).

¹³⁹ *NRDC* (1959) 102 CLR 252, 274.

¹⁴⁰ Monotti, above n 12, 463; Mark Davidson, Ann Monotti and Leanne Wiseman, *Australian Intellectual Property Law* (2008) 407.

to be endorsed in subsequent cases beginning with *Re Elton and Leda Chemicals Ltd's Application*, and the High Court's criticism of the decision in *NRDC*.

M *Re the Dow Chemical Company's Application for a Patent*

Re the Dow Chemical Company's Application for a Patent,¹⁴¹ concerned a similar application involving a soil sterilisation method used to prevent the growth of germinative seeds in seed-infected soils.¹⁴² The object of the treatment is to enable crops to be grown in soil. The difference between this method and the method considered in *Re Standard Oil Development Co's Application* is that this method was designed to prevent the growth of germinative seeds, whereas the method considered in *Re Standard Oil Development Co's Application* was designed to kill weeds while they grew.¹⁴³ The argument in favour of the patent was that '[i]f you have a bag of soil and treat it in a certain way to sterilize it you get a vendible product' that is clearly a manner of manufacture.¹⁴⁴

The Superintending Examiner held the method to be unpatentable on the basis that the treatment does not alter the physical structure of the soil, but rather has the effect of rendering harmless any seeds or parasites that had infected the soil. While the soil here is the carrier of the weeds or seeds, it plays no part in the operation of the method. The case was treated as being distinguishable from *The Cementation Company's Application* for the reason that the subterranean formation in that case involves a modified or improved structure, whereas in the present case the soil itself is unchanged. It was instead likened to the applications refused in *Bovingdon's Application* and *Re Standard Oil Development Co's Application*. The Superintending Examiner chose these precedents because in the application in question, 'the soil structure is unchanged'.¹⁴⁵

The seedicide is applied to the seed infected soil in the same way as the insecticide is applied to the insect infested buildings in *Bovingdon's Application*, without in any way modifying or altering the soil apart from killing the seeds therein. The present case, to my mind, is closer to *Bovingdon's Application* and *Re Standard Oil Development Coy.'s Application* than it is to *Cementation Coy. Ld.'s Application*.¹⁴⁶

Thus, he favoured a physicality requirement. This finding is curious given that in the method upheld in *The Cementation Company's Application* the soil structure was also unchanged. This, however, is now largely academic, as the decision in *Re*

¹⁴¹ [1956] RPC 247.

¹⁴² Note that the term used in the judgment is indeed 'seed-infected soils', not seed-infested soils.

¹⁴³ *Re the Dow Chemical Company's Application for a Patent* [1956] RPC 247, 251.

¹⁴⁴ *Ibid* 248.

¹⁴⁵ *Ibid* 253.

¹⁴⁶ *Ibid*. Note the similarity in the reasoning in *Bovingdon's Application* (1946) 64 RPC 20.

the Dow Chemical Company's Application for a Patent was one of those criticised and not followed by the High Court in *NRDC*.¹⁴⁷

N Re Elton and Leda Chemicals Ltd's Application

This narrow view of manufacture was overturned in *Re Elton and Leda Chemicals Ltd's Application*.¹⁴⁸ This case involved a patent for a method of dispersing fog by introducing a surface-active agent in the form of a smoke or spray into the fog in order to remove or lower the electric charge carried by the surfaces of the droplets, causing them to coalesce and precipitate as rain or drizzle. The utility of the invention is in its application to produce a fog-free atmosphere, say on a runway, or to deliberately induce rainfall.

Here we have an indication that the 'product' referred to in Morton J's rule, when used to denote a process, requires only something in which 'some new and useful effect' may be observed, rather than a physicality requirement. In considering the patent, Lloyd-Jacob J said:

There has been no question, at any rate since before the year 1800, that the expression 'manner of manufacture' in the Statute of James I must be construed in the sense of including a practice of making as well as the means of making and the product of making. It has thus been appreciated that, although an inventor may use no newly devised mechanism, nor produce a new substance, none the less he may, by providing some new and useful effect, appropriate for himself a patent monopoly in such improved result by covering the mode or manner by means of which his result is secured. Seeing that the promise which he offers is some new and useful effect, there must of necessity be some product whereby the validity of his promise can be tested.¹⁴⁹

Lloyd-Jacob J thus equated the term 'vendible' with things of commercial value, consistent with his earlier use of the expression, 'industrial or commercial or trading character' in *Re Lenard's Application*.¹⁵⁰ In this regard he said the following:

Applied with a little latitude it might afford some assistance in the present case, for a fog-free atmosphere or a deliberately induced rainfall could be a factor in the site value of the land whereon the Applicants' process was applied. Pure air or abundant water may not by present commercial practice

¹⁴⁷ See *NRDC* (1959) 102 CLR 252, 274 and above n 139.

¹⁴⁸ [1957] RPC 267.

¹⁴⁹ *Ibid* 268–9.

¹⁵⁰ (1954) 71 RPC 190, 192 (which involved an application in respect of pruning to reduce mortality in clove trees caused by disease).

be vendible as such, but they may well enter indirectly into estimations of commercial value.¹⁵¹

Given that the subject matter in question in this case involved the dispersion of fog, which entails a physical effect, there is only so much this decision can inform us of the need for such a requirement. What it does tell us can be sourced from the broad formulation given to the concept of ‘vendibility’ by Lloyd-Jacob J. By equating ‘vendible’ with things of commercial value, Lloyd-Jacob J indicated that the manner of manufacture concept extends beyond the bounds of material and physical constraints.

O *Virginia-Carolina Chemical Corp’s Application*

In *Virginia-Carolina Chemical Corp’s Application*,¹⁵² Lloyd-Jacob J explained that the presentation of information recorded in or on a physical medium is not patentable, in and of itself. His Honour made clear that any intellectual, informational or visual content attached to a physical medium lies within the realm of the ‘fine arts’ and not the ‘useful arts’, and that it is the ‘useful arts’ and not the ‘fine arts’ that patent law protects.¹⁵³

He clarified that the involvement of some physical apparatus in the presentation of information will not prevent it falling within the scope of the ‘fine arts’, unless the information itself automatically fulfils some mechanical, industrial or otherwise commercial purpose.

Even where such information is of importance in describing or defining an operation to be performed on some apparatus it cannot be regarded as part of the performance itself and thus qualify as a manner of manufacture. If however the marks as such are described to operate through appropriate means automatically to fulfil a commercial purpose, whether the means are mechanical, optical or electrical, they can properly be regarded as an integral part of a manner of manufacture and as such fit subject matter for patent claims.¹⁵⁴

This case confirms the earlier precedents in *Fishburn’s Application* and *Cooper’s Application* that any presentation of information characterised solely by the content of the information has traditionally been not patentable.¹⁵⁵

¹⁵¹ *Re Elton and Leda Chemicals Ltd’s Application* [1957] RPC 267, 269.

¹⁵² [1958] RPC 35.

¹⁵³ *Ibid* 36.

¹⁵⁴ *Ibid*; cited in *NRDC* (1959) 102 CLR 252, 275.

¹⁵⁵ See also *Pitman’s Application* (1969) 86 RPC 646, where an arrangement of printed words for teaching pronunciation of language was thought to have a mechanical purpose, whereas any matter having a purely intellectual, literary or artistic connotation was thought to not be patentable; and *Moore Business Forms Application* [1979] AOJP 2521, where a claim to a business form having printed transverse bars was allowed because the bars served the purpose of allowing the

P *Rolls-Royce Limited's Application*

In *Rolls-Royce Limited's Application*¹⁵⁶ a method of operating an aircraft so as to reduce noise levels during take-off was rejected for being a mere scheme or plan. The method involved the pilot of an aircraft powered with gas turbine engines, inter alia, increasing the effective area of the final jet nozzle shortly after take-off to increase the mass overflow through the by-pass duct, thereby reducing the noise emitted by the jet nozzle. No modification of the aircraft itself resulted from the employment of the claimed method.

Justice Lloyd-Jacob held that this method is not patentable, being merely 'the disclosure of a general flight plan directing the initial operational movements of an aircraft between take-off and the commencement of free-flying conditions'. He dispelled any notion that this might be patentable subject matter by saying, 'this in my judgment is as much outside the operation of any of the useful arts as would be a trainer's direction to a jockey in his control of a racehorse'.¹⁵⁷ The alleged invention was held to not be either a new machine or process or an old machine giving a new and improved result.

It seems that the alleged invention in *Rolls-Royce Limited's Application* was refused because it is no more than information or instructions which could be given to a pilot on how to operate a known machine on which he might, or might not, act. One can only speculate on the significance of the comparison drawn between the claimed method and a method of instructing a jockey. This might indicate that the patent was rejected on the basis that the method was not sufficiently described or that it could not reliably be replicated time and again. That is, it consists of information that could be applied in a process involving human-decision making. Such a process cannot be guaranteed to produce stable, consistent and predictable results because of the human element involved.

Additionally, the patent was thought to be 'generally inconvenient' on the basis that pilots should not face the burden of concern that they may be infringing a patent monopoly while operating standard engine controls and conducting the potentially dangerous undertaking of flying.¹⁵⁸

The issue of 'general inconvenience' aside, it is difficult to say how his Lordship's objection can be described. There is little emphasis on the need for a physicality requirement. The method in question does not involve a transformation of a physical object, as it involves no modification of the aircraft itself, although it does involve the use of a physical device, being an aircraft. The objection seems to be the fact that the alleged invention consists of a procedure a pilot in control of an aircraft could choose to follow, either in whole or only partially, as that person desires.

form to be printed with more lines of type per inch which would still be as easy to read as prior forms having the usual number of lines of type per inch.

¹⁵⁶ [1963] RPC 251.

