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AIRBNB AND RESIDENTIAL TENANCY LAW: DO ‘HOME SHARING’ ARRANGEMENTS CONSTITUTE A LICENCE OR A LEASE?

‘Airbnb is to the residential tenancy market what Uber is to the taxi industry — unregulated and controversial’.1

I Introduction

In tenancy law, the distinction between a lease and a licence is fundamental. A lease confers an interest in land; it can be transferred, and confers rights enforceable against all the world. A licence, on the other hand, merely permits a person to enter onto land, or to do something in relation to it, without being sued. A licence can be withdrawn at any time, and it is not regulated by tenancy legislation or property law generally. Although the distinction is well established, characterising particular housing arrangements2 as involving either a lease or a licence can be problematic. At common law, the existence of a lease depends on whether exclusive possession was conferred on the occupier. Primarily, this involves examining the terms of the agreement between the parties.3 As leases can be created with little formality, a purely verbal agreement may give rise to a lease. On the other hand, a detailed written agreement may explicitly state that the arrangement is a licence and not a lease. A body of case law exists — in both Australia and the United Kingdom (“UK”) — regarding the factors relevant to characterising an arrangement as either a licence or a lease. While these decisions state general principles, they also tend to focus on quite specific factual issues, and accordingly they are not easy to reconcile or apply.

1 Swann v Uecker [2016] VCAT 483 (24 March 2016) [1].
2 Although there are many types of leases, such as pastoral, agricultural and mining leases, this article focuses on residential leases. The terms ‘tenancy’ and ‘lease’ are used interchangeably in this article.
3 Legally, a lease is both a contract and an interest in land. The dual nature of a lease is examined in Part IV of this article.
The legal consequences of characterising a particular arrangement as either a licence or a lease are, however, significant. Whereas a licence is merely a private agreement between parties, a lease automatically confers significant rights and duties on the tenant and the landlord. These rights and duties derive from the agreement, from common law, and from legislation. Perhaps most significantly, when an arrangement is characterised as a lease, it can be terminated only by following the strict process set out in residential tenancy legislation.4

The recent emergence of short-term ‘home sharing’, using online platforms such as Airbnb and Stayz, raises the issue of whether such arrangements should be characterised as either a licence or a lease. According to Airbnb’s ‘Terms of Service’, home sharing constitutes a licence.5 However, a recent decision of the Supreme Court of Victoria suggests that, in certain circumstances, a home sharing agreement may constitute a lease.6 Whether home share arrangements constitute a licence or a lease has significant legal consequences for hosts and for guests.7 These consequences—which may be unknown to most home share hosts—are examined later in this article.

So far, there has been little judicial or scholarly examination of the legal status of home share arrangements with regard to tenancy law. The focus of most of the literature has been on broader policy issues regarding the regulation of home sharing, and particularly on balancing a person’s ability to make money from their property with minimising the negative effects of home sharing (particularly on neighbours).8

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4 Not all leases are regulated by residential tenancy legislation. The strict process for termination applies only to leases that are so regulated. Each state and territory has separate residential tenancy legislation: Residential Tenancies Act 1997 (ACT) (‘Australian Capital Territory Act’); Residential Tenancies Act 2010 (NSW) (‘New South Wales Act’); Residential Tenancies Act 1999 (NT) (‘Northern Territory Act’); Residential Tenancies and Rooming Accommodation Act 2008 (Qld) (‘Queensland Act’); Residential Tenancies Act 1995 (SA) (‘South Australian Act’); Residential Tenancy Act 1997 (Tas) (‘Tasmanian Act’); Residential Tenancies Act 1987 (WA) (‘Western Australian Act’). This article focuses on the legislation in Victoria and New South Wales, as these states represent the two main approaches to coverage in Australia.


6 Swan v Uecker (2016) 50 VR 74 (Croft J) (‘Swan’).

7 This article uses the neutral terms ‘host’ and ‘guest’, rather than the conclusory terms ‘landlord’ and ‘tenant’.

This article focuses instead on determining whether the relationship between home share hosts and guests is in fact currently regulated by residential tenancy law. This issue will inevitably present itself to Australian courts. Therefore, the application of residential tenancy law to home share hosts and guests will soon need to be considered.

Ultimately, this article concludes that home share arrangements may constitute a lease, and residential tenancy legislation may apply to the arrangement, in certain circumstances. Characterising the arrangement depends primarily on examining the terms of the relevant agreement and surrounding circumstances. Many factors will be relevant, such as whether the host provides services (such as cleaning) to the guest, whether the host has access to the premises during the stay, and how the arrangement is described in the agreement. Ultimately, each case will depend on its particular facts and circumstances.

II Home Sharing in Australia

No single definition of ‘home sharing’ has been agreed on in the literature or by regulators. However, several key features of home sharing can be identified. First, home sharing involves the provision of accommodation by means of an online platform, such as Airbnb or Stayz. The use of internet technology defines home sharing as part of the ‘share economy’. Second, home sharing arrangements are typically short-term and involve between one and seven night stays. Due to their short duration (compared to typical tenancy agreements), home shares are often referred to as ‘short stay accommodation’. Third, home shares may involve the provision of an entire premises or merely part of the premises (such as a bedroom and shared use of other rooms). In many home shares, therefore, the host resides in the premises with the guest. Fourth, it is clear that tenants, as well as owners of premises, are making premises available for home sharing. That is, home share ‘hosts’ are not limited to owners of premises. Fifth, and significantly, home share arrangements have many similarities to hotel accommodation, lodging or boarding arrangements, and serviced apartments — each of which is excluded from coverage by residential tenancy legislation. Home share arrangements usually involve not merely the provision of premises, but also the provision of significant services to guests. Often this involves cleaning of the premises and the provision of clean towels, sheets and even some food items. Also, a daily fee is usually charged, which is inclusive of utilities such as

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9 ‘Residential tenancy law’ in this context includes common law and statutory provisions. It is crucial to note that the issue of whether a particular arrangement constitutes a lease is separate from the issue of whether residential tenancy legislation applies to that arrangement.

10 Pearce, above n 8, 60.

11 Other descriptions are ‘gig’ economy, ‘collaborative’ economy and ‘peer to peer’ economy: see Rachel Botsman and Roo Rogers, What’s Mine is Yours: The Rise of Collaborative Consumption (HarperCollins, 2010).

12 See Part VI of this article.
electricity, gas, water and internet. Hosts can also stipulate ‘House Rules’ regulating issues such as ‘Check In’ and ‘Check Out’ times, the maximum number of guests, what parts of the premises can and cannot be used, and even acceptable noise levels and whether smoking is allowed. Arguably, many of these features are not consistent with a grant of exclusive possession to a guest.13

Home sharing arrangements are rapidly increasing in popularity in Australia, and globally. Melbourne and Sydney have the highest number of listed properties on Airbnb in Australia, with the number of listings in Melbourne recently doubling in the period from August 2015 to August 2016.14 Capital cities such as Melbourne and Sydney also offer the highest returns for hosts, with daily rates for short-term accommodation often being significantly higher than the average daily rent for long-term rental accommodation in the same locality.15

The increasing popularity of home sharing has raised many difficult regulatory, social and legal issues. These issues include the income tax implications for hosts,16 whether hosts are regulated by fair trading legislation,17 whether an owners corporation18 can make rules regulating short-term letting by apartment owners,19 and whether short-term letting in residential apartment buildings is contrary to planning laws and the Building Code of Australia.20 Victoria and New South Wales have passed legislation regulating short-term letting in CBD apartment buildings, in response to media reports of damage to common areas and nuisance caused by home share premises being used as weekend ‘party houses’.21

As mentioned above, this article focuses on whether the relationship between home share hosts and guests is currently regulated by residential tenancy law. It also

13 See Part VI of this article regarding the implications of significant services being provided to guests.
14 Victoria, Parliamentary Debates, Legislative Assembly, 16 August 2016, 2971 (Ben Carroll).
16 See Australian Taxation Office, Income Tax: Rental Properties — Non-Economic Rental, Holiday Home, Share of Residence, etc. Cases, Family Trust Cases, TR 2167, 4 July 1985, which sets out the income tax implications of rental properties.
18 An owners corporation (formerly called a body corporate) regulates common property where there is a strata title: see Owners Corporations Act 2006 (Vic) for the Victorian legislation.
19 See Owners Corporation PS501391P v Balcombe (2016) 51 VR 299.
21 See Owners Corporation Amendment (Short-Stay Accommodation) Act 2018 (Vic), Fair Trading Amendment (Short-term Rental Accommodation) Act 2018 (NSW). See also Sustainable Planning Act 2009 (Qld). Chapter 9, part 7A.
examines the legal implications for guests and hosts if home share arrangements are characterised as leases. This analysis commences by examining a recent decision of the Victorian Supreme Court, which suggests that home sharing may constitute a lease.

III THE SWAN DECISION AND ITS IMPLICATIONS

In June 2016, the Supreme Court of Victoria held that a tenant who had offered the rented premises on Airbnb had thereby breached their tenancy agreement by subletting the premises without the landlord’s consent. The significance of this decision is that the Court focused on whether exclusive possession had been conferred by the tenant/host on the Airbnb guest. Although the proceeding was brought by the landlord to evict the tenant for breaching the agreement, the Court focused on the nature of the relationship between the tenant/host and the Airbnb guest. Significantly, the Court determined that exclusive possession had been conferred on the Airbnb guest. Therefore, the arrangement between the host and the guest constituted a lease at common law.

With regard to the legal consequences of home sharing, this decision has two important implications. First, it means that a tenant who offers the rented premises to guests on Airbnb may be evicted. Therefore, a tenant who wishes to do so should seek clear written authorisation from the landlord. Second, and far more significantly, the decision suggests that any person who offers premises on Airbnb or a like platform may be entering a lease with the guest. This is because the legal test for creating a lease is essentially the same as that for creating a sublease. A sublease is simply a subsequent lease, entered into by the tenant and another party over the same premises (or part of the premises). The legal test, in relation to creating a lease and creating a sublease, is exclusive possession.

The implication — not articulated explicitly in the Court’s reasoning in Swan — is that all home sharing arrangements may be leases. As the Court emphasised in Swan, whether or not a lease is created depends on the correct characterisation of the relationship between the host and the guest. There is no reason why the character of the relationship between a home share host and guest should depend on whether the host is a tenant or an owner of the premises.

22 Swan (2016) 50 VR 74.
23 The Swan decision will be examined in more detail in Part VII of this article.
24 Besides constituting unauthorised subletting, offering the premises on Airbnb may also breach other terms of the tenancy agreement. That is, it may provide a landlord with several grounds for evicting the tenant.
25 There are technical requirements relating to creating a sublease that are not relevant to the present discussion.
26 Swan (2016) 50 VR 74, 87 [32], 91 [40]–[41].
IV Legal Consequences of Home Sharing Constituting a Lease

In Victoria, residential tenancy legislation applies, subject to certain exceptions.\(^\text{27}\) where an arrangement meets the common law definition of a lease.\(^\text{28}\) When the *Victorian Act* applies to an arrangement, the nature of the relationship between the parties — now defined as ‘landlord’ and ‘tenant’ — fundamentally changes. The relationship is no longer purely contractual, but is regulated by common law and statutory provisions, imposing certain rights and duties on both parties.

One of the most significant legal consequences of residential tenancy legislation applying to an arrangement is that the process for removing a tenant from the premises is lengthy, complex and strictly regulated. The process involves giving the tenant a valid notice to vacate, applying to the relevant tribunal for a possession order, and obtaining a warrant of possession.\(^\text{29}\) If a home share arrangement constitutes a lease, and residential tenancy legislation applies, then strict compliance with this process is required — for example, if a home share guest overstays and refuses to leave. It may be thought that this scenario would be unlikely to arise. However, it did occur in San Francisco in 2014.\(^\text{30}\) An Airbnb guest who refused to leave the premises — or to pay rent — was found to be covered by Californian tenancy law and the host had to follow a lengthy and expensive eviction process.\(^\text{31}\)

Another significant consequence is that the relevant tribunal has jurisdiction over certain disputes involving the tenancy. In Victoria, this is the Victorian Civil and Administrative Tribunal, and in New South Wales, it is the New South Wales Civil and Administrative Tribunal. These tribunals have jurisdiction under the relevant residential tenancy legislation.\(^\text{32}\) This includes power to order a landlord or a tenant to comply with their duties under the legislation, or to pay compensation for breaching these duties.\(^\text{33}\) In the home sharing context, a landlord may seek an order, for example, that a home sharing ‘guest’ pay compensation for damage they have caused to the premises.

One of the most common issues in relation to home share arrangements is when the premises are used as a ‘party house’ and damage is caused to the premises. Airbnb provides a guarantee to hosts, which promises to reimburse them for damages up to

\(^{27}\) These exceptions are examined in Part VI of this article.

\(^{28}\) See *Residential Tenancies Act 1997* (Vic) s 3 (‘*Victorian Act*’), which provides that the Act applies where premises are ‘let’ under a tenancy agreement. The application of residential tenancy legislation varies across Australian jurisdictions: see Part V of this article.

\(^{29}\) See *Victorian Act* s 330.

\(^{30}\) Maese, above n 8, 482–3.

\(^{31}\) Ibid.

\(^{32}\) *Victorian Act* s 446; *New South Wales Act* ss 187–9.

\(^{33}\) *Victorian Act* s 446; *New South Wales Act* ss 187–9.
$1,000,000. However, this guarantee is subject to strict terms and conditions, and may not cover all instances of damage caused by guests and their visitors. Furthermore, a host’s private home insurance may not cover such damage either, as it may be regarded as commercial use of the premises, rather than private residential use. Therefore, a home share host may need to claim directly against a guest for compensation. Residential tenancy legislation, and the tribunal through which claims are made, may provide a less expensive and more accessible forum for such claims compared to litigation in court.

As mentioned above, it is commonly assumed that the most serious issues raised by the practice of home sharing involve the effects on third parties, and in particular, neighbours. However, this article argues that it is inevitable that disputes and litigation between home share hosts and guests will eventuate. In this light, it is important to determine whether the relationship between the parties is purely contractual (based on a licence), or whether it is regulated by the existing body of residential tenancy law (including residential tenancy legislation).

V Does Svan Apply in Other Jurisdictions?