¹⁵⁷ Ibid 253.

¹⁵⁸ Ibid 256.

IV OBSERVATIONS OF THE PRE-NRDC CASE LAW

There are a number of observations to be made from the historical survey of the pre-NRDC case law undertaken in the previous section of this article. The first is the very general and uncontroversial observation that patent law in Australia protects the products of intellectual effort and human ingenuity that fall within the useful arts and are of practical utility and economic significance.

That the scope of patentable subject matter includes vendible products of economic significance, and involves the practical application of ideas or principles to produce a useful result, is evident in almost all the cases examined dating back to *Boulton and Watt v Bull* and *The King v Wheeler*. However, this view of the law is not evident in all the cases. In some cases, this view is displaced in favour of a more restrictive requirement, that an invention be directed to utility of a chemical or mechanical nature.¹⁵⁹ While the scope of patentable subject matter certainly includes inventions of a mechanical nature, since cases such as *Re C & W's Application*, it would seem to have been made clear that the focus of patentable subject matter is in law broader than this.

While none of the cases preceding NRDC specifically address the issue of whether the 'manner of manufacture' test contains a physicality requirement, they contain strong indications that physical effect or transformation is not a prerequisite to patent eligibility. They establish that processes are certainly patentable subject matter if they are the result of a principle or idea having been reduced so as to achieve a specific result and are embodied in physical objects or substances. The cases make clear that there can be no patent for a mere principle or idea because principles and ideas are not inventions. However, that does not mean that non-physical processes are necessarily excluded as unpatentable principles or abstract ideas. In fact, most judges do not appear to have considered the possibility of non-physical processes, let alone sought to exclude them from the bounds of patentable subject matter. Instead, the cases show that the presence of a physical effect or transformation of matter is merely an example of one form that patentable subject matter may take, rather than an invariable requirement.

These are solid and established principles of patent law. They date back to the earliest cases that consider the concept of manufacture in the late eighteenth century, *Boulton and Watt v Bull* and *The King v Wheeler*.¹⁶⁰ These principles are also supported by the more recent cases, including: *Re C & W's Application*; the cases decided by Evershed J, *The Cementation Company's Application* and *Re Rantzen's Application*, in which his Honour described the question of whether an invention requires a physical or material character as not important; and the *Elton*

¹⁵⁹ *Cooper's Application* (1901) 19 RPC 53; *Rogers v Commissioner of Patents* (1910) 10 CLR 701 (Griffith CJ and O'Connor J); *Fishburn's Application* (1938) 57 RPC 245.

¹⁶⁰ See also *Househill Iron Co v Neilson* (1843) 1 Web Pat Cas 673 in which the House of Lords confirmed the approach taken by Alderson B in *Jupe v Pratt* (1837) 1 Web Pat Cas 144 that all abstract principles may be patentable, subject to their having been directed to a practical application.

and *Leda Chemicals Case* in which Lloyd-Jacob J equated ‘vendible’ with things of commercial value, thereby indicating that the concept of vendibility extends beyond the bounds of material and physical constraints.¹⁶¹

In contrast, there are only a handful of cases which might indicate that the law may contain a physicality requirement, all of which have been overruled. These are *Cooper’s Application*, where Sir Robert Finlay A-G appears to have found in favour of a physicality requirement by his statement that, ‘[t]he subject with reference to which you must apply for a Patent must be one which results in a material product of some substantial character’;¹⁶² the decisions of Morton J in *Fishburn’s Application* and *Re GEC’s Application* (Morton J’s ‘rule’ requiring a vendible product) which were held in *NRDC* to be too narrow an interpretation if read literally;¹⁶³ *Maeder v Busch* (which contains Dixon J’s obiter dicta referring to the need for a ‘tangible thing’); and the horticulture cases, *Bovingdon’s Application*; *Re Standard Oil Development Co’s Application*; and *Re the Dow Chemical Company’s Application for a Patent*, which were overruled by the High Court in *NRDC*. A small number of the cases examined, namely, *Virginia-Carolina Chemical Corporation’s Application* and *Rolls-Royce Limited’s Application* do not appear to indicate either the presence or absence of a physicality requirement.

Then, there is *NRDC* itself. Although the judges in *NRDC* said that the question of whether a non-physical invention is patentable subject matter remained undecided,¹⁶⁴ the answer is evident in the High Court’s reasoning. The beauty of the *NRDC* approach to the manner of manufacture question is its flexibility and ability to adapt to ‘excitingly unpredictable’ changes in technology.¹⁶⁵ The difficulty is that it is tough to identify restrictions on the scope of patentable subject matter that can be easily applied on a case-by-case basis. However, that is the nature of the patentable subject matter standard in all jurisdictions. The only categories of excluded matter recognised in *NRDC* are mere principles, abstract ideas and discoveries, and matter that lies outside the useful arts. That excluded matter does not include non-physical inventions, since non-physical inventions are not necessarily mere principles, discoveries or abstract ideas. Accordingly, it must be said that the reasoning and decision in *NRDC* is entirely consistent with the cases preceding it, which create a patentable subject matter inquiry that does not make reference to physical effect or transformation.¹⁶⁶ Rather, those principles

¹⁶¹ See also *Rogers v Commissioner of Patents* (1910) 10 CLR 701 (Isaacs J) (dissent); *Cornish v Keene* (1837) 132 ER 530, 536, where it was held that production of a vendible article is sufficient test of patentability, but not the only test.

¹⁶² *Cooper’s Application* (1901) 19 RPC 53, 54. Equally, it could be said that his Honour in this case was not in favour of physicality requirement. It is simply too difficult to say one way or the other.

¹⁶³ In fairness to Morton J, given that his Honour in *Re GEC’s Application* indicated that he did not intend to lay down a hard-and-fast rule, it is difficult to ascribe to him an intention to limit patent-eligibility with a physicality requirement.

¹⁶⁴ *NRDC* (1959) 102 CLR 252, 270.

¹⁶⁵ *Ibid* 271.

¹⁶⁶ See McEniery, ‘Patents for Intangible Inventions in Australia (Part 1)’, above n 11.

show that the boundary between patentable subject matter and abstract ideas or principles is specific practical application, not physicality.

Although the Full Court's observation in *Grant* that the patentability of non-physical methods has never been upheld in the pre-*NRDC* case law is accurate, it is another thing entirely to infer that the concept of 'manufacture' is limited to the protection of inventions embodied in physical objects or physically-transformative methods. The Full Court erred by inferring that a line of cases involving largely inventions comprising some physical or corporeal embodiment necessarily means that physicality is a prerequisite to patentability. Accordingly, it is argued that the Federal Court's finding in *Grant* is not good law and should not be followed.

V CONCLUSION

This article has focused on the fact that the 'manner of manufacture' test as developed through the pre-*NRDC* case law, is broad, flexible, inclusive and technology-neutral. It recognises that the products of technological innovation will always be 'excitingly unpredictable',¹⁶⁷ and that such an approach is needed to appropriately recognise and protect new and emerging technologies.

The pre-*NRDC* cases examined show that the focus of the patentable subject matter inquiry is practical utility and economic significance rather than physical embodiment. They demonstrate that this is an established common law principle that dates back to the earliest cases dealing with the concept of 'manufacture'. The view taken is that the pre-*NRDC* cases are all consistent with the finding in *NRDC* itself, that the Australian patentable subject matter test is a broad, flexible, inclusive and technology-neutral standard.

This article disrupts the tenor of the Federal Court's decision in *Grant*, which is based upon the assertion that the physicality requirement it established is consistent with the existing case law. Instead, the historical survey of the cases undertaken indicates that the pre-*NRDC* case law, like *NRDC* itself, does not support the physicality requirement created in *Grant*. On the contrary, the argument made is that those principles show that the boundary between patentable subject matter and abstract ideas or principles is specific practical application. Rather than being a prerequisite to patentability, a physical effect or transformation is merely an indication, or 'clue', that the subject matter is patent eligible. While it is clear that the patent system exists to protect and encourage the creation of new and useful physical machines and devices and new methods that physically transform matter from one state into another, the cases show that this is not the extent of the patent incentive. As such, it is not only the traditionally recognised mechanical, industrial, chemical and manufacturing processes that are patent eligible. Patent eligible subject matter also encompasses non-physical inventions. Accordingly, this article provides further reasons, in addition to those set out by the author in the earlier

¹⁶⁷ *NRDC* (1959) 102 CLR 252, 271.

academic literature,¹⁶⁸ to support the argument that the Federal Court's finding in *Grant* is not good law and should not be followed.

¹⁶⁸ See McEniery, 'Patents for Intangible Inventions in Australia (Part 1)', above n 11; McEniery, 'Patents for Intangible Inventions in Australia (Part 2)', above n 11; McEniery, above n 3.

**THE MINIMUM ENTRENCHED SUPERVISORY REVIEW
JURISDICTION OF STATE SUPREME COURTS:
KIRK V INDUSTRIAL RELATIONS COMMISSION (NSW)
(2010) 239 CLR 531**

ABSTRACT

Kirk v Industrial Relations Commission (NSW) (2010) 239 CLR 531 (*Kirk*)¹ is one of the most important constitutional and administrative law authorities in recent times. The High Court in *Kirk* added substance to the constitutional expression ‘the Supreme Court of any State’ contained in s 73(ii) of the *Constitution* to develop the minimum entrenched supervisory review jurisdiction of state supreme courts. The supervisory review jurisdiction ensures that decisions made by inferior courts and administrative bodies at state level with jurisdictional error can no longer be regarded as immune from judicial review because of a privative clause. The supervisory review jurisdiction is considered to be a fundamental characteristic of Chapter III courts. It is beyond the legislative power of a state to alter the character of its supreme court so that it ceases to meet its constitutional description. A privative clause is capable of so altering the constitutional description of a state supreme court by preventing the exercise of its minimum entrenched supervisory review jurisdiction. *Kirk* is not an application of *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. *Kirk* applies its own substantive doctrine. As a result of *Kirk*, the approach to privative clauses at state level is now much the same as it is at federal level.