As mentioned above, Victorian residential tenancy law is unique in Australia in that the common law definition of a lease is also the basic test for coverage by Victoria’s residential tenancy legislation. All the other jurisdictions in Australia require merely a ‘tenancy agreement’ in order for the relevant residential tenancy legislation to apply. Furthermore, the relevant legislation in these jurisdictions provides that exclusive possession is not required for the legislation to apply. Therefore, in these jurisdictions, the question of whether an arrangement constitutes a lease is separate from the question of whether the relevant legislation applies.

The relevant provision dispensing with the requirement of exclusive possession in Western Australia was considered in Commissioner for Fair Trading v Voulon. In that case, the Supreme Court of Western Australia noted that the provision ‘appears

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35 Pearce, above n 8, 70–3.
36 The significance of this issue is highlighted in Pearce, above n 8; Christensen and Duncan, above n 8 and Maese, above n 8. See also Kelly, above n 8 and Cocks, above n 8.
37 Australian Capital Territory Act s 6A(3); New South Wales Act s 13(1); Northern Territory Act s 4; Queensland Act s 12(2); South Australian Act s 3; Tasmanian Act s 10(1); Western Australian Act s 3.
38 There is also the issue of whether an exception contained in the legislation applies to a particular arrangement. This issue, relevant to all jurisdictions, is addressed in Part VI of this article.
39 Western Australian Act s 3.
40 [2005] WASC 229 (Hasluck J) (‘Voulon’).
to effect a significant change to the position at common law.'\textsuperscript{41} The Court noted that, unlike the common law test for a lease, the statutory provision did not require exclusive possession in order for the Act to apply.\textsuperscript{42} Significantly, the Court held that certain arrangements — such as those between hosts and boarders or lodgers — that are regarded as licences (rather than leases), may be covered by the statutory definition.\textsuperscript{43} This statement is of course subject to any exceptions contained in the relevant legislation.

\textbf{VI Statutory and Other Exceptions to Coverage}

This article now briefly examines the nature and scope of four key exceptions contained in residential tenancy legislation that are relevant to home sharing. Consideration of these exceptions is necessary in order to determine whether home sharing arrangements are covered by residential tenancy legislation in each jurisdiction in Australia. As mentioned above, considering whether an exception applies is the second stage in determining whether residential tenancy legislation applies to a particular arrangement. The main statutory exceptions that will be examined here are for boarders and lodgers, business premises, and holiday premises. This section will also briefly consider common law exceptions to coverage; in the United Kingdom, as discussed below, courts have identified circumstances in which an arrangement confers exclusive possession but will not be considered a lease.

This article outlines, in broad terms, these exceptions and their relevance to home sharing. It does not seek to precisely define their scope. This is not possible due to the wording of the relevant provisions differing from jurisdiction to jurisdiction. There are also relatively few reported decisions concerning these provisions.

\textit{A Boarders and Lodgers}

The most significant exception, in relation to home sharing, is that relating to boarding and lodging arrangements. All Australian jurisdictions exempt such arrangements from coverage by the relevant legislation. In Victoria, such arrangements are exempted because they constitute licences and not leases. In other jurisdictions, these arrangements are exempted by express legislative provisions.\textsuperscript{44}

The words ‘boarder’ and ‘lodger’ have been considered in many decisions, and many definitions have been offered. In 	extit{Voulon},\textsuperscript{45} the Supreme Court of Western Australia considered a number of these decisions. The Court held that a ‘lodger’ is a person who ‘resides … in another person’s house, paying a certain sum periodically for the

\textsuperscript{41} Ibid [38].
\textsuperscript{42} Ibid [78]–[79], [82].
\textsuperscript{43} Ibid [38].
\textsuperscript{44} See, eg, \textit{New South Wales Act} s 8(c); \textit{Queensland Act} s 29(2); \textit{South Australian Act} s 5(1)(b); \textit{Tasmanian Act} s 6.
\textsuperscript{45} [2005] WASC 229 (Hasluck J).
accommodation’.

A ‘boarder’ is a person who has their food and lodgings provided at the house of another for compensation. As mentioned above, both boarders and lodgers are regarded as licensees at common law.

The distinction between the two types of arrangements is, however, significant. As the quotes above suggest, a ‘lodger’ shares the premises with the host. A lodger does not have exclusive possession of the premises because the host lives in and shares the use of the premises with the guest. A ‘boarder’, however, has services provided to them by the host, in addition to the provision of accommodation, though the host usually does not live in the premises with the guest. Generally, the provision of services — such as meals, clean linen and housekeeping — involves the host accessing the guest’s room. Therefore, a boarder does not have exclusive possession of the premises, including their own room.

When a host provides services to guests — particularly when this involves the host accessing the guest’s room — the arrangement will not be covered by residential tenancy legislation. When parts of the premises are shared with the host, this type of arrangement also would not be covered by residential tenancy legislation in Australia. Similarly, hotel, motel, backpacker accommodation, and serviced apartments are expressly excluded from residential tenancy legislation in every Australian jurisdiction. Due to the host accessing the guest’s room during the stay, for example, to provide cleaning, such arrangements would generally constitute licences at common law.

B Premises Used for Commercial Purposes

Residential tenancy legislation excludes from its coverage premises that are used ‘primarily for the purposes of a trade, profession or business’, rather than for

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48 Ibid.
49 Ibid [62]–[64]. See also Street v Mountford [1985] 2 AC 809, 817–8 (Lord Templeman).
50 Voulon [2005] WASC 229, [81]–[82].
51 Queensland Act s 433 lists a number of matters relevant to determining whether a person is a boarder or a lodger. This list includes whether services are provided to the person, and whether the person shares facilities in the premises, including the bathroom and kitchen facilities.
52 The significance of the provision of services to guests is examined further in Part VIID of this article, in the context of examining the correctness of the Swan decision.
53 Victorian Act s 20; New South Wales Act ss 7(c)–(e).
residential purposes. These provisions distinguish between premises that are used for residential, as opposed to commercial, purposes. However, the extent to which premises may be used for a professional or business purpose before residential legislation ceases to apply seems to be one of degree.

This exception may apply where particular premises are used for a business purpose, for example, where the premises are made available for profit on a home sharing platform. Commonly, it is assumed that home share hosts are home owners seeking to earn some extra income from an underutilised asset. However, for many hosts, home sharing has many features of a business: they offer several premises for home sharing (often through an agent), they have never lived in the premises, and their income is largely derived from this source.

According to the few reported Canadian decisions, whether premises are used ‘primarily’ or ‘predominantly’ for a business purpose depends on several factors. This includes the nature and extent of the business activities being carried on at the premises, the proportions of floor space used for private residential and commercial purposes respectively, and the frequency and duration of such commercial use. To determine whether the exception applies, courts examine the terms of the written agreement, and the actual use of the premises. Whether this exception applies to a particular home sharing arrangement would depend on the particular circumstances, but it is more likely to apply when the premises are used primarily for commercial, rather than residential, purposes.

C Holiday Premises

Premises that are ‘ordinarily used for holiday purposes’ are excluded from coverage by residential tenancy legislation. The precise scope and nature of these exceptions is unclear, particularly regarding how a ‘holiday purpose’ is determined. In Re Glynn; Ex Parte Royle, the Full Court of the Supreme Court of Western Australia considered

54 Victorian Act s 7; New South Wales Act s 7(h). The New South Wales Act uses the term ‘predominant’, whereas the Victorian Act uses ‘primarily’. Although the wording is different, the effect of these provisions seems to be the same. The test of ‘predominant’ purpose was developed in Re Hanh (1979) 23 OR (2d) 689 (Ontario Divisional Court).

55 See Pearce, above n 8.

56 Hutchinson, above n 15.

57 There are no reported decisions in Australia.

58 Re Hanh (1979) 23 OR (2d) 689 (Ontario Divisional Court).


60 Victorian Act s 10. See also the New South Wales Act s 8(1)(h), which excludes premises that are let for holiday purposes for a period of not more than three months.

an equivalent provision in the *Western Australian Act*. The Court held that the exception does not depend on the ‘holiday’ being of short duration or one-off. As a result, a long-term holiday home could potentially be exempt. The Court suggested that, for the exception to apply, the ‘exclusive purpose’ of the arrangement must be making the premises available for a holiday, and it is the purpose of entry into the particular agreement, rather than the nature of the premises itself, which is relevant.

Home sharing is often used as a form of holiday accommodation. That is, the premises are used for recreational purposes. However, home sharing is also used by many guests for business purposes. It is difficult to determine whether the exception for holiday premises would apply to home sharing arrangements generally.

**D Common Law Exceptions**

In the UK, certain court decisions suggest that there are certain circumstances where, despite the fact that exclusive possession is granted, a lease does not exist. These circumstances (so-called ‘common law’ exceptions) will be briefly outlined. It is important to note that these exceptions are not part of Australian common law.

First, in *Street v Mountford* the House of Lords suggested that there are circumstances where a person who is given exclusive possession will not have a lease. This occurs where there is another, pre-existing relationship between the parties, such as a family relationship, or that of master and servant. In these circumstances, the pre-existing relationship is regarded as the dominant one, making the imposition of a landlord-tenant relationship unsuitable or inappropriate.

The second scenario includes circumstances where there is said to be no intention by the parties to create a legal relationship. Commonly, this would be based on the nature of the relationship between the parties, and the most common examples are familial relationships. Relationships of ‘charity’ are also included, particularly where little or no rent is paid for the accommodation.

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62 *Western Australian Act* s 5(2)(c).
63 *Re Glynn; Ex Parte Royle* [2003] WASCA 122 (per Wheeler J, Murray J agreeing).
64 Ibid.
65 Ibid [33].
66 Ibid [64].
68 Ibid 817–8 (Lord Templeman).
69 Ibid.
70 Ibid. This decision illustrates the overlap between the contractual and the property aspects of a lease: see Nicholas Shaw, ‘Contractualisation and the Lease-Licence Distinction’ (1996) 18 *Adelaide Law Review* 213.
As mentioned above, exclusive possession is the test for a lease in Australia, and there are no common law exceptions such as those recognised in the UK.\textsuperscript{71}

\section*{VII \textit{Is Swan Correct?}}

This section examines the correctness of the Court’s decision in \textit{Swan}. If the decision is not correct according to legal precedent, then the implication from the decision which has been made in this article — that all home sharing arrangements may constitute a lease — cannot stand. As mentioned above, the Court’s decision in \textit{Swan} was based on the concept of exclusive possession. This section will briefly outline this concept, before examining three aspects that were raised in argument. These aspects are: the relevance of the arrangement being described as a ‘licence’ in the agreement; the short duration of each guest’s stay; the provision of services; and access to the premises by the host during each stay.

\subsection*{A Exclusive Possession}

Exclusive possession is the ‘right to exclude others, including the lessor, from the premises’.\textsuperscript{72} However, the right to exclude ‘all others’ (particularly the landlord), is never absolute. This is because, at common law and under legislation, a landlord retains the power to enter the rented premises and to inspect it for various purposes, including the right to carry out necessary repairs.\textsuperscript{73}

Exclusive possession is not only a circular test for the existence of a lease,\textsuperscript{74} it is also an amorphous concept to identify. That is, the factors relevant to determining its existence will vary from one situation to another. It is therefore difficult to predict with any certainty how a particular arrangement will be characterised by a particular court.

What is settled, however, is that courts determine whether exclusive possession has been granted by examining the terms of the lease agreement.\textsuperscript{75} It should also be

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\begin{itemize}
\item \textsuperscript{71} \textit{Radaich v Smith} (1959) 101 CLR 209, 221–3 (Windeyer J) (‘\textit{Radaich}’). However, there are statutory exceptions that may apply in similar circumstances (such as the exceptions for employee tenants). Also, where the nature of the relationship between the parties (such as a family relationship) may negate an intention to create a legal relationship, it may be argued that there is no tenancy agreement (rather than there being no lease).
\item \textsuperscript{72} \textit{Lewis v Bell} (1985) 1 NSWLR 731, 734 (Mahoney JA).
\item \textsuperscript{73} See, eg, \textit{Victorian Act} ss 85–6, which regulates a landlord’s right of inspection and right of entry.
\item \textsuperscript{74} A tenant has a legal right to exclude others from the premises. However, the defining feature of a tenancy is the ability to exclude others. The test for a lease is therefore indistinguishable from its legal consequences: See Pearce, above n 8.
\item \textsuperscript{75} \textit{Street} [1985] AC 809, 826–7 (Lord Templeman). See also \textit{Radaich} (1959) 101 CLR 209, 221–3 (Windeyer J).
\end{itemize}
\end{footnotesize}
noted that a lease agreement may be created with very little formality. A lease may be oral or in writing, and its terms may be express or implied. Courts examine the parties’ words and actions, and any written documents, to determine the terms and nature of the arrangement.

B The Relevance of Descriptions Used by the Parties

One of the most difficult issues in tenancy law is determining the relevance of the words used in the agreement describing the arrangement. Generally speaking, it is in the interests of a host to try to characterise the relationship as a licence, rather than a lease. This is because a licensee has fewer rights. For example, the licensee can be removed immediately when the licence is revoked. Also, as mentioned above, courts base their characterisation of the arrangement on the terms of the agreement. Therefore, it is common for an accommodation agreement to expressly provide that it is a licence, not a lease, and to expressly deny that exclusive possession is granted.

In Swan, the Court examined the language used in the agreement entered by individual guests, which was provided on the Airbnb website. The agreement described Airbnb visitors as ‘guests’ (rather than ‘tenants’) and described the arrangement as a ‘licence’ (rather than a ‘lease’). In relation to these descriptions, the Court stated that the agreement must be considered as a matter of ‘substance’, rather than mere ‘form’, and that the surrounding circumstances must be considered. The Court held that it was not bound by ‘self-serving subjective statements’ and that the parties could not ‘escape the legal consequences of one relationship by professing that it is another’.

It is a well-established doctrine that courts are not bound by the labels or descriptions that parties give to a particular agreement or arrangement. On the contrary, a court must determine objectively whether a particular arrangement confers exclusive possession. The leading case on this topic is Street v Mountford, which the Victorian Supreme Court referred to in Swan. In this case, the landlord argued that the applicable tenancy legislation did not apply to the arrangement, as it was titled a ‘licence agreement’. However, the House of Lords determined that the arrangement conferred exclusive possession. Therefore, despite being labelled as a licence, the

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76 See, eg, Victorian Act s 3; New South Wales Act s 13. Both of these provisions state that a tenancy agreement may be oral or in writing.
77 Swan v Uecker (Residential Tenancies) [2016] VCAT 483 (24 March 2016) [41]. See Airbnb, above n 5, cl 8.2.
78 Swan (2016) 50 VR 74, 91 [40], 93–4 [47], 100 [66]. Justice Croft cited the statement of Tadgell JA in KJRR Pty Ltd v Commissioner of State Revenue [1999] 2 VR 174,177 [6] of the need for a court to determine the ‘true nature of the grant’ at 90 [37].
80 Ibid (Lord Templeman).
81 [1985] AC 809.
82 Ibid 816 (Lord Templeman).
arrangement was characterised as a lease and the protections of tenancy legislation consequently applied.

The approach, and conclusion, of the Court in Swan on this issue is arguably correct. Whether the parties describe the arrangement as a licence or a lease in the written agreement is simply a label of their intention. According to the two cardinal principles outlined above (first, that an objective approach is taken to characterising the relationship, and second, that the agreement is examined as a matter of substance and not mere form), the form the parties use to categorise the arrangement is irrelevant. As the courts have repeatedly affirmed, “the only intention which is relevant is the intention demonstrated by the agreement [as interpreted by the court]”.85

Home sharing arrangements are different to traditional types of landlord-tenant relationships, such as the one in Street. It is also true that the approach developed by courts in relation to the descriptions used in the agreement have typically worked to protect tenants from unscrupulous landlords, who were seeking to avoid the application of residential tenancy legislation to particular arrangements. This approach, when applied in the circumstances in Swan, actually worked to the disadvantage of the tenants who were evicted for breaching their tenancy agreement. However, the Court’s application of these principles in Swan seems hard to fault.

C The Short Duration of Each Guest’s Stay

The second issue considered by the Court was the short duration of the accommodation provided to each Airbnb guest. In Swan, the Court simply stated that ‘short term leases are…not eschewed by the common law’,86 and that a lease could be ‘for days or even hours’.87 This statement of principle, although technically correct, is open to a number of criticisms. First, none of the dicta relied on by the Court in support of this proposition were from residential tenancies decisions.88 Further, it is arguable that residential tenancies create a distinct type of lease agreement, and principles developed in relation to general commercial leases, such as those relied on by the Court in Swan, do not necessarily apply to them.89 Second, the distinguishing feature

85 Ibid 809, 826 (Lord Templeman).
86 Swan (2016) 50 VR 74, 92 [42].
88 The decisions referred to were Genco v Salter (2013) 46 VR 507 and Western Australia v Ward (2002) 213 CLR 1. The former case concerned the classification of particular premises under the Building Code of Australia. The latter case concerned native title and involved consideration of pastoral leases.
89 See Adrian Bradbrook, Poverty and the Residential Landlord-Tenant Relationship (Australian Government Publishing Service, 1975). Moore notes that a major purpose for the enactment of the Residential Tenancy Acts was that ‘the body of landlord-tenant law concerning commercial premises would diverge from that concerning residential premises’: Anthony Moore, ‘Adrian Bradbrook and Residential Tenancy Reform’ in Paul Babie and Paul Leadbetter (eds), Law As Change: Engaging with the Life and Scholarship of Adrian Bradbrook (University of Adelaide Press, 2014) 139, 141.
of a residential tenancy (as opposed to a pastoral or commercial lease) is that the premises are used ‘primarily for residential purposes’. Although the premises need not be the tenants’ only or even primary residence, taking up ‘residence’ would, as a practical matter, usually involve the connection of utilities such as gas, electricity and water, and moving in a substantial amount of furniture and other belongings. Obviously, this is not consistent with the notion of a tenancy lasting for a few ‘days or even hours’.

In *Swan*, the Court referred to decisions of the ‘highest level in the House of Lords’ on the general meaning of exclusive possession. The Court need not, however, have looked so far afield. At the time of the Court’s decision, Australian tenancy tribunals had considered the issue of home sharing on two previous occasions (not including the decision under review in that case). In both of these decisions, the tribunal had determined that short stay accommodation such as Airbnb did not constitute a lease. In *Knight*, the Victorian Civil and Administrative Tribunal Member emphasised that a lease would usually involve the premises becoming a person’s ‘usual residence’ and an ‘expectation [by the parties] of…continuing occupation’. It is arguable that these decisions, by tribunal members who are experienced in the specialised field of residential tenancy law, are worthy of serious consideration, and should have at least been referred to by the Court in *Swan*.

**D The Relevance of Services Provided by the Host**

The least convincing aspect of the Court’s decision in *Swan* was its rejection of the similarity between home sharing arrangements, on one hand, and boarding or lodging arrangements, on the other. As mentioned above, boarding and lodging arrangements have always been regarded as a licence, rather than a lease, because the guest does not have exclusive possession of the premises. On the contrary, the host would usually access the guest’s room, to provide services such as room cleaning, room service and laundry service. Indeed, the Court accepted that a hotel guest or lodger would usually be regarded as a licensee, rather than a tenant. Also, in *Street v Mountford*, Lord Templeman emphasised the distinction between a lease and a situation where ‘attendance or services’ are provided with the accommodation.

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90 See *Victoria Act* s 7.
91 It is notable that the Court cautioned against conflating ‘practicalities with the actual legal position’: *Swan* (2016) 50 VR 74, 91 [41].
92 *Swan* (2016) 50 VR 74, 89 [35].
93 *Wong & Shih v Doney* [2016] NTCAT 57 (3 February 2016) (Buxner P); *Alex Taxis Pty Ltd v Knight (Residential Tenancies)* [2016] VCAT 528 (30 March 2016) (Member Kirmos) (‘*Knight*’).
94 *Knight* [2016] VCAT 528 (30 March 2016) (Member Kirmos) [30].
95 In this context, boarding and lodging arrangements include hotel-like accommodation (which was referred to synonymously by the Court).
96 *Swan* (2016) 50 VR 74, 91 [40].
97 *Street v Mountford* [1985] AC 809, 818.
In *Swan*, the Court simply stated that the ‘hotel room analogy is not appropriate in the present circumstances’\(^{98}\) and that the occupancy granted to Airbnb guests was ‘not akin to that of a “lodger” or hotel guest’.\(^{99}\) It is clear, however, that the arrangement in *Swan* had many similarities to that of a hotel guest, and was unlike a conventional tenancy arrangement. First, Airbnb guests had limited use of the premises, such as strict Check In and Check Out times, and were subject to strict House Rules (including restrictions on noise and smoking). These restrictions on the use of the premises are not consistent with the general right to undisturbed use of the premises that a tenant ordinarily enjoys. Second, guests were provided significant services by the host, such as tourist information, clean linen and towels, house cleaning and basic food items such as tea and coffee. In summary, the arrangement appeared to be a lodging or boarding arrangement, which has traditionally been characterised as a licence rather than a lease.\(^{100}\)

**VIII Conclusion**

The decision of the Supreme Court of Victoria in *Swan* is a mixed result for home sharing in Australia. On the one hand, the decision may protect landlords from unauthorised subletting of rented premises by tenants offering the premises online. On the other hand, the decision may impose significant obligations under tenancy law on all those who offer premises on Airbnb and similar platforms. This is due to the central holding in *Swan*: the relationship between a home share host and guest may constitute a lease at common law.

This article has examined some significant issues arising from this decision. First, it outlined some legal consequences of home share arrangements constituting a lease, such as the strict process for evicting a tenant under residential tenancy legislation. Second, it examined whether home share arrangements would be covered by residential tenancy legislation in jurisdictions other than Victoria. It concluded that the exclusion of boarding and lodging arrangements in other jurisdictions may apply to home share arrangements. The article also examined some other exclusions from coverage, such as business premises, holiday premises, and common law exceptions recognised in the UK. Finally, this article examined the correctness of the *Swan* decision, particularly in relation to the similarities between boarding and lodging arrangements, and home share arrangements. It is notable that the *Swan* decision has not yet been followed or approved by another court, but neither has it been disapproved at the time of writing.

The *Swan* decision highlighted that home share arrangements may constitute a lease, and may be covered by residential tenancy legislation. However, as the Court emphasised, each home sharing arrangement will depend on its particular facts and circumstances. It seems clear, for example, that those arrangements where the host

\(^{98}\) *Swan* (2016) 50 VR 74, 93 [46].

\(^{99}\) Ibid.

\(^{100}\) See Part VIA of this article.
resides in the premises with the guest constitute a licence, and not a lease, and so are outside the scope of residential tenancy law. Much will depend on the terms of the agreement, the nature of the premises, and the surrounding circumstances. As highlighted above, a significant factor will be the nature and extent of any services provided by the host, and any access the host has to the premises during the stay.
This case raises some profound questions about the nature of family obligations, the relationship between family obligations and the state, and the relationship between the freedom of property owners to dispose of their property as they see fit and their duty to fulfil their family obligations.1

The above quote, taken from the judgment of Lady Hale in the recent United Kingdom Supreme Court case of *Ilott v The Blue Cross*,2 summarises the questions that are raised in the area of family provision law.

Since its first enactment into Victoria in 1906, and subsequently in the other States and Territories of Australia, family provision laws have broadened substantially through judicial interpretation and legislative amendments. What started out as a protective measure to ensure adequate provision for dependent widows and orphans has transformed into a rigid entitlement to inheritance rights for financially comfortable applicants. The current law faces heavy criticism over its excessive encroachment on testamentary freedom and encouragement of opportunistic claims, resulting in calls for reform around Australia.3

This article will firstly give a brief overview of the underlying original policy rationale for family provision legislation before undertaking a detailed analysis of the issues arising from the modern rationale. A review conducted of all family provision cases decided under the *Inheritance (Family Provision) Act 1972* (SA) from 2000 to 2018 as part of this study shows that adult children comprise the greatest proportion of claims made under South Australia’s family provision laws.4 A number of recent

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*Sylvia Villios* and *Natalie Williams*

**FAMILY PROVISION LAW, ADULT CHILDREN AND THE AGE OF ENTITLEMENT**

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1 *Ilott v The Blue Cross* [2018] AC 545, 578 [49]. This case involved an estranged adult daughter who brought a claim under the *Inheritance (Provision for Family and Dependants) Act 1975* (UK) c 63 (‘the 1975 Act’) against her mother’s estate. This case will be discussed in greater detail below.
2 [2018] AC 545.
4 See Appendix 2 for an overview of cases decided under the *Inheritance (Family Provision) Act 1972* (SA) from 2000 to 2018.
studies indicate that this is an Australia-wide trend. This article will focus on the approach which is taken towards adult children claimants and will reveal that the current law raises significant issues in law, policy, and practice.

I Historical Purpose and Policy

Led by prominent philosophers John Locke, Jeremy Bentham and John Stuart Mill, the 18th century saw a rise of liberal individualism and strict testamentary freedom. Under the principle of testamentary freedom, testators had the right to dispose of their property by will as they liked and to whomsoever they wished, no matter how arbitrary or capricious. As outlined by Cockburn CJ in *Banks v Goodfellow*, ‘the law of every civilized people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass’.

The only way a will would be invalidated was by challenging the testator’s testamentary capacity. This high standard resulted in plainly unjust cases where widows and children were left destitute by testators irresponsibly or arbitrarily exercising their absolute testamentary freedom without ensuring adequate provision for their surviving wives and children in their will.

By the late 19th century, liberal individualism was giving way to a more progressive society which saw greater recognition of women’s rights, both within the community and at home. Leading this movement was New Zealand, the first country to recognise a woman’s right to vote, which passed the *Testator’s Family Maintenance Act*.

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7 (1870) LR 5 QB 549, 563.


Two pioneers of this movement were Sir Robert Stout, who later became Chief Justice of the Supreme Court of New Zealand, and his wife, Lady Anna Stout. This couple were social rights activists who fought for greater recognition of women’s rights, and it was Sir Robert Stout who first introduced the family maintenance legislation in Parliament in 1896. However, his proposed ‘set shares’ scheme proved unpopular with the progressive mood of those times. In response, Robert McNab reintroduced a slightly modified testator’s family maintenance legislation which removed the set shares scheme and allowed for greater testamentary freedom, subject only to an application by the deceased’s spouse or child if they had been left without adequate provision. This was met with the approval of Parliament and the Testator’s Family Maintenance Act 1900 (NZ) was passed in 1900 — the first of its kind in the common law world.

Australia was not far behind. Australian parliaments were soon debating the value of a woman’s contributory role in the partnership of marriage, her subsequent entitlement to a share of the estate, and the need to protect her economically vulnerable state. Two notable cases that helped prompt the introduction of such laws in Australia were those of a well-known bookmaker, Francis O’Neill, and owner of ‘Truth’ newspaper, John Norton in 1916. O’Neill left his entire estate to his mistress and illegitimate children, leaving his own wife and child penniless, while Norton disinherited his wife and son and left the bulk of his estate to his nine year old daughter, Joan, and niece, Eva Pannett. The public outcry over such unjust outcomes paved the way for justifying the revolutionary intrusion of family provision law into

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13 Ibid 207, 211–12; Renwick, above n 11, 162; (12 July 1900) IIII NZPD 507.
14 Atherton, ‘New Zealand’s Testator’s Family Maintenance Act of 1900 — The Stouts, the Women’s Movement and Political Compromise’, above n 10, 211–12, 217; Renwick, above n 11, 162; (12 July 1900) IIII NZPD 508; (12 September 1900) IIII NZPD 614–5.
15 Renwick, above n 11, 162–3; (12 July 1900) IIII NZPD 507; (12 September 1900) IIII NZPD 615; Atherton, ‘New Zealand’s Testator’s Family Maintenance Act of 1900 — The Stouts, the Women’s Movement and Political Compromise’, above n 10, 213–14, 216, 219; Cameron, above n 9.
16 Renwick, above n 11, 161; Atherton, ‘New Zealand’s Testator’s Family Maintenance Act of 1900 — The Stouts, the Women’s Movement and Political Compromise’, above n 10, 203.
17 South Australia, Parliamentary Debates, House of Assembly, 3 October 1918, 803, 805 (Archibald Henry Peake); South Australia, Parliamentary Debates, House of Assembly, 15 October 1918, 884 (John Gunn).
18 Lindsay, above n 8, 2.
19 Re O’Neill (1917) 34 WN (NSW) 72.
testamentary freedom. The first version of the Victorian legislation, the *Widows and Young Children Maintenance Act 1906* (Vic), was based on the New Zealand Act. All other States and Territories in Australia introduced similar legislation shortly after. Similar legislation was also introduced in the United Kingdom and in parts of Canada.