I INTRODUCTION

On 3 February 2010, the High Court handed down its judgment in *Kirk*. Chief Justice French, Gummow, Hayne, Crennan, Kiefel and Bell JJ delivered a joint judgment (‘joint judgment’). Justice Heydon dissented only on minor issues. *Kirk* impacts upon Australian administrative law by establishing an understanding of the constitutional minimum entrenched supervisory review

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¹ (2010) 239 CLR 531. The judgment is described as a ‘landmark’: ‘Developments’ (2010) 21 *Public Law Review* 141, 145.

jurisdiction of state supreme courts. This jurisdiction is a limitation on state legislative power. The entrenchment of the doctrine results in a ‘convergence’ of the state approach with the Commonwealth approach to supervisory review.² The convergence has been achieved through a similar interpretation of s 73(ii) to s 75(v) of the *Constitution*.³ The focus of Australian administrative law is now whether a decision is made with jurisdictional error or an error of law on the face of the record.⁴ That said, the distinction between inferior courts and administrative tribunals for the purpose of jurisdictional error remains.⁵

This article will discuss the facts, procedural history and outcome of *Kirk* before the High Court. The jurisdictional errors identified by the High Court in *Kirk*, namely the misconstruction of the *Occupational Health and Safety Act 1983* (NSW) (‘the *OHS Act*’) and the failure to adhere to the rules of evidence, resulted in the Industrial Court of New South Wales (‘Industrial Court’) misapprehending the limits of its functions and powers. The article concludes that the *Kirk* decision can be reconciled with the non-exhaustive categories of jurisdictional error identified in *Craig v South Australia* (‘*Craig*’).⁶ The article highlights that *Kirk* is not simply a case concerning jurisdictional error but also a case where there was an error of law on the face of the record. The concept of error of law on the face of the record is briefly discussed and it is noted, interestingly, that the High Court conceded that the common law meaning of ‘record’ may be abrogated by statute. The article discusses the separate judgment of Heydon J which raises two additional issues to that of the joint judgment. These are the impossibility of compliance with the *OHS Act* as a result of the Industrial Court’s construction of ss 15 and 16, and the Industrial Court’s asserted dominion. Justice Heydon considered these issues resulted in a fundamental infringement of the rule of law. The article then discusses how the High Court added substance to the constitutional expression ‘the Supreme Court of any State’ contained in s 73(ii) to develop an understanding of the entrenched minimum supervisory review jurisdiction of state supreme courts. The article considers whether the development of the entrenched minimum supervisory review jurisdiction is the result of an application of *Kable v Director of*

² Chief Justice James Spigelman, ‘The Centrality of Jurisdictional Error’ (Speech delivered at the AGS Administrative Law Symposium: Commonwealth and New South Wales, Sydney, 25 March 2010). I note the speech of Chief Justice Spigelman is now published: Hon James Spigelman AC, ‘The Centrality of Jurisdictional Error’ (2010) 21 *Public Law Review* 77. The speech version is used throughout. Chris Finn, ‘State Privative Clauses: The High Court Decision in *Kirk*’ (2010) 32 *Law Society Bulletin South Australia* 35, 35.

³ Chief Justice Spigelman, above n 2.

⁴ *The Cheltenham Park Residents Association Inc v Minister for Urban Development and Planning* [2010] SASC 93 (9 April 2010), [37], [38] (Gray J with whom Nyland and Vanstone JJ agreed); *Director General, New South Wales Department of Health v Industrial Relations Commission of New South Wales* [2010] NSWCA 47 (22 March 2010), [15] (Spigelman CJ with whom Tobias JA and Handley AJA agreed); *Hall v State of South Australia* [2010] SASC 219 (22 July 2010), [49] (Gray J); Chief Justice Spigelman, above n 2; Finn, above n 2, 35.

⁵ *Kirk*, 580 (joint judgment); *Craig v South Australia* (1995) 184 CLR 163, 174, 177, 179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

⁶ (1995) 184 CLR 163.

Public Prosecutions (NSW) ('Kable').⁷ It is concluded that *Kirk* is not an application of *Kable* but the application of a separate substantive doctrine. The article outlines the law relating to privative clauses at state level and how *Kirk* makes the approach to overcome a privative clause at state level the same as it is at federal level, as understood in *Plaintiff S157/2002 v Commonwealth*.⁸ Finally, the article considers the impact of the *Kirk* decision by examining selected cases that have applied or considered the *Kirk* doctrine.

II BACKGROUND

Kirk Group Holdings Pty Ltd ('the Kirk Company') owned a small farm in New South Wales. Mr Kirk was a director of the company who took no active part in the running of the farm. Management of the farm was delegated to Mr Graham Palmer, an employee of the Kirk Company. On the recommendation of Mr Palmer, the Kirk Company purchased an All Terrain Vehicle. Whilst delivering three lengths of steel to a paddock at the far end of the property, Mr Palmer took the ATV down the side of a hill where it overturned and killed him.⁹

At first instance, Walton J of the Industrial Court convicted Mr Kirk and the Kirk Company ('the appellants') for breaches of ss 15,¹⁰ 16¹¹ and 50 of the *OHS Act*.¹² The appellants were both subject to pecuniary penalties.¹³ The appellants appealed against conviction and sentence to the New South Wales Court of Criminal Appeal and applied to the New South Wales Court of Appeal for prerogative relief in the nature of certiorari and prohibition.¹⁴ The appeals were all dismissed.¹⁵ The appellants then sought leave to appeal to the Full Bench of the Industrial Court against the decision of Walton J at first instance. The Full Bench granted leave to appeal on the limited ground of whether the Judge had addressed the submission that the Kirk company had fulfilled its duty to the farm manager, but ultimately

⁷ (1996) 189 CLR 51.

⁸ (2003) 211 CLR 476.

⁹ *Ibid* 550 (joint judgment).

¹⁰ *Occupational Health and Safety Act 1983* (NSW) s 15:

(1) Every employer shall ensure the health, safety and welfare at work of all the employer's employees.

¹¹ *Occupational Health and Safety Act 1983* (NSW) s 16:

(1) Every employer shall ensure that persons not in the employer's employment are not exposed to risks to their health or safety arising from the conduct of the employers undertaking while they are at the employers place of work.

¹² *Workcover Authority (NSW) v Kirk Group Holdings Pty Ltd* (2004) 135 IR 166.

¹³ Mr Kirk received a financial penalty of \$11,000 and \$110,000 against the Kirk Company. Both Mr Kirk and the Kirk Company were also ordered to pay the prosecutor's costs: *Workcover Authority (NSW) v Kirk Group Holdings Pty Ltd* (2004) 137 IR 462.

¹⁴ The New South Wales Court of Criminal Appeal and New South Wales Court of Appeal sat together to resolve the appeal: *Kirk Group Holdings Pty Ltd v Workcover Authority (NSW)* (2006) 66 NSWLR 151.

¹⁵ *Kirk Group Holdings Pty Ltd v Workcover Authority (NSW)* (2006) 66 NSWLR 151 (Spigelman CJ, Beazley and Basten JJA).

dismissed the appeal.¹⁶ The appellants applied to the New South Wales Court of Appeal for an order of certiorari. The Court of Appeal found no jurisdictional error to warrant prerogative relief.¹⁷ The appellants applied for, and were granted, special leave to appeal to the High Court.¹⁸

In the High Court, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ quashed the appellants' convictions.¹⁹ Justice Heydon, in a separate judgment, agreed in substance with the joint judgment but departed on the particular orders to be made. Two significant jurisdictional errors were identified and were found not to be outside the purview of supervisory review notwithstanding the privative clause contained in s 179(1) of the *Industrial Relations Act 1996* (NSW) ('IR Act').

III JURISDICTIONAL ERROR IN MISCONSTRUCTION OF THE OHS ACT

The Kirk Company was charged with, and convicted of, strict liability offences contained in ss 15²⁰ and 16²¹ of the *OHS Act*. Although they were offences of

¹⁶ *Kirk Group Holdings Pty Ltd v Workcover Authority (NSW)* (2006) 158 IR 281; *Kirk Group Holdings Pty Ltd v Workcover Authority (NSW)* (2007) 164 IR 146.

¹⁷ *Kirk Group Holdings Pty Ltd v Workcover Authority (NSW)* (2008) 173 IR 465.

¹⁸ *Kirk & Anor v Industrial Relations Commission of NSW & Anor* [2009] HCATrans 93, [700] – [705] (French CJ).

¹⁹ *Kirk*, 550 (joint judgment).

²⁰ *Occupational Health and Safety Act 1983* (NSW) s 15(1) and:

- (2) Without prejudice to the generality of subsection (1), an employer contravenes that subsection if the employer fails:
- (a) to provide or maintain plant and systems of work that are safe and without risks to health,
 - (b) to make arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage or transport of plant and substances,
 - (c) to provide such information, instruction, training and supervision as may be necessary to ensure the health and safety at work of the employer's employees,
 - (d) as regards any place of work under the employer's control:
 - (i) to maintain it in a condition that is safe and without risks to health, or
 - (ii) to provide or maintain means of access to and egress from it that are safe and without any such risks,
 - (e) to provide or maintain a working environment for the employer's employees that is safe and without risks to health and adequate as regards facilities for their welfare at work, or
 - (f) to take such steps as are necessary to make available in connection with the use of any plant or substance at the place of work adequate information:
 - (i) about the use for which the plant is designed and about any conditions necessary to ensure that, when put to that use, the plant will be safe and without risks to health, or
 - (ii) about any research, or the results of any relevant tests which have been carried out, on or in connection with the substance and about any conditions necessary to ensure that the substance will be safe and without risks to health when properly used.

²¹ *Occupational Health and Safety Act 1983* (NSW) s 16(1).

strict liability,²² statutory defences were available in s 53 of the *OHS Act*.²³ When examining the charges, the High Court discovered that the information stated in the charges simply restated ss 15 and 16 of the *OHS Act* and did not particularise any offending conduct. As the charges did not specify offending conduct, the statutory defences under s 53 of the *OHS Act* could not be used by the appellants. This revealed a misconstruction of the *OHS Act* by the Industrial Court as they had convicted the appellants for unidentified acts or omissions and robbed them of their ability to defend the charges. It was clear that such a construction could not have been the intention of Parliament.

The High Court held that the particulars stated in the charges against the appellants lacked specificity as they failed to identify an act or omission that contravened the *OHS Act* and what measures Mr Kirk had not taken to alleviate the risk.²⁴ The lack of specificity rendered the particulars deficient as they omitted the necessary step of identifying the ‘measure which the employer should have taken as relevant to the offence’.²⁵ The analysis in the joint judgment revealed a consistency between the decision of the Industrial Court in this case and in others, which were ‘said to establish the proposition that a prosecutor is not required to demonstrate that particular measures should have been taken’.²⁶ The following passage of the joint judgment illustrates what was held to be the erroneous approach of the Industrial Court, which ultimately led to a misconstruction of the *OHS Act*:

The approach taken by the Industrial Court fails to distinguish between the content of the employer’s duty, which is generally stated, and the fact of the contravention in a particular case. It is that fact, the act or omission of the employer, which constitutes the offence. Of course it is necessary for an employer to identify risks present in the workplace and to address them, in order to fulfil the obligations imposed by ss 15 and 16. It is also necessary for the prosecutor to identify the measures that should have been taken.²⁷

²² Note Mr Hatcher SC had made mention of the appellants intention to raise the *Proudman v Dayman* (1941) 67 CLR 536 ‘honest and reasonable mistake’ common law defence to strict liability: *Kirk & Anor v Industrial Relations Commission of NSW & Anor* [2009] HCATrans 93, [695] (Mr Hatcher SC). This appears to have been the appellant’s strategy as the statutory defences were impossible to rely on.

²³ *Occupational Health and Safety Act 1983* (NSW) s 53:

- (1) It shall be a defence to any proceedings against a person for an offence against this Act or the regulations for the person to prove that:
- (a) it was not reasonably practicable for the person to comply with the provision of this Act or the regulations the breach of which constituted the offence, or
 - (b) the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision.

²⁴ *Kirk*, 558, 561 (joint judgment).

²⁵ *Ibid* 560 (joint judgment).

²⁶ *Ibid*.

²⁷ *Ibid* 561 (joint judgment).

It may be that the strict requirement for a prosecutor to include particulars places employers in occupational health and safety litigation in ‘a better position to argue’, where appropriate, that it was not reasonably practicable to comply with occupational health and safety obligations in the circumstances.²⁸ Without requiring the respondent to detail particulars of the charges, the appellant was in effect denied any opportunity to rely on the operation of the statutory defences. The joint judgment identified this conundrum:

the appellants could not have known what measures they were required to prove were not reasonably practicable.²⁹

The lack of particulars stated in the charges was held to be a jurisdictional error. The framing of the charges with such a lack of specificity highlighted the Industrial Court’s misconstruction of ss 15 and 16 resulting in the ‘wrong understanding of what constituted an offence ... and how the defence under s 53(a) was to be applied’.³⁰

In *Craig*, the High Court identified a number of categories of jurisdictional error. The third category is where an inferior Court, while acting within its jurisdiction, does ‘something which it lacks authority to do’.³¹ Consistent with this category of jurisdictional error identified in *Craig*, the Industrial Court misapprehended the nature of its functions or powers.³² This misapprehension led the Industrial Court to convict the appellants with unidentified offending conduct.³³

Having concluded that the Industrial Court lacked the power to convict the appellants for an unidentified act or omission, the High Court also formulated the jurisdictional error in terms of the Industrial Court convicting the appellants where it ‘had no power’ to do so.³⁴ This particular formulation of jurisdictional error is consistent with the first category identified in *Craig*, namely that the Industrial Court acted ‘outside the general area of its jurisdiction’ by making a decision that lies ‘outside...the theoretical limits of its functions and powers’.³⁵

²⁸ See Joe Catanzariti, ‘High Court Examines NSW OH&S Laws’ (2010) 48 *Law Society Journal* 46.

²⁹ *Kirk*, 558 (joint judgment).

³⁰ *Ibid* 561 (joint judgment).

³¹ *Craig*, 177 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

³² Rebecca Heath and Paul Walker, ‘Casenotes: *Kirk v Industrial Relations Commission of NSW*’ (2010) 17 *Australian Journal of Administrative Law* 122, 123.

³³ *Kirk*, 574 (joint judgment).

³⁴ *Ibid* 574–5 (joint judgment).

³⁵ *Craig*, 177 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

IV JURISDICTIONAL ERROR THROUGH BREACHING RULES OF EVIDENCE

The High Court identified a second jurisdictional error of the Industrial Court. The Industrial Court failed to adhere to the rules of evidence and had, therefore, acted outside of its jurisdiction. As with the first identified jurisdictional error, this error can be understood as falling within the third category identified in *Craig*.

Mr Kirk was called before Walton J of the Industrial Court to give evidence for the prosecution. Under s 17(2) of the *Evidence Act 1995* (NSW) (*Evidence Act*), a defendant is not a competent witness for the prosecution.³⁶ It was clear by s 163(2) of the *IR Act* that it was Parliament's intention for proceedings of the Industrial Court to be conducted in accordance with the rules of evidence. The High Court considered that the rule in s 17(2) was not one that could be waived under s 190 of the *Evidence Act*. The High Court considered the calling of Mr Kirk as a witness for the prosecution to be a 'fundamental' breach of the rules of evidence, constituting the second jurisdictional error.³⁷

Extrajudicially, Spigelman CJ, reflecting on the *Kirk* decision on this point, has posited that there is now a lingering question after *Kirk* as to 'whether other rules of evidence or procedure are of equal significance to criminal trials and, perhaps, other trials'.³⁸ It is submitted a breach would have to be 'fundamental' in order for it to constitute a jurisdictional error worthy of review.³⁹ Otherwise, the efficiency and convenience of inferior courts would be critically undermined.

The breach of the rule of evidence in *Kirk* was so fundamental that it resulted in a jurisdictional error. The jurisdictional error occurred as the Industrial Court misapprehended 'a limit on its powers'.⁴⁰ The High Court considered that the Industrial Court's power to try criminal charges was 'limited to trying the charges applying the laws of evidence'.⁴¹ Like the first jurisdictional error, this error can be

³⁶ Similar legislation exists throughout Australia in both the uniform evidence legislation and its variants, mostly in the context of criminal law: *Evidence Act 1929* (SA) s 18; *Evidence Act 1995* (Cth) s 17(2); *Evidence Act 2008* (Vic) s 190(1)(a); *Evidence Act 1977* (Qld) s 8; *Evidence Act 1906* (WA) s 8(1)(a); *Evidence Act 1939* (NT) ss 9(1), 2(a); *Evidence Act 2001* (Tas) s 17(2). For discussion of the common law principle and its application see Justice Dyson Heydon, *Cross on Evidence* (LexisNexis Butterworths, 8th ed, 2010) [13075–85] and Andrew Ligertwood, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts* (LexisNexis Butterworths, 5th ed, 2010) 429–30 [5.110–2]. Interestingly, the *Evidence Act 1995* (NSW) s 17(2) uses the word 'defendant' whereas the *Evidence Act 1929* (SA) s 18 uses the words 'accused persons'.

³⁷ Neil Foster, 'Case Note on *Kirk v Industrial Relations Commission of New South Wales; Kirk Group Holdings v Workcover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 (3 Feb 2010)' (Working paper No 76, National Research Centre, 2010) 2.

³⁸ Chief Justice Spigelman, above n 2.

³⁹ *Kirk*, 575 (joint judgment).

⁴⁰ *Ibid*, 585–6 (Heydon J).

⁴¹ *Ibid* 575 (joint judgment).

understood as falling into the third category identified in *Craig*.⁴² In this way, *Kirk* does not advance our understanding as to what constitutes jurisdictional error. The contemporary approach to jurisdictional error remains as it was expressed in *Craig*.

V THE CRAIG CATEGORIES OF JURISDICTIONAL ERROR

As *Kirk* does not develop our understanding of what errors are regarded as jurisdictional, it would seem prudent to consider what the *Craig* categories are and how they operate. *Craig* has been described as ‘standing in the way’ of an award of certiorari for jurisdictional error in *Kirk*, as it was a case the High Court had to consider.⁴³ In *Craig*, the High Court maintained the difference between jurisdictional and non-jurisdictional error, contrary to the contemporary position in the United Kingdom.⁴⁴ The Court recognised a distinction between errors made by an inferior court and those made by an administrative tribunal (‘the *Craig* distinction’).⁴⁵ For an inferior court, the High Court adopted a restrictive approach

⁴² *Craig*, 177 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

⁴³ In *Craig*, Brennan, Deane, Toohey, Gaudron and McHugh JJ delivered a joint judgment, (‘the Court’); Chris Finn, ‘Constitutionalising Supervisory Review at State Level: The End Of Hickman?’ (2010) 21 *Public Law Review* 92, 94.