Since then, the Acts in each Australian jurisdiction have been repealed or have undergone several amendments, as seen in South Australia, with each change bringing a wider access to relief in response to changing family structures and social values. The change of title of most of the Acts from ‘Family Maintenance’ to ‘Inheritance (Family Provision)’ demonstrates the significant shift of emphasis from maintenance of dependents to protection of inheritance rights. The one notable exception in all these changes is Victoria, which has limited the class of persons who may make a family provision claim under a will.

II Family Provision Legislation in Australia

A Eligible Applicants

To make a family provision claim, an applicant must first be eligible under the family provision legislation of the particular state or territory. Eligible applicants differ in each state and territory, however generally include spouses, former spouses, domestic partners, children, step-children, grandchildren, parents, and siblings.

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21 Lindsay, above n 8, 2–3.
22 See, eg, Frances M Hannah and Myles McGregor-Lowndes, ‘From Testamentary Freedom to Testamentary Duty: Finding the Balance’ (Working Paper No 42, Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, 2008) 1; Lindsay, above n 8, 9.
23 See, eg, *Inheritance (Family Provision) Act 1972* (SA) s 3; *Testator’s Family Maintenance Act Amendment Act 1943* (SA); *Inheritance (Family Provision) Act Amendment Act 1975* (SA); *Statutes Amendment (Domestic Partners) Act 2006* (SA).
24 See, eg, *Inheritance (Family Provision) Act 1972* (SA) s 3; *Testator’s Family Maintenance Act Amendment Act 1943* (SA); *Inheritance (Family Provision) Act Amendment Act 1975* (SA); *Statutes Amendment (Domestic Partners) Act 2006* (SA).
27 See, eg, South Australia, *Parliamentary Debates*, House of Assembly, 3 September 1965, 2520 (Frank Jacques Potter).
In South Australia, Queensland, Victoria, Tasmania and New South Wales, the category of children encompasses adopted children of the deceased. Currently, competent and self-supportive adult children are automatically eligible in all jurisdictions in Australia and will not be presumed ineligible on the mere basis of being able-bodied self-supportive adults.

With respect to adult step-children of the deceased, in the Australian Capital Territory, New South Wales, Northern Territory, South Australia, and Western Australia, a dependency test is applied. Accordingly, in these States, those children that are raised in the home of a step-parent, with the step-parent and child sharing a relationship of parent and child, will be eligible applicants provided that this relationship existed at the time of the step-parent’s death. However, where the step-child cannot demonstrate dependency on the step-parent, for example in the case of independent adult step-children, the law considers the natural parents of the children to be responsible for those children and in these cases there is no moral or other duty which extends to the step-parent. In Western Australia, an eligible claimant also includes a step-child if the deceased received or was entitled to receive property from the estate of a parent of the step-child (other than as a creditor) and, at the time of the parent’s death, the value of that property is greater than the prescribed amount.

In Queensland, Tasmania and Victoria, step-children are not required to demonstrate dependency and are treated in the same way as biological, foster and adopted children. In these states, if a child’s father or mother remarries at any stage in their life, including when the child is an independent adult, they are eligible to make a claim notwithstanding that the child may never have lived in the same household as that step-parent and had never been dependent on the step-parent. In the most extreme case, the child’s parent may remarry multiple times, leaving the child in

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28 For adopted children, see Inheritance (Family Provision) Act 1972 (SA) s 4 (definition of ‘child’); Administration and Probate Act 1958 (Vic) s 90(b), (d), (f)-(g) (definition of ‘eligible person’); Succession Act 2006 (NSW) s 57(2); Testator’s Family Maintenance Act 1912 (Tas) s 2(1); Succession Act 1981 (Qld) s 40 (definition of ‘child’).

29 Family Provision Act 1969 (ACT) s 7(1)(c); Inheritance (Family Provision) Act 1972 (SA) s 6(c), s 4 (definition of ‘child’) makes no distinction between minors and adults; Family Provision Act 1970 (NT) s 7(1)(c); Succession Act 1981 (Qld) s 41(1); Testator’s Family Maintenance Act 1912 (Tas) s 3A(b); Family Provision Act 1972 (WA) s 7(1)(c); McCosker v McCosker (1957) CLR 566, 576 (Dixon CJ and Williams J), cited in Wall v Crane [2009] SASC 382 (16 December 2009) [18] (White J).

30 See Family Provision Act 1970 (NT) s 7(2)(b); Family Provision Act 1969 (ACT) s 7(2); Succession Act 2006 (NSW) ss 57(1)(e), 59(1)(b) – no particular reference to step-children however they would fall within the criteria set out in s 57(1)(e); Inheritance (Family Provision) Act 1972 (SA) s 6(g); Family Provision Act 1972 (WA) s 7(1)(ea).

31 Family Provision Act 1972 (WA), ss 7(1) (ea) and (eb). Under Family Provision Regulations 2013 (WA) reg 3 the prescribed amount is $517,000.

32 Succession Act 1981 (Qld) ss 40 (definition of ‘child’), 41(1); Testator’s Family Maintenance Act 1912 (Tas) s 2(1) (definition of ‘child’); Administration and Probate Act 1958 (Vic) s 90(c), (f) (definition of ‘eligible person’).
the position in which there are multiple step-parents upon which a claim can be made against their estate. Furthermore, in Victoria, ‘marriage’ is not required for the definition of step-child, even where a parent is an unmarried domestic partner.33

B Criteria

Once the applicant is eligible, the court must then exercise its discretion to determine whether the applicant has been ‘left without adequate provision for his or her proper maintenance, education or advancement in life’.34 As the High Court said in Vigolo v Bostin:

‘Maintenance’ may imply a continuity of a pre-existing state of affairs, or provision over and above a mere sufficiency of means upon which to live. ‘Support’ similarly may imply provision beyond bare need.35

In the Australian Capital Territory, New South Wales, and Victoria, the legislation provides a list of factors that the court must take into account when determining whether to make an order for family provision.36 With respect to adult children, in Victoria, the court is further required to consider the degree to which the adult child is not capable, by reasonable means, of providing adequately for their own proper maintenance and support.37 Courts have questioned whether these lists provide anything more to the general test of whether the applicant has been left without adequate provision for his or her proper maintenance, education or advancement in life.38

1 ‘Adequate’ or ‘Proper’

The court’s approach to this criteria differs depending on which of the following distinct but relative terms are emphasised: ‘adequate’ or ‘proper’.41 ‘Adequacy’

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34 Inheritance (Family Provision) Act 1972 (SA) s 7(1)(b); Administration and Probate Act 1958 (Vic) s 91(2)(d), (4)(b); Family Provision Act 1972 (WA) s 6(1); Succession Act 2006 (NSW) s 59(1)(c); Family Provision Act 1970 (NT) s 8(1); Family Provision Act 1969 (ACT) s 8(2); Testator’s Family Maintenance Act 1912 (TAS) s 3(1); Succession Act 1981 (QLD) s 41(1) (emphasis added).
36 Administration and Probate Act 1958 (Vic) s 91(2); Succession Act 2006 (NSW) s 60(2); Family Provision Act 1969 (ACT) s 8(3).
37 Administration and Probate Act 1958 (Vic) s 91A(4)(c).
implies an objective consideration of the applicant’s financial need to determine the 

basic level of support necessary to live a sustainable lifestyle without being a burden on the state.42 ‘Proper’ implies a more flexible and subjectively moral or ethical approach.43 What is adequate may not be proper in regard to the applicant’s situation in life and testator’s wealth.44 When determining if proper provision is given, the court must take into account all the circumstances of the case. These include: the lifestyle and standard of living the applicant is accustomed to; the applicant’s needs, financial position and general situation; whether the applicant’s resources are able to maintain those needs, lifestyle and standard of living; the estate’s size and nature; relationship between the applicant and the testator; relationship between the testator and beneficiaries; and competing claims.45

Where a will does not make adequate provision for the proper maintenance and support of the particular applicant, and further provision for the applicant will not unduly prejudice other beneficiaries for whom the deceased had a responsibility to make provision, the court adopts a reasonably generous approach.46 The cases include some colourful statements of this approach. For example, Fullagar and Menzies JJ in Blore v Lang stated that the need of an applicant for further provision may extend beyond ‘the bread and butter of life’ to include ‘a little of the cheese or jam that a wise and just parent would appreciate should be provided if circumstances permit’.47

To similar effect is the approach taken by the High Court in Worland v Doddridge, where Williams and Fullagar JJ approved the following statement of the South Australian Supreme Court:

Proper maintenance is (if circumstances permit) something more than a provision to keep the wolf from the door — it should at least be sufficient to keep the wolf from pattering around the house or lurking in some outhouse in the backyard — it should be sufficient to free the mind from any reasonable fear of any insufficiency as age increases and health and strength gradually fail.48

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42 Ibid; Justice R N Chesterman, ‘Does Morality Have a Place in Applications for Family Provision Brought Pursuant to s 41 of the Succession Act 1981’ (Speech delivered at the QLS Annual Succession Law Conference, Sunshine Coast, 1 November 2008) 7.


46 Blore v Lang (1960) 104 CLR 124; Worland v Doddridge (1957) 97 CLR 1; Re Harris (1936) 5 SASR 497.

47 (1960) 104 CLR 124, 135.

48 (1957) 97 CLR 1, 12, quoting Re Harris (1936) 5 SASR 497, 501.
More recently, it has been said that the court should provide a ‘nest egg’ to protect against the unforeseen events in life. Justice Gzell in *McGrath v Eves* observed that ‘there is no rule to the effect that proper provision for an adult and presently able-bodied child does not extend to providing him or her with a house or money to buy one’. The relevance of the size of the estate as a significant consideration in determining applications for further provision was discussed by Debelle J in *Bowyer v Wood*. In that case, while recognising that the size of the estate does not justify the court in rewriting the will in accordance with its own ideas of justice and fairness, Debelle J noted the continued reference in the cases to the size of the estate as a relevant factor. The ‘relative urgency’ of an applicant’s need for provision is also a relevant factor.

2 Moral Duty

The word ‘proper’ has also been interpreted as including the question of whether the testator had a ‘moral duty’ to provide for the applicant. The concept of moral duty has become an important element in the courts’ reasoning process in family provision claims, despite its absence in the Acts of all states apart from Victoria. In Victoria, the court may take into account the degree of moral duty the deceased had at the time of death.

A moral duty is breached if a testator had not acted as a wise and just husband or father would have. To come to this conclusion, a court must draw upon its own general knowledge and experience of current social standards, but is not allowed to use its own ideas of fairness and justice. However, critics have observed that moral duty or moral claims are subjective expressions which cannot be easily assessed.
or understood, leading courts to make assumptions upon their own assessment of social values which may be incorrect.

In determining the extent of the moral claim that a parent owes a child, Mill has expressed the view that children were only entitled to expect maintenance and education to the extent of making them independent and self-reliant to ‘enable them to start with a fair chance of achieving by their own exertions a successful life’. However, a review of the more recent judicial cases indicates that courts may have taken the concept of moral duty beyond what may be acceptable.

Courts have found breaches of moral duties solely upon the testator’s own neglect or disinterest in the applicants during their childhood. In Drioli v Rover, the Court found that despite the lack of contact, the testator’s self-supporting daughters had a moral claim because more could have been expected from the testator, especially during the early years when the daughters ‘moved out of the family home into marriage and child-bearing’. Moral obligations have also been found based upon past contributions by the applicant towards the testator or the estate or solely on the bare fact of parentage.

Although a moral claim cannot be based upon a testator’s preference for one person over another, courts have held that bequeathing a larger portion to a sibling and charity than to a child was a failure of moral duty because a testator owes a stronger moral obligation to their children over siblings and charity. This happens especially when bequests are made to charitable organisations which the testators had not shown a great interest to during their lifetimes, thus making altruistic acts impossible except in limited circumstances.

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60 Kozlowski v Kozlowski [2013] SASFC 112 (18 October 2013) [43] (Sulan J); Grainer, above n 55, 148.
63 Grainer, above n 55, 146–7.
65 Grainer, above n 55, 146–7.
This moral obligation persists even if the applicant is in financially secure circumstances. In large estates, courts will extend the moral duty to include an obligation to provide the means that will allow the applicant to continue the affluent lifestyle they are used to. Due to the courts’ liberal interpretation of what is ‘proper’ and what is within a ‘moral duty’, it appears that courts are quite willing to interfere with a testator’s wishes, thus almost guaranteeing applicants a high chance of success once they are eligible.

It should also be noted that due to the factually sensitive nature of family provision cases, the results of cases are highly unpredictable. This is exacerbated by a lack of higher court leadership in the area, given the High Court of Australia’s reluctance to hear this sort of dispute. Two cases in the last ten years is not adequate guidance for a jurisdiction like this.

For the purposes of this research paper, a review was conducted of all family provision cases decided under the Inheritance (Family Provision) Act 1972 (SA) from 2000 to 2018. In total, 24 cases were found, although it should be noted that these cases are not reflective of the larger proportion of family provision claims which are usually settled in mediation. This analysis showed that 22 out of the 24 cases were successful at increasing the amount of provision awarded. This is consistent with a 74 per cent success rate in judicial case reviews and 77 per cent success rate in public trustee file reviews across Australia.