⁴⁴ The House of Lords abolished the distinction between jurisdictional error and error within jurisdiction in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, 174 (Lord Reid). The House of Lords also abolished the distinction between jurisdictional and non-jurisdictional error. United Kingdom judicial review now focuses on errors of law and errors of fact. The former is reviewable, the latter is not. *R v Lord President of the Privy Council; Ex parte Page* [1993] AC 682, is the pinnacle case abolishing jurisdictional and non-jurisdictional error, and upholding error of law as the key to judicial review. Lord Griffiths summarised as follows:

It is in my opinion important to keep the purpose of judicial review clearly in mind. The purpose is to ensure that those bodies that are susceptible to judicial review have carried out their public duties in the way it was intended they should. In the case of bodies other than Courts, in so far as they are required to apply the law they are required to apply the law correctly. If they apply the law incorrectly they have not performed their duty correctly and judicial review is available to correct their error of law so that they may make their decision upon a proper understanding of the law.

In the case of inferior Courts, that is, Courts of a lower status than the High Court, such as the justices of the peace, it was recognised that their learning and understanding of the law might sometimes be imperfect and require correction by the High Court and so the rule evolved that certiorari was available to correct an error of law of an inferior Court: *R v Lord President of the Privy Council; Ex parte Page* [1993] AC 682, 693 (Lord Griffiths).

Spigelman CJ has suggested as a result of *Kirk*, the ‘practical difference with *Anisminic* may be small’: Chief Justice Spigelman, above n 2. In this respect, convergence of the Australian approach with that of the United Kingdom may be forthcoming. A potential convergence with the United Kingdom approach was envisaged as early as 2005: Denise Meyerson, ‘State and Federal Privative Clauses: Not So Different After All’ (2010) 16 *Public Law Review* 39, 50–3.

⁴⁵ *Craig*, 176 (The Court).

to jurisdictional error, confining reviewable errors to those where the inferior court ‘mistakenly asserts or denies the existence of jurisdiction’ or ‘misapprehends or disregards the nature or limits of its functions or powers’.⁴⁶ *Craig* posited four categories of error that constitute jurisdictional error in the decision of an inferior court. These are where an inferior Court ‘acts wholly or partly outside the general area of its jurisdiction’ by making a decision that lies ‘wholly or partly outside... the theoretical limits of its functions and powers’; where an inferior Court, while acting within jurisdiction, does ‘something which it lacks authority to do’; where an inferior Court ‘disregards or takes into account of some matter’, which should have been taken into account or ignored for the purposes of correctly exercising jurisdiction; or where an inferior Court ‘misconstrues’ a statute or instrument causing it to misconceive ‘the nature and function’ of its power.⁴⁷ This categorisation left many errors of law to be non-jurisdictional, meaning that they were outside the purview of judicial review.⁴⁸ With respect to tribunals, *Craig* posited that any error of law made in the exercise of a tribunal’s jurisdiction could be a jurisdictional error.⁴⁹ Under the *Craig* distinction, therefore, it is possible for an inferior Court to err in the course of the exercise of its jurisdiction without actually exceeding its jurisdiction.⁵⁰

There is support for the contention that the jurisdictional errors in *Kirk* do not extend the *Craig* categories.⁵¹ The High Court in *Kirk* did not directly challenge *Craig* but did reduce the *Craig* categories to mere examples, paving a way for future development of the concept of jurisdictional error:

As this case demonstrates, it is important to recognise that the reasoning in *Craig* that has just been summarised is not to be seen as providing a rigid taxonomy of jurisdictional error. The three examples given in further explanation of the ambit of jurisdictional error by an inferior court are just that – examples. They are not to be taken as marking the boundaries of the relevant field. So much is apparent from the reference in *Craig* to the difficulties that are encountered in cases of the kind described in the third example.⁵²

Chris Finn suggests that comments in the joint judgment about the doubt of the distinction between inferior courts and administrative tribunals should be considered strictly as obiter.⁵³ It is also clear from the above quotation that the High Court did not challenge the distinction between inferior courts and administrative

⁴⁶ Ibid 177 (The Court).

⁴⁷ Ibid.

⁴⁸ Ibid 179 (The Court).

⁴⁹ Ibid.

⁵⁰ See Chris Finn, ‘Jurisdictional Error: *Craig v South Australia*’ (1996) 3 *Australian Journal of Administrative Law* 177.

⁵¹ Finn, above n 43, 96.

⁵² *Kirk*, 574 (joint judgment).

⁵³ Finn, above n 43, 96.

tribunals for the purposes of jurisdictional error. This may help explain why post-*Kirk* cases have continued to apply the *Craig* distinction.⁵⁴

Another suggestion, posited extrajudicially by Spigelman CJ, is that '[t]he effect of *Kirk* [may] be that the full range of jurisdictional error must remain open at both Commonwealth and State levels'.⁵⁵ It is submitted that this may be so in the context of administrative tribunals but perhaps not in relation to inferior courts, should the *Craig* distinction remain. It must also be borne in mind that *Kirk* itself only considered jurisdictional error made by an inferior court, not an administrative tribunal. As the *Craig* distinction appears to remain and because *Kirk* reduced the *Craig* categories to examples, it is more difficult than ever to define the precise scope of jurisdictional error.

VI ERROR OF LAW ON THE FACE OF THE RECORD

At common law, certiorari may be ordered where a decision is vitiated by an error of law on the face of the record.⁵⁶ The High Court in *Craig* adopted a restrictive approach as to what constitutes the 'record'. *Craig* considered that the 'record' in this context does not mean 'reasons for decision' or a 'transcript of proceedings'.⁵⁷ To permit these as records would 'go a long way towards transforming certiorari into a discretionary general appeal for error of law'.⁵⁸ What the common law considers to be the 'record' for these purposes is no more than 'the documentation which initiates the proceedings and thereby grounds the jurisdiction of the tribunal, the pleadings and adjudication'.⁵⁹ The High Court in *Kirk* accepted that the common law definition of 'record', as understood in *Craig*, could be modified by statute. In *Kirk*, s 69(4) of the *Supreme Court Act 1970* (NSW) defined 'record' to include 'the reasons expressed by the Court or tribunal for its ultimate determination'. The High Court accepted this expansion of the common law definition of the 'record'. Therefore, the two errors of law identified by the High Court in *Kirk* were both jurisdictional errors and errors on the face of the record.⁶⁰

⁵⁴ *Director General*, [24] (Spigelman CJ), *Hall*, [53] (Gray J).

⁵⁵ Chief Justice James Spigelman, above n 2.

⁵⁶ *Kirk*, 576 (joint judgment).

⁵⁷ *Craig*, 181 (The Court).

⁵⁸ *Ibid* (The Court).

⁵⁹ *Ibid* 182 (The Court). For a useful and detailed analysis of what constitutes the 'record' for the purposes of certiorari, see Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 4th ed, 2009) 232–7 [4.220–35]. See also Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2008) 105–6.

⁶⁰ *Kirk*, 566 (joint judgment).

VII JUSTICE HEYDON

Justice Heydon agreed with the joint judgment in substance, but departed on minor issues such as costs orders.⁶¹ In his separate judgment he placed significant emphasis on two areas – the impossibility of complying with the legislative scheme, and the Industrial Court’s asserted dominion. Justice Heydon found Walton J’s finding that Mr Kirk ‘[d]id not supervise the daily activities of the employees or contractors working on the farm’ to be unrealistic.⁶² Justice Heydon considered that the obligation of daily supervision of employees and contractors, even by the owners of small farms, was ‘an astonishing one’.⁶³ Interestingly, Heydon J found it to be offensive to ‘a fundamental aspect to the rule of law’ that the ‘imposed obligations ... were impossible to comply with’.⁶⁴ The impossibility included the fact that the statutory defences could never be relied on and that, therefore, a conviction would almost always be entered without specificity or defence. Justice Heydon found that the Industrial Court was acting within its own dominion. The Full Bench of the Industrial Court had described the appellants’ earlier application to the New South Wales Court of Appeal as ‘forum shopping’.⁶⁵ Justice Heydon considered this to be ‘an assertion of exclusive dominion over the fields within its jurisdiction’.⁶⁶ His Honour considered that specialist Courts possess a tendency ‘to lose touch with the traditions, standards and mores of the wider profession and judiciary’.⁶⁷ For Heydon J the assertion of exclusive dominion further offended the rule of law.⁶⁸

VIII CH III ENTRENCHED SUPERVISORY JURISDICTION

Although *Kirk* did not extend the *Craig* categories of jurisdictional error, the case did establish that there exists, as a result of s 73(ii) and its place within Ch III of the Constitution, a minimum entrenched supervisory review jurisdiction of state supreme courts. This is the aspect of the judgment in which *Kirk* develops its own substantive doctrine. The state supreme court minimum entrenched supervisory review jurisdiction is, at least partially, the result of a culmination of earlier High Court cases and an emerging trend of adding substance to constitutional phrases to give them a modern understanding.

⁶¹ Ibid 585 (Heydon J). See also: Jeffrey Phillips SC, *The End of Revolutionary Justice* (2010) <<http://www.jeffreyphillipssc.com/kirk-anor-ats-workcover-authority-of-new-south-wales/>> at 2 June 2010. The joint judgment ordered that Workcover NSW pay for only a portion of the costs of the overall proceedings. Heydon J would have allowed Mr Kirk to have costs from Workcover on an indemnity basis, signalling his disapproval of the conduct of the litigation. For discussion of this see Foster, above n 37.

⁶² *Kirk*, 587 (Heydon J).

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid 588 (Heydon J).

⁶⁶ Ibid 587 (Heydon J).

⁶⁷ Ibid 589 (Heydon J).

⁶⁸ Ibid.