III Testamentary Freedom

Testamentary freedom has been described as an important civil right, with the ownership of property rendered incomplete if lacking the power to also give it as

70 Grainer, above n 55, 145.
72 See Appendix 2 for an overview of cases decided under the Inheritance (Family Provision) Act 1972 (SA) from 2000 to 2018.
73 Victorian Law Reform Commission, above n 3, 99. This number also does not include appeals of the cases.
74 See Appendix 2 for an overview of cases decided under the Inheritance (Family Provision) Act 1972 (SA) from 2000 to 2018.
76 Grainer, above n 55, 159. See also Banks v Goodfellow (1870) LR 5 QB 549, 563–5 (Cockburn CJ); McGregor-Lowndes and Hannah, ‘Tyrannical Testators vs Greying Heirs?’, above n 6, 64.
the owner wishes. W7 English political philosophers, John Locke, Jeremy Bentham and John Stuart Mill in the late 18th and early 19th century advocated strongly for preserving testamentary freedom. Locke’s view was that ‘the end of law’, was ‘not to abolish or restrain, but to preserve and enlarge Freedom’. W8 Bentham saw a father’s testamentary power as providing a way in which to incentivise his children. W9 Bentham described this power as one which would reward ‘dutiful and meritous conduct’. W10 Mill described this power as that of ‘showing marks of affection, of requiting services and sacrifices, and of bestowing their wealth according to their own preferences, or their own judgment of fitness’. W8 Any intrusions into this power was limited only to providing maintenance or education for dependent children to ‘enable them to start with a fair chance of achieving by their own exertions a successful life’ but nothing further. W2 This important civil right led to the enactment of the Wills Act 1837 (UK) 1 Vict, c 26 which was later mirrored in Wills Acts throughout Australia. W3

Taking Locke, Mill and Bentham’s approach, the legal principles are clear in stating that there should be no unnecessary intrusions upon the testator’s testamentary freedom. W4 It was never intended that courts should re-write the testator’s will or intrude upon testamentary freedom to the extent that ‘a testator’s decisions expressed in his will have only a prima facie effect, the real dispositive power being vested in the Court’. W5 Any power to vary a testator’s will is limited only to the extent necessary to ensure adequate provision for the applicant and no more. W6 A testator’s reasons cannot justly be ignored unless the evidence does not support such reasons W7 and, if no error is shown, courts will only disturb a disposition if there is a ‘strong or cogent’ case to do so. W8


80 Ibid.

81 Mill, above n 62, ch 2 [3].

82 Ibid.

83 Rosalind Croucher, ‘A Lament for Family Provision — A Good Idea Gone Wrong? Australian Reflections’ (Paper presented at Colloquium on 40 Years of The PRA: Reflection And Reform, Auckland, 8 December 2016).


85 Ibid [140].


88 Sampson v Sampson & Perpetual Executor Trustee and Agency Co (WA) Ltd (1945) 70 CLR 576.
However, the past 100 years of family provision law has seriously challenged testamentary freedom\textsuperscript{89} to the extent that people now believe ‘their will can effectively be challenged by anyone, and that they do not truly have freedom to dispose of their property by will.’\textsuperscript{90} Professor Rosalind Croucher comments that ‘family provision today pays very little heed to testamentary freedom, apart from largely lip service. The litigation that has overtaken wills has made testamentary wishes but a bit of kindling in a costs bonfire.’\textsuperscript{91} Courts have shown an increasing willingness to override the testator’s wishes in family provision cases.\textsuperscript{92} Family provision cases are decided objectively because the testator’s subjective wishes are given little to no weight.\textsuperscript{93}

There are two notable British studies which explore community attitudes with respect to family provision laws. The first study was published in 2009 and was conducted by Gareth Morrell, Matt Barnard and Robin Legard.\textsuperscript{94} This study used focus groups of people from ‘non-traditional’ families. The second study was jointly conducted in 2010 by Alun Humphrey, Lisa Mills and Gareth Morrell of the National Centre for Social Research and Gillian Douglas and Hillary Woodward of Cardiff University.\textsuperscript{95} These studies identified reasons as to why relatives of a deceased person should be entitled to a share in the deceased’s estate. Primarily, these reasons were centred on bloodline or lineage to maintain family stability or need arising from disability or poverty. Another reason was where the descendant had materially contributed to the deceased’s acquisition of wealth.

In 2006, the New South Wales Law Reform Commission undertook a study on the attitudes to inheritance which reported similar findings to the British studies outlined above. Professor Prue Vines commented that

> over the twentieth century the notion that some expectation of inheritance could exist continued to grow, and the idea that the testator could do whatever he or she wished diminished accordingly. In response to this expectation legislatures expanded the range of possible applicants for family provision.\textsuperscript{96}

\textsuperscript{89} Hannah and McGregor-Lowndes, ‘Finding the Balance’, above n 23, 1.
\textsuperscript{90} Victorian Law Reform Commission, above n 3, 99; Tilse et al, ‘Having the Last Word?’, above n 75, 17–18;
\textsuperscript{91} Rosalind Croucher, ‘If We Could Start Again: Re-Imagining Family Provision Law in the 21st Century’ (Paper presented at 2017 STEP Australian Conference, Melbourne, 2–4 August 2017).
\textsuperscript{92} Mark Minarelli and Russell Jones, ‘Family Provision Claims in South Australia’ (Summer Report, DW Fox Tucker, 2016) 19.
\textsuperscript{93} Grainer, above n 55, 150.
\textsuperscript{95} Alun Humphrey et al, ‘Inheritance and the Family: Attitudes to Will-Making and Intestacy’ (Report, National Centre for Social Research, August 2010).
\textsuperscript{96} Prue Vines, Bleak House Revisited? Disproportionality in Family Provision Estate Litigation in New South Wales and Victoria (Australasian Institute of Judicial Administration, 2011) [2.6].
IV Adult Children

When family provision laws were first introduced in Australia, courts were strict on adult sons.\(^97\) In order for adult sons to make a successful claim, they had to be able to establish a ‘special need’ or ‘special claim’.\(^98\) This could be established in a number of ways, for example, they may have been a dependent on the testator at the time of their death, they may have contributed to the building up of the testator’s estate, they may have suffered from some physical or mental disability, a financial disaster, unemployment or they may have a number of dependents relying on them for support.\(^99\)

Chief Justice Stout in *Allardice v Allardice* commented that ‘[i]f they had any push they should, considering their age, have ere this done something for themselves, and to settle money on them now might destroy their energy and weaken their desire to exert themselves’\(^100\). The rationale behind this argument is that because an adult son is prima facie able to maintain and support himself,\(^101\) the testator’s responsibility for his son should end once the son is mature, able-bodied and capable of being self-supportive.\(^102\) This is in contrast to the testator’s ongoing responsibility to widows and infant children who are prima facie dependent on him.\(^103\)

However, a dramatic shift in the courts’ approach to adult children, as well as legislative amendment, has led to an expansion of the law in this area. The requirement to demonstrate ‘special circumstances’ no longer forms part of the law of adult child family provision claims under the Acts in all states and territories.\(^104\) Accordingly, currently, competent and self-supportive adult children are automatically eligible in

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\(^{98}\) *Delisio v Santoro* [2002] SASC 65 (27 February 2002) 80 (Besanko J).


\(^{100}\) *Allardice v Allardice* (1910) 29 NZLR 959, 971. Adult daughters were not subject to the same requirement.


all states and territories in Australia and will not be presumed unsuccessful on the mere basis of being able-bodied self-supportive adults.

In this fight for equality among the sexes, and where women are increasingly more like men in respect of having independent financial means, it is interesting to note that the courts appear to have taken a ‘counter-cultural’ approach. Namely, by ‘reducing’ adult sons to the status of prima facie dependent children instead of ‘raising’ adult daughters to the status of prima facie being able to maintain and support themselves.

V The Age of Entitlement

It has been held that the purpose of the legislation is to provide a safety net and not a statutory right to a minimum allocation from the estate. However, over the years, through judicial interpretation and legislative amendment, dependency has given way to entitlement. This entitlement appears to be based largely upon recognition of the family relationship, rather than need or reciprocity.

There is considerable concern that the current law allows or encourages opportunistic and non-genuine claims, although views differ over how widespread the issue really is. There is evidence of increasing litigation in succession law, and greed, along with a culture of entitlement, has been nominated by legal practitioners, mediators, and trustees as the main drivers of these family provision applications.

There are growing numbers of adult children who expect a share of the estate as a right, creating the current culture of expectation, which means it is no longer

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105 See, eg, Inheritance (Family Provision) Act 1972 (SA) s 4 (definition of ‘child’), which does not discriminate between minors and adults.
109 See, eg, Grainer above n 102, 189; Tilse et al, ‘Having the Last Word?’, above n 75, 21.
110 Grainer, above n 55, 143.
113 Myles McGregor-Lowndes and Frances Hannah, ‘Every Player Wins a Prize?’, above n 69, 75–6; Tilse et al, ‘Having the Last Word?’, above n 75, 16–17.
inappropriate behaviour to contest a will.\textsuperscript{114} A 2002 English survey found that 45 per cent of ‘younger people have greater expectations of an inheritance’.\textsuperscript{115} This view may be encouraged by the judicial perception that a bare parental relationship is sufficient to find a moral duty.\textsuperscript{116} This may also be due to a perception that wills are a mechanism to distribute ‘family money’ and, thus, should be allocated within family.\textsuperscript{117}

A review of public trustee files revealed that a sense of entitlement made up 19 per cent of commonly reported grounds for contesting wills.\textsuperscript{118} Increasing wealth has also been highlighted as a factor leading to the increase in family provision claims. Increasing wealth has been accumulated by the generation of baby boomers as a result of rising real estate prices, a share market boom and superannuation, thus providing further incentive for opportunistic applicants to get a share of the wealth.\textsuperscript{119}

A review of all judicial cases in South Australia from 2000 to 2018 revealed that a vast majority of applicants (19 out of 24 cases) were competent adult children between the ages of 42 and 76.\textsuperscript{120} Among the 19 cases, a proportion of these adult children were financially independent.\textsuperscript{121}

This research is consistent with that of academics at the University of Queensland, who conducted a study which reviewed all publicly available succession law judgments in Australia during a 12-month period. It involved examining the number of estates subject to family provision claims, who was contesting them, and to what extent those challenges were successful.\textsuperscript{122} They reported some of the findings in an

\textsuperscript{115} Sappideen, above n 114, 755.
\textsuperscript{116} McGregor-Lowndes and Hannah, ‘Every Player Wins a Prize?’, above n 69, 76.
\textsuperscript{117} Tilse et al, ‘Having the Last Word?’, above n 75, 21.
\textsuperscript{118} Tilse et al, ‘Families and Generational Asset Transfers’, above n 75, 8.
\textsuperscript{120} See Appendix 2 for an overview of cases decided under the Inheritance (Family Provision) Act 1972 (SA) from 2000 to 2018.
\textsuperscript{122} White et al, above n 75, 882. The research was supported by the Australian Research Council’s Linkage Projects funding scheme (project number LP110200891), and had contributions from the Public Trustees of Queensland, Tasmania, South Australia, Western Australia, and the Australian Capital Territory, as well as the State Trustees of Victoria and New South Wales Trustee and Guardians.
article published in 2015. Of the sample size chosen for the study, 52 per cent of the claims made were by adult children with no incapacity. The success rate in these cases was 69 per cent, and over 80 per cent for children when the estate was over $1 million. Taking a conservative approach, the study identified that approximately one-third of the claimants could be regarded as ‘financially comfortable adults just wanting more’. 

In 2008 and then in 2009, two Queensland academics, Professor McGregor-Lowndes and Frances Hannah, examined family provision laws in Australia and other jurisdictions. They argue that ‘[t]here appear to be few limitations on claims by adult children in Australia. Indeed, claims by adult children have become easier to maintain over time in Australian jurisdictions’.

Professor Rosalind Croucher has expressed concern about adults making claims against the wishes of the testator, when they are not in any financial or any other need. Croucher has described a cohort ‘of independent, self-sufficient 50 and 60 year olds wanting to get more of the pie from their parents, notwithstanding that the parent had made a conscious decision that they had already had enough and/or did not deserve more (or even anything)’. 

In very recent times, however, it could be argued that the courts appear to be taking a slightly different approach to opportunistic claims. In Swanson v Reis, a 56 year-old son made a family provision application for further provision from his late mother’s estate. In the deceased’s will, the defendant, another adult son, received two thirds of the $420 000 estate while the plaintiff received one sixth, approximately $70 000. The plaintiff was described to be in a ‘comfortable position financially’. Conversely, the defendant was ‘in a significantly worse financial position’. The Court dismissed the claim.

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123 Ibid.
124 Ibid 901.
125 McGregor-Lowndes and Hannah, ‘Every Player Wins a Prize?’, above n 69.
127 McGregor-Lowndes and Hannah, ‘Every Player Wins a Prize?’, above n 69.
129 Rosalind F Croucher, ‘Succession Law Reform in NSW — 2011 Update’ (Speech delivered at the Blue Mountains Annual Law Conference, Katoomba, 17 September 2011).
130 Ibid.
132 Ibid [31].
133 Ibid [72].
C Estrangement

A number of the claims made by adult children under the Acts involve situations where the testator had been estranged from the claimant. These cases touch on the ‘reward and punish’ notion expressed by Mill and Bentham. The varied outcomes in the cases reveal that courts are not consistent in their views on estrangement, with some courts holding estrangement as a determinative factor sufficient to order provision, and other courts placing it as just one out of the many factors.

In Malone v Runge\(^{134}\), the testator had made a gift of $10,000 to each of her 56 year old and 61 year old estranged daughters, representing a small proportion of the overall estate. In her will, the testator referred to the estrangement between her and these two daughters following an incident five years ago. Prior to the incident, the relationship between them was close and loving. The evidence showed the deceased did not make any attempts to improve the relationship with her daughters. Further, based on the totality of the relationship between the testator and her daughters, the Court determined that there was a failure, on the part of the deceased, to make adequate provision for the proper maintenance or advancement in life of each of her daughters.

In Parker v Australian Executor Trustees Limited\(^{135}\), a testator had five children who, at the time of his death, were in their 50s and 60s. He gifted one son his farm, the daughter $100,000 and the residue to a charitable trust. All five children challenged the will. With respect to the three estranged children who were not left with anything, the Court found that this was due to the testator’s own behaviour and that this created an even stronger moral obligation to properly provide for them after his death. All five children were awarded provision out of the estate.

These cases can be contrasted with that of Burke v Burke\(^{136}\) which involved an estranged adult son who was left with $100,000 of a $1.3 million estate, the balance of which was left equally to his two siblings. The adult son was bankrupt and receiving a pension. A compelling letter written by the testator accompanied the testator’s will, explaining the heartache caused by the estrangement initiated by the adult son. The Supreme Court of New South Wales referred to the judgment in Goldberg v Landerer which held that

the Court should accept that testators are, in certain circumstances, entitled to make no provision for children, particularly in the case of children who treat their parents callously, by withholding without proper justification, their support and love from them in their declining years. Even more so where that callousness is compounded by hostility.\(^{137}\)

\(^{134}\) [2012] NSWSC 1032 (10 September 2012).

\(^{135}\) [2016] SASC 64 (1 June 2016).


\(^{137}\) [2010] NSWSC 1431 (10 December 2010) [39].
The Court did not make any provision for the son and the Court of Appeal upheld the primary judgment. With respect to the issue of estrangement, Ward JA with whom Meagher JA agreed, held that

as a general proposition estrangement (or ‘mere estrangement’) will not be a determinative factor against (nor, I would add, is estrangement in the absence of callousness or hostility a determinative factor in favour of) the making of provision for an adult child. It is simply a factor to be taken into account with all the circumstances of the particular case.\(^{138}\)

In the recent United Kingdom case of *Ilott v The Blue Cross*,\(^{139}\) the Supreme Court considered the issue of estrangement in the context of adult children claims under the 1975 Act. The case involved a daughter who had been estranged from her mother for many years. The mother gave her estate to a number of charities and did not give anything to her daughter, who was a 50-year-old welfare recipient with five children.

At first instance, District Judge Million awarded the daughter £50 000. The daughter appealed the decision and the Court of Appeal held that the District Judge had failed to take into account the interaction of the award of £50 000 with the daughter’s welfare payments. Accordingly, the award was increased to £143 000, which would enable her to purchase a home and have a capital sum to fund future needs, whilst allowing the welfare payments to continue. The charities appealed to the Supreme Court, which held that the Court of Appeal erred in its approach on the basis that maintenance under the Act was ‘by definition the provision of income rather than capital’.\(^{140}\) Accordingly, the amount awarded to buy a house was a capital amount and was not appropriate, as it went beyond meeting day-to-day living expenses.\(^{141}\)

Lady Hale discussed the ‘unsatisfactory state of the current law’ with respect to claims by adult children and commented that to a large extent this had been driven by the lack of guidance in the 1975 Act.\(^{142}\) The approach of the Supreme Court in this case stands in contrast to the manner in which the Australian courts have interpreted the concept of ‘maintenance’ in the Family Provision Acts in Australian states.

## VI Adult Step-children

The increase in blended family structures is also perceived as a factor impacting on the increase in family provision claims. Due to increased longevity, more marriages are ending by dissolution, resulting in higher rates of second and third marriages.\(^{143}\)

\(^{138}\) *Burke v Burke (No 2)* [2015] NSWCA 195 (13 July 2015) [103].

\(^{139}\) [2018] AC 545.

\(^{140}\) Ibid [15].

\(^{141}\) Ibid [14].

\(^{142}\) Ibid [66].

Of the total number of marriages in 2004, 30 per cent had children under 16 years from a previous marriage\(^{144}\) and in total, 5–6 per cent of Australian families included step-children.\(^{145}\) Multiple marriages and changing notions of ‘family’ have been cited as reasons for the growing increase of family applications, as partners and children of each blended family strive for a share of the deceased’s estate.\(^{146}\)

Professor Prue Vines undertook a significant empirical study of estate litigation, published in 2011.\(^{147}\) This study examined a series of cases in the Supreme Courts of New South Wales and Victoria in the Family Provision jurisdiction. Vines’ research shows that disputes between children of a former marriage and the subsequent partner of the deceased are the ‘fiercest’:

> Emotions run high in such situations and there is a risk that litigation may be used as a weapon for vendetta. Several lawyers spoke of clients who said they didn’t care if the entire estate was used up in litigation, as long as the other claimant didn’t get anything.\(^{148}\)

In Queensland, Tasmania and Victoria, step-children are not required to demonstrate dependency and are treated in the same way as biological, foster and adopted children. This leaves the door open for adult step-children to make a claim against their adult step-parent’s estate (or possibly against the estates of multiple step-parents). However, in these situations it is unlikely that the step-child will be able to make a successful claim under the respective Acts as they will not be able to establish that a moral duty existed for the step-parent to provide for them. In these states, a review of the case law indicates that if it can be shown that the deceased’s estate was derived from the efforts of the step-child’s natural parents, then the step-child will often be successful in those instances, even where they did not share a close personal relationship with the step-parent.

In *James v Day*,\(^{149}\) a step-child made a claim against his step-parent’s estate despite the fact that he had never lived in the same household as the step-parent. The court took a historical view and considered the source of the step-parent’s estate which was derived from the natural parent of the step-child. This was a key factor which the Court took into account in awarding provision to the step-child. Similar reasoning was applied in the case of *Keets v Marks*.*\(^{150}\)

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\(^{144}\) Zinta Harris, ‘From “Brady Bunch” to “Modern Family”: Succession Planning Tips for Blended Families’ *Blended Families and Estate Planning* (November 2014) 1.

\(^{145}\) Tilse et al, ‘Having the Last Word?’, above n 75, 11.

\(^{146}\) McGregor and Hannah, ‘Tyrannical Testators vs Greying Heirs?’, above n 6, 69–70; Viellaris, above n 112.

\(^{147}\) Vines, above n 96.

\(^{148}\) Ibid [3.18].


In *Freeman v Jacques*,\(^{151}\) the step-children made a claim against their step-parent’s will, which left the estate to a friend. The step-children had no relationship with their step-parent and all interactions had been hostile in nature. In a similar manner to the cases described above, the Court justified making provision for the step-children even though they had already benefited from their father’s estate, based on the fact that the source of the step-parent’s estate was derived from their natural parent’s work during their lifetime. Another relevant consideration was that the step-children were in necessitous circumstances.

In *McCann v Ward*,\(^{152}\) a step-child made a claim against the estate of the wealthy deceased step-parent. In this case, the deceased had three children from a previous marriage and two step-daughters from his second marriage. In his will, he left his estate to his children and to his second wife. He did not leave anything to his step-daughters. It was submitted on behalf of the estate that the testator had no responsibility to make provision for his step-daughter for three principal reasons. Firstly, because the relationship between step-father and step-child was not one of parent and child. Secondly, the necessitous situation in which the step-child found herself was a product of her own doing and thirdly, the step-father had met any responsibility he had to make provision to his step-daughter by making provision for her mother, his second wife, with the intention that her mother would leave her with adequate provision when she died. The Court held that the deceased had a responsibility to make adequate provision for the contingency that his step-daughter would be in financial need if he died before his second wife which he failed to do. In making this determination, the Court took into account the wealthy position of the testator and the good relationship which the testator had with his step-daughter.

In the Australian Capital Territory, New South Wales, the Northern Territory, and South Australia the law provides no recourse to those cases involving blended families where the child’s parent remarries and then predeceases their subsequent spouse whom they have left their assets to, who then makes a will leaving no provision for their step-children.

### VII Law Reform Commission Reviews of Succession Law

Given the discussion above, one of the key issues that arises is whether competent adult children should be given automatic eligibility or whether they should first be subject to additional criteria. Many critics have highlighted the unsatisfactorily high incidences of claims made by financially secure adult children.\(^{153}\) It has been argued that obligations to children should end once they are self-supporting and that the community would only expect parents to provide a buffer for adult children when

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\(^{152}\) [2012] VSC 63 (1 March 2012).

\(^{153}\) Chesterman, above n 42, 15; Renwick, above n 11, 173; McGregor-Lowndes and Hannah, ‘Reforming ‘Tyrannical Testators vs Greying Heirs?’’, above n 6, 78; Rosalind F Croucher, ‘Succession Law Reform in NSW — 2011 Update’, above n 129.
they fall on hard times or if they lack the resources to meet ill health or advancing years.\textsuperscript{154} This implies a further criterion of need or dependency for competent adult children.\textsuperscript{155} This issue has been reviewed by law reform commissions in the United Kingdom, New Zealand and Australia.

A United Kingdom Law Commission

In 1971, the United Kingdom Law Commission published a consultation paper on Family Property Law which resulted in the enactment of the \textit{Inheritance (Provision for Family and Dependants) Act 1975} (UK).\textsuperscript{156} The Commission considered whether an age limit or dependency test for adult children claimants would be appropriate, but decided against restricting claims of adult children in this manner, leaving it to the courts to determine whether a claimant was deserving.\textsuperscript{157}

The Commission was concerned that limiting the claims of adult children might result in unfairness in those cases where the parent had a moral obligation to support their adult child during their lifetime, but refused to.\textsuperscript{158} The Commission was also concerned about instances where an adult child requires support after the death of the parent.\textsuperscript{159}

With respect to step-children, the Commission recommended that the law introduce a new category of ‘eligible applicant’. This would apply to any person (not being a child of the deceased), who in the case of any marriage or civil partnership to which the deceased was at any time a party, was treated as a child of the family in relation to that marriage or civil partnership.\textsuperscript{160} This recommendation was enacted in the 1975 Act.

More recently, in 2008, the Commission consulted widely on the subject of family provision, producing a report in 2011 on ‘Intestacy and Family Provision Claims on Death’ to the British Parliament.\textsuperscript{161} The Commission made reference to the cases

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\textsuperscript{155} See also Renwick, above n 11, 174–5.


\textsuperscript{157} Ibid.

\textsuperscript{158} Ibid [76].

\textsuperscript{159} Ibid.

\textsuperscript{160} Ibid [79].

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of *Re Hancock*\(^{162}\) and *Ilott*\(^{163}\) to describe the restrictive approach to adult children taken under the UK case law. The following part of the Court of Appeal’s judgment in *Re Hancock* was referenced in the Commission’s report:

> If ... the adult child is in employment, with an earning capacity for the foreseeable future, it is unlikely he will succeed in his application without some special circumstance such as a moral obligation.\(^{164}\)

Consultees were asked whether the 1975 Act should be amended to afford adult children a greater chance of success.\(^{165}\) The strong view was that the current law should not be changed and ultimately, the Commission made no provisional proposal for reform with respect to children.\(^{166}\) The Commission did recommend an extension of the law with respect to the treatment of step-children. In that regard, the Commission recommended that the relationship between the child and the deceased did not have to be preferable to the deceased’s marriage or civil partnership.\(^{167}\)

### B New Zealand Law Commission

In 1997, the New Zealand Law Commission published a report following a review of its family provision laws.\(^{168}\) The report recommended that with respect to adult children, a stricter approach be taken and that there was no support for an equal shares approach in its consultation.\(^{169}\) It considered that family provision laws served a ‘reward’ and ‘support’ role and that judicial rewriting of wills was inappropriate in all but the most extreme cases.\(^{170}\)

The Law Commission provided the following reasoning:

> Powers to provide for adult children that are as extensive and indeterminate as those in the present law would, if applied to the living, be judged rightly as unacceptable. No reason has been advanced why they should apply after a will-maker’s death.\(^{171}\)

\(^{162}\) [1998] 2 FLR 346.

\(^{163}\) [2011] 2 FCR 1.


\(^{165}\) United Kingdom Law Commission, *Intestacy and Family Provision Claims on Death*, above n 161, [6.12].

\(^{166}\) Ibid [6.13].

\(^{167}\) Ibid [6.31].


\(^{169}\) Ibid [48].

\(^{170}\) Ibid [74].

\(^{171}\) Ibid [75].
The Law Commission recommended that adult independent children should only be able to make a claim under certain circumstances: if they provided valuable benefits to the parent during the parent’s lifetime; if the adult child is in genuine need and there would be no adverse impact to the beneficiaries under the deceased parents’ will to support them with periodic payments; or if the child is seeking a memento or keepsake of sentimental value only.\textsuperscript{172} In all other instances, adult claims should be disallowed.

With respect to step-children, the Law Commission recommended that claims be limited to those situations where the child and step-parent shared a relationship of parent and child and where the step-parent has assumed the responsibilities of a parent.\textsuperscript{173}

\textbf{C National Committee for Uniform Succession Laws in Australia}

The National Committee for Uniform Succession Laws in Australia completed their Uniform Succession Laws Project in 2009.\textsuperscript{174} To date, its recommendations have only been partially implemented in New South Wales in the \textit{Succession Act 2006 (NSW)}, and Western Australia in the \textit{Inheritance (Family and Dependents Provision) Amendment Act 2011 (WA)}.

With respect to adult children, the Committee recommended that eligibility should not extend to adult children of the deceased person unless it can be shown that they are a person for whom the deceased person had a responsibility to make provision for the person’s maintenance, education or advancement in life.\textsuperscript{175} In that regard, the Committee recommended that being an adult child was not enough to bring a claim against the deceased parent.

A draft Family Provision Bill 2004 was produced as part of the project. Clause 6 of the Bill provided that a ‘non-adult child’ (meaning a minor, but not including a step-child) is ‘automatically’ entitled to apply. Clause 7 provides that a person to whom the deceased owed a responsibility to provide maintenance, education or advancement in life may apply to the court for a family provision order. Accordingly, step-children, adult children, and other family members are not ‘automatically’

\textsuperscript{172} Ibid [77].
\textsuperscript{173} Ibid [79].
\textsuperscript{174} The National Committee’s Report and Supplementary Report on Family Provision have been published by the Queensland Law Reform Commission, Miscellaneous Paper 28, December 1997 and Report 58, July 2004. This was a joint project conducted by the National Committee for Uniform Succession Laws with all States and Territories under the direction of the Queensland Law Reform Commission.
entitled under clause 6 and have to apply under clause 7. Such a provision is yet to be adopted in any state in Australia.\textsuperscript{176}

\textbf{D Victorian Law Reform Commission}

The Victorian Law Reform Commission (‘VLRC’) announced in March 2012 that it would be undertaking an inquiry into succession laws. The Succession Laws Report of the VLRC was published in 2013.\textsuperscript{177} With respect to the \textit{Administration and Probate Act 1958} (Vic) as it applies to children, the Commission recommended that the Victorian Parliament implement the New South Wales test for eligibility, but extend it to include step-children.\textsuperscript{178} Accordingly, it was recommended that adult children and step-children should be eligible to make a claim in all circumstances. This recommendation was despite earlier references in the report to cases involving ‘opportunistic, or non-genuine claims, which although they lack merit, are settled by estates for “go away money” in order to avoid the depletion of the estate through legal costs’.\textsuperscript{179}

On 20 August 2014, the Justice Legislation Amendment (Succession and Surrogacy) Bill 2014 was tabled in the Victorian Parliament. Controversially, adult children were excluded from the list of eligible claimants, unless the adult child suffered from a disability or was between the ages of 18 and 25 and a full-time student, or was wholly or partially dependant on the deceased.\textsuperscript{180} Any ‘special circumstances’ the child could raise would be irrelevant under the Bill. The proposed amendments went far beyond any other jurisdiction in Australia, beyond what was recommended by the VLRC and applied an even stricter test than that for ‘adult sons’ in the early 1900s. The Bill elevated the position of step-children giving them equal status to biological children.