There has been an inclination in constitutional case law for the High Court to add substance, where appropriate, to constitutional expressions and create new entrenched concepts and characteristics.⁶⁹ Justice Gummow considered in *Kable v Director of Public Prosecutions (NSW)*⁷⁰ that the ‘Supreme Court of a State’ was a constitutional expression that could not be diminished by legislation. In *Forge v Australian Securities and Investments Commission*,⁷¹ Gleeson CJ considered that state supreme courts have substantive criteria that are constitutionally enshrined, and as such they ‘must continue to answer the description of “Courts”’.⁷² In *Forge* Gummow, Hayne and Crennan JJ considered inferior Courts to be subject to the supervisory review of state supreme courts through the grant of prerogative relief.⁷³ These cases paved way for the High Court in *Kirk* to develop an understanding of what constitutes the minimum entrenched supervisory review jurisdiction of state supreme courts.

It is against this background that in *Mitchforce Pty Ltd v Industrial Relations Commission NSW*,⁷⁴ a case not discussed by the High Court in *Kirk*, Spigelman CJ posed the question of whether or not Ch III of the *Constitution* creates an entrenched minimum supervisory review jurisdiction due to the position of state supreme courts in the federal hierarchy, with the High Court at its apex.⁷⁵ It has been suggested that *Kirk* answers Spigelman CJ’s question in the affirmative.⁷⁶

Prior to *Kirk*, Gleeson CJ in *Forge* considered that state supreme courts have constitutionally entrenched substantive characteristics. His Honour stated:

It follows from Ch III that State Supreme Courts must continue to answer the description of ‘courts’. For a body to answer the description of a court it must satisfy minimum requirements of independence and impartiality. That is a stable principle, founded on the text of the Constitution.⁷⁷

⁶⁹ Chief Justice Spigelman outlines a number of constitutional words and phrases which have been interpreted so as to constitutionally entrench not only the words themselves, but their definitions and criteria. Examples of such phrases include ‘trial by jury’ under s 80 in *Brownlee v The Queen* (2001) 207 CLR 278, [7], [33], ‘trading and financial corporations’ under s 51(xx) in *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, [58], and ‘jurisdiction’ under Ch III in *Re McJannet; Ex parte Minister for Employment Training and Industrial Relations* (1995) 184 CLR 630, 653: Chief Justice Spigelman, above n 2.

⁷⁰ *Kable*, 141–2 (Gummow J).

⁷¹ (2006) 226 CLR 45 (*Forge*).

⁷² *Ibid* 69 (Gleeson CJ).

⁷³ *Ibid* 82 (Gummow, Hayne and Kiefel JJ). Note that this obiter was in the context of discussing the essential features of an ‘inferior Court’ for the purposes of determining which errors would be reviewable.

⁷⁴ (2003) 57 NSWLR 212, (*Mitchforce*).

⁷⁵ *Ibid* 237–8.

⁷⁶ Leighton McDonald, ‘The Entrenched Minimum Provision Of Judicial Review And The Rule Of Law’ (2010) 21 *Public Law Review* 14, 34.

⁷⁷ *Forge*, 69 (Gleeson CJ).

In *Forge*, Gummow, Hayne and Crennan JJ, similarly stated:

inferior State courts, particularly the courts of summary jurisdiction, [are] subject to the general supervision of the Supreme Court of the State, through the grant of relief in the nature of prerogative writs.⁷⁸

A *The Kirk Doctrine*

The Chapter III issue in *Kirk* was first identified by Gummow J, who questioned whether the Industrial Relations Commission received federal jurisdiction.⁷⁹ It was clear that it was exercising federal jurisdiction as its jurisdiction was derived from the New South Wales Supreme Court – a Court capable of being vested with federal judicial power. It was submitted by Mr Hatcher SC that as the Industrial Court was capable of receiving federal jurisdiction it ought to have regard to judgments of the High Court, rather than an application of its own jurisdiction.⁸⁰ It was clear this was not happening. At 5 March 2010 the conviction rate for defendants charged under the *OHS Act* in the Industrial Relations Court was 98.4%.⁸¹ It was obvious that the statutory defences under s 53 of the *OHS Act* were of little or no effect and that the Industrial Court was applying its own law without regard to decisions of the High Court, which it was bound to follow due to its position in the federal hierarchy and its ability to receive federal jurisdiction.

In *Kirk*, by force of s 73(ii) of the Constitution, an entrenched minimum supervisory jurisdiction of state supreme courts was found. At Federation, state supreme courts had the jurisdiction of the Court of Queen's Bench, which had power to issue the writ of certiorari to any inferior court in the state.⁸² The joint judgment concluded that the power of supervisory review at Federation 'was ... *and remains*' the mechanism for the determination of the exercise of state executive and judicial power by persons and bodies other than the supreme court.⁸³ In constitutional terms, the joint judgment concluded:

In considering State legislation, it is necessary to take into account of the requirement of Ch III of the Constitution that there be a body fitting the description 'the Supreme Court of a State', and the constitutional corollary

⁷⁸ Ibid 82 (Gummow, Hayne and Kiefel JJ). Note that this obiter was in the context of essential features of an 'inferior court' for the purposes of determining which errors would be reviewable.

⁷⁹ *Kirk v Industrial Relations Commission of New South Wales* [2009] HCA Trans 093, [235] (Gummow J).

⁸⁰ Ibid [250] (Mr Hatcher SC).

⁸¹ Jeffrey Phillips SC, *The End of Revolutionary Justice* (2010) <<http://www.jeffreyphillipssc.com/kirk-anor-ats-workcover-authority-of-new-south-wales/>> at 2 June 2010.

⁸² *Kirk*, 580 (joint judgment).

⁸³ Ibid. For an extensive history of the Supreme Court common law jurisdiction see Mark Aronson, above n 59, 20–2 [2.10] and the references there cited, and Peter Cane, above n 59, 17–43 and the references there cited.

that ‘it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description’.⁸⁴

The supervisory review jurisdiction of state supreme courts confers to the courts power to grant orders of prohibition, certiorari and mandamus.⁸⁵ The High Court considered the role of state supreme courts in issuing constitutional writs ‘was, and is’, a defining characteristic of those courts.⁸⁶ This is significant as previously privative clauses were able to confine what writs were available upon review.

The minimum entrenched supervisory review jurisdiction of state supreme courts was stated by the High Court in the following terms:

A defining characteristic of State Supreme Courts is the power to confine inferior courts and tribunals within their authority to decide by granting relief in the nature of prohibition and mandamus, and ... also certiorari, directed to inferior courts and tribunals on the grounds of jurisdictional error.⁸⁷

A justification for the entrenchment of this minimum jurisdiction is that if a legislature or executive was able to curtail the constitutional description of a s 73(ii) state supreme court, it would ‘create islands of power immune from supervision and restraint’.⁸⁸ This concern resonates in the judgment of Heydon J, who recognised serious impediments to the rule of law if this practice was allowed to continue.⁸⁹ Thus, the s 73(ii) state supervisory review jurisdiction is analogous to the federal supervisory review jurisdiction under s 75(v) that the High Court identified in *Plaintiff S157/2002 v Commonwealth*.⁹⁰

IX KIRK AND THE KABLE PRINCIPLE

The *Kable* principle is a limit on state legislative power to not confer power onto state supreme courts that is ‘repugnant to or incompatible with their exercise of the judicial power of the Commonwealth’.⁹¹ The premise of the *Kable* principle is

⁸⁴ *Kirk*, 580 (joint judgment) considering the principle in *Forge*, 76 (Gummow, Hayne and Crennan JJ).

⁸⁵ *Kirk*, 580 (joint judgment).

⁸⁶ *Ibid* 580–1 (joint judgment).

⁸⁷ *Ibid* 566 (joint judgment).

⁸⁸ *Ibid* 581 (joint judgment).

⁸⁹ *Ibid* 587–9 (Heydon J).

⁹⁰ (2003) 211 CLR 476 (*Plaintiff S157*). Chief Justice Spigelman, above n 2. Importantly, the Supreme Courts of the territories are not recognised in Ch III, and the ‘territories power’ in s 122 of the *Constitution* does not afford them the minimum entrenched supervisory jurisdiction: *Spratt v Hermes* (1965) 114 CLR 226, 250. See also Rebecca Heath and Paul Walker, ‘Casenotes: *Kirk v Industrial Relations Commission of NSW*’ (2010) 17 *Australian Journal of Administrative Law* 122, 126.

⁹¹ *Kable* 102 (Gaudron J).

that because state supreme courts are capable of exercising federal judicial power, state parliaments cannot pass legislation that confers the exercise of non-judicial power onto the judiciary. While *Kirk* is not an application of *Kable*, there are similar nuances in the two cases that suggest there may be a separation of at least supreme court judicial power at state level, which cannot be curtailed by legislation. However, the independence of state judiciaries would seem more correctly understood on an institutional integrity analysis rather than a separation of powers analysis.

Although the majority in *Kable* confirmed that there is no strict separation of powers at state level,⁹² McHugh J envisaged that Ch III of the *Constitution* was capable of necessitating a separation of powers at state level to ensure that there is a limit on state legislative power:

in some situations the effect of Ch III of the Constitution may lead to the same result as if the State had an enforceable doctrine of separation of powers. This is because it is a necessary implication of the Constitution's plan of an Australian judicial system with State courts invested with federal jurisdiction that no government can act in a way that might undermine public confidence in the impartial administration of the judicial functions of State courts.⁹³

However, as Chief Justice French recently explained in *South Australia v Totani*:

There was at Federation no doctrine of separation of powers entrenched in the constitutions of the States. Unsuccessful attempts to persuade courts of the existence of such a doctrine were made in New South Wales, Western Australia and South Australia in the 1960s and 1970s, and Victoria in 1993, relying, inter alia, upon the decision of the Privy Council in *Liyanage v The Queen* [[1967] 1 AC 259]. The absence of an entrenched doctrine of separation of powers under the constitutions of the States at Federation and thereafter does not detract from the acceptance at Federation and the continuation today of independence, impartiality, fairness and openness as essential characteristics of courts of the States. Nor does the undoubted power of State Parliaments to determine the constitution and organisation of State courts detract from the continuation of those essential characteristics. It is possible to have organisational diversity across the Federation without compromising the fundamental requirements of a judicial system.⁹⁴

⁹² Ibid 92 (Toohey J), 109 (McHugh J). Prior to this, only State courts had enunciated the principle. See, eg: *R v McKay* (1998) 148 FLR 212, 216 (Crispin J); and *De Domenico v Marshall* (1999) 153 FLR 437, 441 (Miles CJ). Duncan Kerr SC, 'The Federal and State Courts on Constitutional Law: The 2006 Term' (Speech presented at the Gilbert and Tobin Centre of Public Law 2007 Constitutional Law Conference, Sydney, 16 February 2007).

⁹³ *Kable*, 118 (McHugh J).

⁹⁴ (2010) 85 ALJR 19, 41–2. Footnoted citations omitted.

Kirk is not an application of the *Kable* principle.⁹⁵ In *Kirk*, the New South Wales Parliament was not trying to confer incompatible powers on the Court as in *Kable*, but was rather attempting to remove a ‘defining characteristic’ — the supervisory review jurisdiction. However, Spigelman CJ has stated extrajudicially that the basis of the *Kable* doctrine is the ‘preservation of the institutional integrity of State Courts, because of their position in the Australian legal system required by the Commonwealth Constitution’.⁹⁶ In this way, Spigelman CJ suggests that *Kirk* may extend the *Kable* doctrine ‘beyond matters of procedure and appearance to matters of substance’.⁹⁷

The notion that ‘the Supreme Court of a State’ is a constitutional expression that cannot be diminished by legislative power was first considered by Gummow J in *Kable*.⁹⁸ This was confirmed by the joint judgment in *Forge*.⁹⁹ The challenge of adding substance to the phrase ‘the Supreme Court of a State’ is clear in these cases.¹⁰⁰ This substantive trend begs the question of how much substance is left to be ‘discovered’ before state supreme courts are regarded as federal courts – cemented by their role and significance at and before Federation. It may well be that the High Court will continue this trend and, over time, continue to discover new constitutionally entrenched characteristics of state supreme courts that further reveal their federal nature.

X PRIVATIVE CLAUSES

As a result of the entrenched minimum supervisory review jurisdiction of state supreme courts outlined in *Kirk*, a new understanding of the approach to the treatment of privative clauses in state legislation was discerned and applied. For decades in Australia, the approach courts took to determine the applicability of privative clauses was governed by the principle stated by Dixon J in *R v Hickman; Ex parte Fox and Clinton*¹⁰¹ (‘the *Hickman* principle’). The *Hickman* principle prevented courts from overcoming privative clauses in Commonwealth legislation if the administrative decision maker acted outside of its power in a bona fide

⁹⁵ Finn, above n 43, 106.

⁹⁶ Chief Justice Spigelman, above n 2. The notion of ‘institutional integrity’ was discussed by Gaudron J in *Kable* where she emphasised the ‘necessity to ensure the integrity of the judicial process and the integrity of the Courts’: *Kable*, 102 (Gaudron J).

⁹⁷ Chief Justice Spigelman, above n 2.

⁹⁸ *Kable*, 141–2 (Gummow J).

⁹⁹ *Forge*, 76 (Gummow, Hayne and Crennan JJ).

¹⁰⁰ Since the time of writing this case note, it would appear that the *Kable* doctrine concerning Ch III of the *Constitution* has been used to limit the extent of legislative power over the criminal law: *South Australia v Totani* (2010) 271 ALR 662. Although outside the scope of this case note, it is interesting to see that Ch III of the *Constitution* is capable of placing a limit on State legislative power over laws which are formed under the reserve powers of the *Constitution*.

¹⁰¹ (1945) 70 CLR 598 (‘*Hickman*’).

attempt to properly exercise its power.¹⁰² The *Hickman* principle, as outlined by Dixon J, is as follows:

no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, it relates to the subject matter of the legislation, and it is reasonably capable of reference to the power given to the body.¹⁰³

The principle allowed a court or administrative body to make a decision outside of its power so long as it was a bona fide attempt at exercising a legitimate power. This was termed by Dixon J as the ‘expansionist theory’ of jurisdiction.¹⁰⁴

In *Kirk*, the High Court was faced with the privative clause contained in s 179 of the *IR Act*. Section 79(1), read in conjunction with s 179(5), provided that a decision of the Industrial Court was final and could not be appealed against, reviewed, quashed or called into question in any court or tribunal — whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise.¹⁰⁵ Section 179(4) extended the privative clause to cover ‘purported decisions’.¹⁰⁶ The High Court read the provision down to the point of constitutional validity so that it was unable to prevent review of jurisdictional error where the New South Wales Supreme Court was exercising the entrenched minimum supervisory review jurisdiction under Chapter III.

The most significant reconsideration of the *Hickman* principle was in *Plaintiff S157*, where the High Court used the principle as an initial step to facilitate the ‘reconciliation of apparently conflicting statutory provisions’.¹⁰⁷ In this way, the principle was used to ascertain what ‘protection [a privative clause] purports to afford’.¹⁰⁸ Ultimately, the Court in *Plaintiff S157* held that a privative clause will be invalid if it ousts the ‘entrenched minimum provision of judicial review’ of the

¹⁰² The *Hickman* principle as stated by Dixon J was that an administrative decision will be protected by a privative clause so long as it is ‘a bona fide attempt to exercise its power, it relates to the subject matter of the legislation, and it is reasonably capable of reference to the power given to the body’: *Hickman*, 615 (Dixon J). In this way, a body would be able to act within its jurisdiction by exercising power outside of its jurisdiction if the latter exercise satisfied the *Hickman* principle. This effectively expanded the jurisdiction conferred upon the body. See Mark Aronson, above n 59, 969–75 [17.70–100] and Peter Cane, above n 59, 200–5.

¹⁰³ *Hickman*, 615 (Dixon J).

¹⁰⁴ *Ibid.*

¹⁰⁵ *Kirk*, 581 (joint judgment).

¹⁰⁶ *Ibid.*, 582 (joint judgment).

¹⁰⁷ *Plaintiff S157*, 501 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See Aronson, above n 59, 969–75 [17.80–100] and Cane, above n 59, 205–7.

¹⁰⁸ *Ibid.* 504, 510 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

High Court as conferred by s 75(v) of the *Constitution*.¹⁰⁹ The Court in *Plaintiff S157* disagreed with Dixon J's expansionist theory.¹¹⁰ In *Plaintiff S157*, the High Court ultimately read down the privative clause contained in s 474 of the *Migration Act 1958* (Cth) to make it consistent with constitutional limits on Commonwealth legislative power. It was held that the privative clause would only validly operate to cover administrative decisions that 'involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act'.¹¹¹ This was determined by reference to jurisdictional error in terms of a failure to discharge 'imperative duties' or to observe 'inviolable limitations or restraints'.¹¹² At Commonwealth level, as a result of *Plaintiff S157*, a privative clause will no longer protect a purported decision.

Until *Kirk*, *Mitchforce* was perhaps the leading case on the approach to the reviewability of jurisdictional error at state level when faced with a privative clause.¹¹³ In *Mitchforce*, attention turned to s 179 of the *IR Act* – the same privative clause considered in *Kirk*. It is surprising that there is no mention of *Mitchforce* in *Kirk*. Chief Justice Spigelman attempted to apply *Plaintiff S157* but found difficulties on the basis that there is no strict separation of powers at state level.¹¹⁴ The Chief Justice concluded that the privative clause would not cover a 'purported decision' that did not satisfy the *Hickman* principle.¹¹⁵ Applying *Plaintiff S157*, a jurisdictional fact, which is a jurisdictional error, was held not to be in breach of an 'inviolable limitation' and the relevant decision was therefore protected by the privative clause as a purported decision. Chief Justice Spigelman went as far as to say: 'Parliament intended the Industrial Commission to be the sole judge of its jurisdiction'.¹¹⁶ In this way, *Mitchforce* may have been understood as a quasi revival of Dixon J's expansionist theory established in *Hickman*. However, such an approach is inconsistent with the rejection of the expansionist theory in *Plaintiff S157*. On this basis, there is room for the argument that *Mitchforce* may have been 'wrongly decided'.¹¹⁷

The treatment of the privative clause in *Kirk* demonstrates that Dixon J's expansionist approach to jurisdiction is not the contemporary understanding of jurisdiction at state or federal level. Contrary to *Mitchforce*, the addition of the word 'purported' in the privative clause faced in *Kirk* was held to not add substance to the word 'decision'.¹¹⁸ An attempt to exercise jurisdiction was not equated to the actual, proper exercise of jurisdiction. The joint judgment in *Kirk* concluded that legislation which removes a defining characteristic of a state supreme court

¹⁰⁹ Ibid 498, 513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

¹¹⁰ Ibid 502 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

¹¹¹ Ibid 506 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

¹¹² Ibid.

¹¹³ See Cane, above n 59, 210–12.

¹¹⁴ *Mitchforce*, 229, 230 (Spigelman CJ).

¹¹⁵ Ibid 233 (Spigelman CJ).

¹¹⁶ Ibid 235 (Spigelman CJ).

¹¹⁷ Finn, above n 43, 102.