It is clear that a primary objective of the Bill was to prevent unmeritorious claims and to mitigate against the costs in these matters. The policy behind the Bill was discussed in the second reading speech as follows:

\begin{quote}
The starting point is that a deceased is entitled to dispose of their estate as they see fit, and this should only be departed from where they had a moral duty to provide for the needs of the claimant and yet failed to do so.
\end{quote}

\textsuperscript{176} Department of Justice (NSW), ‘Statutory Review of the Succession Act 2006’ (Report, February 2018). Most recently, the New South Wales Department of Justice Review conducted a statutory review of the \textit{Succession Act 2006} (NSW). It was recommended that there be no reform to the eligibility of adult children or step children.

\textsuperscript{177} Victorian Law Reform Commission, above n 3.

\textsuperscript{178} Ibid 114 (Recommendation 38).


\textsuperscript{180} Justice Legislation Amendment (Succession and Surrogacy) Act 2014 s 3 (see definition of \textit{eligible person} (b)).
Thus, for example, adult children successfully leading independent lives would not usually have grounds to claim on an estate.181

The Law Institute of Victoria (‘LIV’) raised serious concerns with the Bill to the Attorney-General and successfully lobbied that the Bill not be passed unless adult children were able to make family provision claims.182 The LIV provided examples of adult children who would not be able to make a claim under the Bill.183 The first involved the deceased parent providing for one child and not the other or others based on the gender of their children. The adult children who miss out would not be able to make a claim. The second and third involved an unemployed child living away from home or an adult child living away from home due to their parent’s mental health issues. These adult children are dependant at the time of their parent’s death and would not be able to make a claim. Finally, an example was provided of a financially dependent adult child who shortly after their parent’s death is diagnosed with a disease and is unable to work. Again, this adult child would be independent at the time of their parent’s death and would not be able to make a claim.

The Government acknowledged that the Bill went too far in taking away the rights of the adult family members who might have good reason to contest a will. The amended Bill was passed on 16 October 2014 resulting in the enactment of the Justice Legislation Amendment (Succession and Surrogacy) Act 2014 which was given royal assent on 21 October 2014. The current position in Victoria is that adult children and step-children are eligible claimants in all circumstances.184 However, in determining the extent of provision to be made by a family provision order, if any, the court must take into account the degree to which the adult child or step-child is not capable, by reasonable means, of providing adequately for their proper maintenance and support.185 This new provision which applies to adult children and step-children may deter some of the opportunistic claims made by adult children under the Victorian family provision legislation. At the 2017 STEP Australia Conference, Justice Kate McMillan of the Supreme Court of Victoria highlighted that the number of family provision cases in Victoria has reduced since the passing of the Act, although, simultaneously, there has been an increase in constructive trusts claims.

E South Australian Law Reform Institute

The authors of this article are two of the co-authors of the South Australian Law Reform Institute’s (‘SALRI’) final report on the Inheritance (Family Provision)
Act 1972 (SA), which was referred to the Attorney General in December 2017. With respect to independent adult children, SALRI took the view that, whilst legitimate concerns were raised during consultation with respect to independent adult children, it would be problematic to restrict the circumstances in which adult children are able to make a claim under the Act. In particular, SALRI’s final report notes that imposing restrictions on the eligibility for adult children leads to a real risk of precluding deserving claims and may in some situations encourage dependency.

With respect to adult step-children, SALRI took the view that the present automatic eligibility to make a claim is inappropriate for step-children and that there should be exceptions to permit adult step-children to make a claim under the Act but only in limited circumstances. These circumstances include: that the adult step-child is significantly vulnerable (such as with a physical or intellectual disability); the adult step-child substantially contributed to the testator’s estate or care; the adult step-child was genuinely dependent on the testator at the time of the testator’s death; or the assets accumulated by the adult step-child’s natural parent substantially contributed to the estate of the testator.

VIII Costs

The extensive implications arising from the complex issue of costs in family provisions claims are beyond the scope of this article. However, it is important to note that the problem of costs is very closely related to opportunistic claims. There are complaints of practitioners who exploit the common assumption that all costs are paid out of the estate, resulting in an increase of opportunistic claims being brought forward at the expense of the beneficiaries and the estate. Executors may be forced to settle such opportunistic claims in order to protect the estate from further costs.

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187 Ibid 64, 67 (Recommendation 10): SALRI recommended that the law should remain as it is, and adult children who are competent and self-supporting and all other adult children should automatically be eligible to make a family provision claim, just like children under the age of 18.
188 Ibid 64.
189 Ibid 65.
190 Ibid 67 (Recommendation 11).
191 Victorian Law Reform Commission, above n 3, 100.
and delays,\textsuperscript{194} as indicated by a high 87 per cent success rate in mediation.\textsuperscript{195} Even without demonstrating need, applicants may walk away with $10,000 or $20,000 as ‘go away’ money.\textsuperscript{196} Whether defended or settled, these opportunistic claims result in an unnecessary diminishment of the estate size due to the excessive and highly disproportionate legal costs that are usually borne out of the estate.\textsuperscript{197}

However, there have been recent discussions on a re-evaluation of the probate costs rule. In 2014, the Chief Justice of South Australia observed that ‘[t]he probate costs rule is arguably anachronistic in modern times in which there is a greater concern with the need for proportionality in litigation. It may soon be necessary to reconsider it’.\textsuperscript{198} Subsequent cases have emphasised the need to develop a stricter approach to costs,\textsuperscript{199} although a major change is yet to be seen.

**IX Reforms to Australia’s Family Provision Law**

This article has focused on the role of adult children in family provision litigation. The studies referred to in this paper indicate this as one of the major issues in family provision litigation around Australia. With respect to the issues of law, these concerns have arisen from liberal interpretations of the grounds of criteria by courts and, with respect to the issues of policy, they have arisen from a serious encroachment on testamentary freedom and an unhealthy culture of entitlement.

Family provision law is one of the most fundamental frameworks with respect to the role that property plays in families and it is an area where community expectations must align with the law. In that regard, it is apparent that the modern rationale of family provision is flawed and misaligned with community expectations. It has led to opportunistic claims and costly litigation, largely by competent adult children. Reform is necessary to resolve the inefficiencies and to align the Acts with their original purposes and with community expectations.

It is important that reform seeks to find a balance between the two competing aims: respecting testamentary freedom and ensuring adequate provision for those with

\textsuperscript{194} McGregor-Lowndes and Hannah, ‘Tyrannical Testators vs Greying Heirs?’, above n 6, 63; Victorian Law Reform Commission, above n 3, xvii, 99–100.

\textsuperscript{195} Tilse et al, ‘Having the Last Word?’, above n 75, 17; Victorian Law Reform Commission, above n 3, 99–100.

\textsuperscript{196} McGregor-Lowndes and Hannah, ‘Every Player Wins a Prize?’ above n 69, 77; Victorian Law Reform Commission, above n 3, 100.

\textsuperscript{197} Victorian Law Reform Commission, above n 3, 99. See also Vines, above n 96, 31.

\textsuperscript{198} [2014] SASC 98 (7 August 2014) [65].

\textsuperscript{199} See, eg, *Harkness v Harkness (No 2)* [2012] NSWSC 35 (2 February 2012); *Barbon v Tessar (No 2)* [2015] VSC 597 (30 October 2015); *Re Frances Ponikvar (Deceased) (No 2)* [2016] SASC 166 (4 November 2016); *Roche v Roche (No 2)* [2017] SASC 75 (5 June 2017) [17]–[18].
legitimate claims. Practically, this would be focused on reducing the number of opportunistic claims, while ensuring those with legitimate claims are not excluded.

One option for reform is to disallow adult children to be able to make a claim unless they can establish that the deceased had a responsibility to provide for them, or require adult children to establish further criteria before they are eligible to make a claim. This criteria could be either financial need or demonstration of contributions to the testator's welfare or estate. Other possible options include attributing greater weight to the testator's wishes and reasons through legislative amendment in those states that do not provide this requirement as well as a possible exclusion of the concept of moral duty to be replaced by a statutory list of considerations.

X Conclusion

This article has provided an overview of the underlying original policy rationale concerning family provision legislation and then undertook a detailed analysis of the issues arising from the current modern rationale. With respect to adult children claimants, this article has revealed that the current law in operation raises significant issues in law, policy and practice.

While this article strongly advocates restricting the claims of adult children to reduce the initial occurrence of opportunistic claims and the flow-on costs, the authors of this article recognise that this action is insufficient on its own to address the deeper societal issues at play. By placing a higher emphasis on testator's wishes and excluding or clarifying the concept of moral duty, this may focus on restoring the importance of testamentary freedom and establishing a logical basis for the success of family provision claims. Ultimately, a comprehensive investigation and reform involving community education, legal education and in-practice processes is necessary to challenge the underlying perception of entitlement.


201 Ibid.

202 Tilse et al, ‘Having the Last Word?’, above n 75, 6.
### APPENDIX 1 — FAMILY PROVISION LAW IN AUSTRALIA

**(LIST OF ELIGIBLE APPLICANTS AND DISCRETIONARY FACTORS)**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>List of Eligible Applicants</th>
<th>Grounds of Criteria</th>
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</thead>
</table>
| **South Australia** | **Inheritance (Family Provision) Act 1972**  
| s 6 | (a) Spouse  
(b) Former spouse  
(ba) Domestic partner (including former domestic partners under s4)  
(c) Children  
(g) Step-children (including of former domestic partners) if they were maintained wholly or partly or legally entitled to be maintained wholly or partly by the deceased immediately before his death  
(h) Grandchildren  
(i) Parents if they cared for, or contributed to the maintenance of the deceased during his lifetime  
(j) Siblings if they cared for, or contributed to the maintenance of the deceased during his lifetime | s 7(1)(b): If the applicant is left without adequate provision for his proper maintenance, education or advancement in life, the Court may order such provision as the Court thinks fit out of the deceased’s estate for the applicant’s maintenance, education or advancement in life. |
| **Victoria** | **Administration and Probate Act 1958**  
| s 90 | (a) Spouse or domestic partner  
(b) Children (including adopted) if under 18 OR full-time student between 18–25 OR disabled child  
(c) Step-children if under 18 OR full-time student between 18–25 OR disabled child  
(d) Person who for a substantial period of deceased’s life, believed deceased was parent and was treated as such— if under 18 OR full-time student between 18–25 OR disabled child | s 91(1): On an application under section 90A, the Court may order that provision be made out of the estate of a deceased person for the proper maintenance and support of an eligible person.  
s 91A(1): In making a family provisions order, the Court must have regard to:  
(a) The deceased’s will  
(b) Deceased’s reasons for making dispositions  
(c) Deceased’s intentions to providing for applicant |

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203 Please note that some extracted sections of legislation in this table have been paraphrased for simplicity and clarity. For the exact wording, please refer to the original Acts.
<table>
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<tr>
<th>Jurisdiction</th>
<th>List of Eligible Applicants</th>
<th>Grounds of Criteria</th>
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</table>
| Victoria cont. | (e) Former spouse/domestic partner if at the time of the deceased’s death, they could have taken proceedings under the *Family Law Act 1975* (Cth)  
(f) Child / step-child not referred to in (b) and (c)  
(g) Person who for a substantial period of deceased’s life, believed deceased was parent and was treated as such  
(h) Registered caring partner of deceased  
(i) Grandchild  
(j) Spouse or domestic partner of deceased’s child where child dies within one year of deceased’s death  
(k) Person who was a member of the deceased’s household | s 91A(2): the court may have regard to the following criteria:  
(a) Relationship between deceased and applicant  
(b) Obligations or responsibilities of deceased to applicant, other applicants and beneficiaries  
(c) Size and nature of estate  
(d) Financial resources, including earning capacity and financial needs of applicant and beneficiary of estate  
(e) Any physical, mental or intellectual disability of applicant or beneficiary of estate  
(f) Age of applicant  
(g) Contribution of applicant to estate or welfare of deceased or deceased’s family  
(h) Benefits previously given by deceased to applicant or beneficiary  
(i) Whether applicant maintained by deceased before deceased’s death  
(j) Liability of any other person to maintain applicant  
(k) Applicant’s character and conduct  
(l) Effect of family provision order on amounts received from deceased’s estate by other beneficiaries  
(m) Any other relevant matter |

s 91(2)(c)–(d): Applicants from (h)–(k) must have been wholly or partly dependent on the deceased for their maintenance and support, AND at the time of death, the deceased had a moral duty to provide for the applicant’s proper maintenance and support, AND his distribution of his estate failed to make adequate provision for the proper maintenance and support of the applicant

s 91(4): Court may take into account the degree:  
(a) of moral duty the deceased had at the time of death
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<th>Jurisdiction</th>
<th>List of Eligible Applicants</th>
<th>Grounds of Criteria</th>
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| Western Australia  
*Family Provision Act 1972* | s 7(1)  
(a) spouse or domestic partner  
(b) former spouse or domestic partner who at the time of the deceased’s death was receiving or entitled to receive maintenance from the deceased  
(c) child (including children born within 10 months after the deceased’s death)  
(d) grandchild if maintained wholly or partly by the deceased OR one of the parents was the deceased’s child and had predeceased the deceased OR if born within 10 months after the deceased’s death and one of the parents was the deceased’s child and had predeceased the deceased  
(e) step-child if maintained wholly or partly or was entitled to be maintained wholly or partly by the deceased OR where deceased received or was entitled to receive property from estate of the step-child’s parent above the prescribed value.  
(f) Parents, if relationship was admitted by deceased or established in lifetime of deceased | s 91(5)(b): for applicants (h)–(k), the definition of ‘eligible person’ must be proportionate to the applicant’s degree of dependency on the deceased  
(b) to which the distribution of the deceased’s estate failed to make adequate provision for the proper maintenance and support of the applicant  
(c) to which the applicant is not capable, by reasonable means, of providing adequately for his own proper maintenance and support — for applicants (f)–(g)  
(d) to which the applicant was wholly or partly dependent on the deceased at the time of the deceased’s death for their proper maintenance and support — for applicants (h)–(k)  