¹¹⁸ *Kirk*, 582 (joint judgment).

would be beyond state legislative power.¹¹⁹ Therefore, s 179(1) of the *IR Act* was read down to the point of constitutional validity so that the word ‘decision’ could not include a decision made with jurisdictional error.¹²⁰ In this way, the High Court deprived the privative clause of effect in much the same way as it did in *Plaintiff S157*.¹²¹ The High Court in *Kirk* granted an award of certiorari for jurisdictional error, notwithstanding the presence of the privative clause.¹²²

As a result of *Kirk*, the issue of whether an administrative decision can be challenged, despite there being a privative clause in state legislation attempting to oust judicial review, is determined by investigating whether the decision was made with jurisdictional error. If the decision was made with jurisdictional error, or an error of law on the face of the record, the privative clause will not protect the decision from review. The words ‘Supreme Court of a State’ in s 73(ii) of the Constitution confer a limitation on state legislative power as they contain a defining characteristic of state supreme courts — the minimum supervisory review jurisdiction.

XI SELECTED APPLICATION CASES

As *Kirk* established the entrenched minimum supervisory review jurisdiction and altered the treatment of privative clauses contained in state legislation, it is prudent to ascertain how state supreme courts are applying the *Kirk* doctrine. A brief summary of three cases illustrates that the *Craig* distinction between inferior courts and administrative tribunals remains. However, privative clauses are being read down so as to not oust the entrenched minimum supervisory review jurisdiction.

Kirk was first considered in South Australia by the Full Court of the South Australian Supreme Court in *The Cheltenham Park Residents Association Inc v Minister for Urban Development and Planning*.¹²³ In *Cheltenham*, the appellant, the Cheltenham Park Residents Association Incorporated, sought judicial review of a decision of the respondent, the Minister for Urban Development and Planning to approve an amendment to a Development Plan. The key contention of the appellant was that in granting approval to amend the Development Plan, the respondent failed to consider potential stormwater management issues, including storage and re-use and the prevention of flooding. At first instance, the Trial Judge dismissed the appellant’s claims on the basis that the Minister was not required to take flood plan mapping into account and that the decision was not manifestly unreasonable. On appeal, Gray J stated that ‘[w]hen a decision made fails to take into account a relevant consideration in the exercise of a discretion, a jurisdictional error is committed’.¹²⁴ A privative clause contained in s 22(10) of the *Development*

¹¹⁹ Ibid 583 (joint judgment).

¹²⁰ Ibid 582 (joint judgment).

¹²¹ Chief Justice Spigelman, above n 2.

¹²² *Kirk*, 583 (Joint judgment).

¹²³ [2010] SASC 93 (9 April 2010) (*‘Cheltenham’*).

¹²⁴ *Cheltenham*, [10] (Gray J).

Act 1993 (SA)¹²⁵ refused judicial review on the basis of a development plan or an amendment to a development plan being inconsistent with the relevant planning strategy.¹²⁶ Justice Gray stated in obiter that, as a result of *Kirk*, s 22(10) was beyond state legislative power as it sought to deny the South Australian Supreme Court of its entrenched supervisory review jurisdiction.¹²⁷ The appeal was ultimately dismissed for a lack of evidence and no order was made to invalidate the legislation.

The South Australia Supreme Court again considered *Kirk* in *Hall v State of South Australia*.¹²⁸ The plaintiff and applicant, Mr Hall, was issued with a number of notices of inquiry regarding his position as an officer of the public service from the Chief Executive of the Attorney-General's Department ('the Chief Executive'). It was alleged that Mr Hall had accessed a large number of pornographic websites using a computer allocated to him for the purposes of his employment. Mr Hall made application for judicial review seeking declaratory relief from the Chief Executive's decision to issue him with notices of inquiry. The Chief Executive issued a notice of inquiry pursuant to s 58 of the *Public Sector Management Act 1995* (SA) ('*Public Sector Management Act*')¹²⁹ and by that notice sought to suspend Mr Hall from duty pursuant to s 59(1)(b) and (c). Section 58(1) of the *Public Sector Management Act* made it an essential precondition to the issue of a s 58 notice of inquiry for the Chief Executive to 'suspect on reasonable grounds that an employee was liable to disciplinary action'. It was also an essential precondition to suspension for the Chief Executive to issue a 'notice of disciplinary inquiry' under s 59(1)(c). The issue to be determined was whether the notice of enquiry was valid for these purposes. Before considering whether the Chief Executive's administrative decision to issue a notice of inquiry to Mr Hall contained jurisdictional error, Gray J determined the applicability of a privative clause contained in s 59(9) of the *Public Sector Management Act*. His Honour stated that s 59(9) was invalid on the basis that it infringed the entrenched minimum supervisory review jurisdiction established in *Kirk*. Justice Gray stated:

to the extent that a 'decision to suspend' is challenged by the within application for judicial review, it is challenged on a jurisdictional basis. That basis is an alleged misconstruction on the part of the Chief Executive of section 58 of the Act, and an allegation that it was beyond the Chief Executive's power to issue a notice of inquiry in the circumstances that he did. In this respect, the alleged error falls into a recognised category of jurisdictional error; namely, a misapprehension of or disregard to the 'nature or limits of [his functions or powers]' [*Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [72] citing the well established example set out in *Craig v*

¹²⁵ Section 22(10) of the *Development Act 1993* (SA) stated: 'No action can be brought on the basis— (a) that a Development Plan, or an amendment to a Development Plan, approved under this Act is inconsistent with the Planning Strategy; ...'

¹²⁶ *Cheltenham*, [36] (Gray J).

¹²⁷ *Ibid* [39] (Gray J).

¹²⁸ [2010] SASC 219 (22 July 2010) ('Hall').

¹²⁹ Repealed by the *Public Sector Act 2009* (SA).

South Australia (1995) 184 CLR 163 at 177]. This is particularly so when regard is had to the class of the relevant decision-maker: an individual administrative decision-maker with powers conferred under a statute. It is settled that the concept of jurisdictional error as it relates to administrative tribunals is wider than in the case of inferior Courts.¹³⁰

Justice Gray found that there was sufficient evidence to support the conclusion that the Chief Executive formed the requisite suspicion under s 58(1) to issue the notice of inquiry and that, therefore, no jurisdictional error had occurred in the decision to issue the notice of inquiry.¹³¹ No other jurisdictional error was identified and the appeal was ultimately dismissed.

The Full Court of the New South Wales Supreme Court applied *Kirk* in *Director-General, New South Wales Department of Health v Industrial Relations Commission of New South Wales*.¹³² The case is seen as a ‘firm assertion by the Court of Appeal of its supervisory jurisdiction’.¹³³ An employee was summarily dismissed for misconduct in public employment. At first instance, Schmidt J of the Industrial Relations Commission dismissed the application for failing to demonstrate that the decision to dismiss was harsh, unjust or unreasonable.¹³⁴ On appeal, the Full Bench found in favour of the appellant. An appeal was sought against the Full Bench, but the same privative clause as overcome in *Kirk* prevented review. The New South Wales Court of Appeal quashed the decision of the Full Bench. Chief Justice Spigelman, with whom Tobias JA and Handley AJA agreed, fell short of outright rejecting the *Hickman* principle, and overcame the privative clause by applying the *Kirk* doctrine.¹³⁵ In this way, *Kirk* may be viewed as the latest understanding of the *Hickman* principle. Jurisdictional errors and errors on the face of the record were identified.¹³⁶ The Court of Appeal exercised the ‘broader basis of intervention’ on the ground that it was a decision of the Industrial Relations Commission.¹³⁷ Chief Justice Spigelman concluded:

I apply the test for exercising a supervisory jurisdiction over an inferior court. It appears to me that when sitting as the Commission, rather than the Industrial Court, the broader basis of intervention with respect to a tribunal is applicable.¹³⁸

¹³⁰ *Hall*, [53] (Gray J).

¹³¹ *Ibid*, [63], [66–9] (Gray J).

¹³² [2010] NSWCA 47 (22 March 2010).

¹³³ Jeffrey Phillips SC, *Captain Kirk Strikes Again* (2010) <<http://www.jeffreyphillipssc.com/kirk-v-industrial-relations-commission/>> at 2 June 2010.

¹³⁴ *Cesari v Sydney North West Area Health Service (No 2)* [2008] NSWIRComm 240 (Schmidt J).

¹³⁵ *Director General*, [13] – [14] (Spigelman CJ).

¹³⁶ *Ibid*, [21], [22] (Spigelman CJ).

¹³⁷ *Ibid* [24] (Spigelman CJ).

¹³⁸ *Ibid*. The broader basis of intervention Spigelman CJ refers to, are the non exhaustive errors listed by Lord Reid in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, 170 (Lord Reid). These errors include a decision made ‘in bad

This appears to be acknowledgment that the *Craig* distinction remains. The matter was ultimately remitted back to the Industrial Relations Commission.

XII CONCLUSION

By adding substance to the constitutional expression ‘Supreme Court of a State’ in s 73(ii) of the *Constitution*, the High Court entrenched the minimum supervisory review jurisdiction of state supreme courts. The supervisory jurisdiction is a limit on state legislative power similar to, but not the same as, the *Kable* principle. Accordingly, it is beyond state legislative power to enact privative clauses that protect decisions made with jurisdictional error. The *Kirk* supervisory review jurisdiction creates a convergence of the state approach to reviewability of jurisdictional error with the Commonwealth approach outlined in *Plaintiff S157*. Whilst the High Court defined the minimum entrenched supervisory review jurisdiction of state supreme courts, it did not outline, with any precision, what errors are considered jurisdictional. The most that can be said about this aspect of the case is that the *Craig* categories were reduced to ‘examples’. This leaves room for the High Court to develop the current understanding of jurisdictional error, which would now, after *Kirk*, modify the scope of supervisory review at both state and federal level.

faith’, a decision made without power, a failure to comply with natural justice, a misconstruction of the provisions giving the tribunal power to act, a failure to take into account a relevant consideration, and the taking into account an irrelevant consideration.

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