s 6(1): if the disposition of the deceased’s estate does not make adequate provision for the proper maintenance, support, education or advancement in life of any of the person mentioned in s 7, the Court may order such provision as the Court thinks fit out of the deceased’s estate.
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<th>Jurisdiction</th>
<th>List of Eligible Applicants</th>
<th>Grounds of Criteria</th>
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<tr>
<td>New South Wales</td>
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<td>s 57(1)</td>
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<tr>
<td><em>Succession Act 2006</em></td>
<td>(a) Spouse</td>
<td>(a) Relationship between applicant and deceased</td>
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<td></td>
<td>(b) Domestic partners</td>
<td>(b) Obligations or responsibilities owed by deceased to applicant</td>
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<td>(c) Children (s 57(2)): including adopted children, children born in a de facto relationship</td>
<td>(c) Nature and extent of deceased’s estate</td>
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<td>by virtue of <em>Status of Children Act 1996</em></td>
<td>(d) Financial resources and financial needs of applicant</td>
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<td>and a child for whose long-term welfare both parties have parental responsibility by</td>
<td>(e) Financial circumstances of person applicant is cohabitating with</td>
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<td>virtue of <em>Children and Young Persons (Care and Protection) Act 1998</em></td>
<td>(f) Physical, intellectual or mental disability of applicant</td>
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<td></td>
<td>(d) Former spouse</td>
<td>(g) Age of applicant</td>
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<td>(e) Person who was wholly or partly dependent on the deceased AND was a grandchild OR a</td>
<td>(h) Any contribution by applicant to the deceased’s estate or welfare</td>
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<td>member of the deceased’s household</td>
<td>(i) Any provisions for the applicant by the deceased</td>
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<td>(f) Person in a close personal relationship with the deceased at the time of the deceased’s</td>
<td>(j) Evidence of deceased’s testamentary intentions</td>
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<td>death (where one or each of whom provides domestic support and personal care: s 3(3))</td>
<td>(k) Whether applicant was maintained, wholly or partly, by the deceased</td>
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<td>(l) Whether any other person is liable to support applicant</td>
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<td>(m) Character and conduct of applicant</td>
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<td>(n) Character and conduct of any other person</td>
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<td></td>
<td></td>
<td>(o) Relevant Aboriginal or Torres Strait Islander customary law</td>
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<td>(p) Any other relevant matter</td>
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<td>Northern Territory</td>
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<td>s 59(1)–(2): if adequate provision for the proper maintenance, education or advancement has not been made for the applicant, the court may make such order for provision out of the estate</td>
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<td><em>Family Provision Act 1970</em></td>
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<td>s 60(1)–(2): in determining whether to make a family provision order, the Court may have regard to:</td>
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<td>(a) Relationship between applicant and deceased</td>
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<td>(b) Obligations or responsibilities owed by deceased to applicant</td>
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<td>(c) Nature and extent of deceased’s estate</td>
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<td>(f) Physical, intellectual or mental disability of applicant</td>
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<td>(g) Age of applicant</td>
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<td>(h) Any contribution by applicant to the deceased’s estate or welfare</td>
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<td>(j) Evidence of deceased’s testamentary intentions</td>
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<td>(k) Whether applicant was maintained, wholly or partly, by the deceased</td>
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<td>(p) Any other relevant matter</td>
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<td>s 8(1): if adequate provision is not available from the estate of the deceased for the proper maintenance, education and advancement in life of the applicant, the court may order such provision as fit out of the estate of the deceased.</td>
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<td>s 22: the court shall have regard to the testator’s reasons for making the dispositions.</td>
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<td>Jurisdiction</td>
<td>List of Eligible Applicants</td>
<td>Grounds of Criteria</td>
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| Northern Territory cont.  | (e) Grandchild – if parent was a child of the deceased and had predeceased the deceased OR grandchild was not maintained by parent or parents at time of deceased’s death  
(f) Parent – if maintained by deceased immediately before deceased’s death OR deceased was not survived by spouse, de facto partner or any children | s 8(2): the court shall make an order if adequate provision for the proper maintenance, education or advancement in life of the applicant is not available.  
s 8(3) – criteria for decision under subsection (2):  
(a) Applicant’s character and conduct  
(b) Relationship between applicant and deceased  
(c) Financial and non-financial contributions by either or both applicant and deceased to the property or financial resources or either or both persons  
(d) Any contributions by applicant or deceased to welfare of another or of child of either person  
(e) Income, property and financial resources of applicant and deceased  
(f) Applicant and deceased’s physical and mental capacity for gainful employment  
(g) Financial needs and obligations of applicant and deceased  
(h) Responsibility of either applicant and deceased to support any other person  
(i) Terms of any order under the Domestic Relationships Act 1994  
(j) Any payments to either the applicant or deceased by the other in respect of the maintenance of the other person or child of other person  
(k) Any other relevant matter  
s 22: the court shall have regard to the testator’s reasons for making the dispositions |
| Australian Capital Territory  | Family Provision Act 1969  
s 7(1)  
(a) Partner (s 7(9)): defined to include someone who was the domestic partner of the deceased at any time AND either: deceased’s spouse, civil union partner or civil partner at any time OR deceased’s domestic partner continuously for 2 or more years at any time OR parent of a child of the deceased  
(b) Person in domestic relationship with deceased for 2 or more years continuously  
(c) Child  
(d) Step-child – must be maintained by the deceased immediately before the deceased’s death  
(e) Grandchild – if parent of grandchild was child of deceased and had predeceased the deceased OR grandchild was not maintained by parent or parents at time of deceased’s death  
(f) Parent – if maintained by deceased immediately before deceased’s death OR deceased was not survived by partner or any children |  

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<tr>
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<tr>
<td>Tasmania</td>
<td><strong>s 3A</strong>&lt;br&gt;(a) Spouse: including domestic partners (s 2(1))&lt;br&gt;(b) Children: including adopted, step-children and surrogate children (s 2(1))&lt;br&gt;(c) Parents, if deceased dies without leaving spouse or children&lt;br&gt;(d) Former spouse, if receiving or entitled to receive maintenance from the deceased&lt;br&gt;(e) Person whose significant relationship with deceased, within meaning of Relationships Act 2003, had ceased before date of deceased’s death and who was receiving or entitled to receive maintenance from the deceased</td>
<td><strong>s 3(1):</strong> if applicant is left without adequate provision for his proper maintenance and support, the court may order such provision as the court, having regard to all the circumstances of the case, thinks proper out of the deceased’s estate. <strong>s 7:</strong> in fixing the amount of provision, the court shall have regard to the net value of the estate and whether any such person is entitled to independent means. <strong>s 8A:</strong> the court may have regard to the deceased’s reasons for making the dispositions and the court may accept such evidence of those reasons as it considers sufficient</td>
</tr>
<tr>
<td>Queensland</td>
<td><strong>s 41(1):</strong> spouse, child or dependant&lt;br&gt;<strong>s 5AA:</strong> spouse = husband or wife; de facto partner (as defined in AIA); civil partner; former husband or wife; former civil partner (if had not remarried or entered into civil partnership with another person before deceased’s death AND was entitled to receive maintenance at time of deceased’s death)&lt;br&gt;<strong>s 40:</strong> child = any child, step-child or adopted child&lt;br&gt;<strong>s 40:</strong> dependant = any person who was being wholly or substantially maintained or supported by the deceased being:&lt;br&gt;(a) Parent of deceased&lt;br&gt;(b) Parent of surviving child under 18 of deceased&lt;br&gt;(c) Person under 18&lt;br&gt;<strong>s 40A:</strong> step-child = person is the child of deceased’s spouse AND the relationship between the step-child and step-parent did not stop due to a divorce, ending of civil partnership or ending of a de facto relationship between the step-parent and step-child’s parent</td>
<td><strong>s 41(1):</strong> if adequate provision is not made for the proper maintenance and support of the deceased’s spouse, child or dependent, the court may order such provision as it thinks fit out of the deceased’s estate. <strong>s 41(1A):</strong> the court shall not make an order for dependant unless satisfied it is proper that some provision is made for the dependant, having regard to the extent to which the dependant was maintained or supported by deceased before the deceased person’s death and the dependant’s need for continue maintenance and support</td>
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<td>Jurisdiction</td>
<td>List of Eligible Applicants</td>
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<tr>
<td>Queensland</td>
<td>The relationship of step-child and step-parent does not stop merely because:</td>
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<td>cont.</td>
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<td>(a) the step-child's parent had predeceased the step-parent, and the marriage, civil partnership or de facto relationship between the step-parent and step-child's parent subsisted when the parent died; or</td>
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<td>(b) the step-parent remarried, entered into a civil partnership or formed a de facto relationship after the parent's death, if the marriage, civil partnership or de facto relationship between the parent and step-parent subsisted when the parent died</td>
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<tr>
<td>South Australia</td>
<td>The following persons are, in respect of the estate of a deceased person, entitled to claim the benefit of this Act:</td>
<td>s 7(1):</td>
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<tr>
<td><em>Inheritance (Family Provision) Act 1972</em></td>
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<td></td>
<td>(a) the spouse of the deceased person;</td>
<td>Where –</td>
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<td>(b) a person who has been divorced from the deceased person;</td>
<td>(a) a person has died domiciled in the State or owning real or personal property in the State; and</td>
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<td>(ba) the domestic partner of the deceased person;</td>
<td>(b) by reason of his testamentary dispositions or the operation of the laws of intestacy or both, a person entitled to claim the benefit of this Act is left without adequate provision for his proper maintenance, education or advancement in life,</td>
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<td>(c) a child of the deceased person;</td>
<td>the Court may in its discretion, upon application by or on behalf of a person so entitled, order that such provision as the Court thinks fit be made out of the estate of the deceased person for the maintenance, education or advancement of the person so entitled.</td>
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<td>(g) a child of a spouse or domestic partner of the deceased person being a child who has maintained wholly or partly or who was legally entitled to be maintained wholly or partly by the deceased person immediately before his death;</td>
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<td>(h) a child of the deceased person;</td>
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<td>(i) a parent of the deceased person who satisfies the court that he cared for, or contributed to the maintenance of, the deceased person during his lifetime;</td>
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<td>(j) a brother or sister of the deceased person who satisfies the court that he cared for, or contributed to the maintenance of, the deceased person during his lifetime.</td>
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<td>Jurisdiction</td>
<td>List of Eligible Applicants</td>
<td>Grounds of Criteria</td>
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<tr>
<td>Victoria</td>
<td>s 90:</td>
<td>s 91(1): Despite anything to the contrary in this Act, on an application under section 90A, the Court may order that provision be made out of the estate of a deceased person for the proper maintenance and support of an eligible person.</td>
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<td>(l) a person who was the spouse or domestic partner of the deceased at the time of the deceased's death;</td>
<td>s 91(2): The Court must not make a family provision order under subsection (1) unless satisfied –</td>
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<td>(m) a child of the deceased, including a child adopted by the deceased who, at the time of the deceased's death, was –</td>
<td>(a) that the person is an eligible person; and</td>
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<td>(n) a step-child of the deceased who, at the time of the deceased's death, was –</td>
<td>(b) in the case of a person referred to in paragraphs (h) to (k) of the definition of 'eligible person', that the person was wholly or partly dependent on the deceased for the eligible person's proper maintenance and support; and</td>
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<td>(o) a person who, for a substantial period during the life of the deceased, believed that the deceased was a parent of the person and was treated by the deceased as a natural child of the deceased who, at the time of the deceased's death, was –</td>
<td>(c) that, at the time of death, the deceased had a moral duty to provide for the eligible person's proper maintenance and support; and</td>
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<td>(p) a former spouse or former domestic partner of the deceased if the person, at the time of the deceased's death –</td>
<td>(d) that the distribution of the deceased's estate fails to make adequate provision for the proper maintenance and support of the eligible person, whether by –</td>
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<td>(ii) has either –</td>
<td>(i) the deceased's will (if any); or</td>
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<td>(A) not taken those proceedings; or</td>
<td>(ii) the operation of Part IA; or</td>
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<td>(B) commenced but not finalised those proceedings; and</td>
<td>(iii) both the will and the operation of Part IA.</td>
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<td>(iii) is now prevented from taking or finalising those proceedings because of the death of the deceased;</td>
<td>s 91(4): In determining the amount of provision to be made by a family provision order, if any, the Court must take into account –</td>
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<td></td>
<td>(q) a child or step-child of the deceased not referred to in paragraph (b) or (c);</td>
<td>(a) the degree to which, at the time of death, the deceased had a moral duty to provide for the eligible person; and</td>
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<td>(b) the degree to which the distribution of the deceased's estate fails to make adequate provision for the proper maintenance and support of the eligible person; and</td>
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<td>Jurisdiction</td>
<td>List of Eligible Applicants</td>
<td>Grounds of Criteria</td>
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<td>(r)</td>
<td>a person who for a substantial period during the life of the deceased, believed that the deceased was a parent of the person and was treated as a natural child of the deceased not referred to in paragraph (d);</td>
<td>(c) in the case of an eligible person referred to in paragraph (f) or (g) of the definition of ‘eligible person’, the degree to which the eligible person is not capable, by reasonable means, of providing adequately for the eligible person’s proper maintenance and support; and</td>
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<td>(s)</td>
<td>a registered caring partner of the deceased;</td>
<td>(d) in the case of an eligible person referred to in paragraphs (h) to (k) of the definition of ‘eligible person’ the degree to which the eligible person was wholly or partly dependent on the deceased for the eligible person’s proper maintenance and support at the time of the deceased’s death.</td>
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<td>(t)</td>
<td>a grandchild of the deceased;</td>
<td>s 91A(1):</td>
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<td>(u)</td>
<td>a spouse or domestic partner of a child of the deceased (including a step-child or a person referred to in paragraph (d) or (g)) if the child of the deceased dies within one year of the deceased’s death;</td>
<td>In making a family provisions order, the Court must have regard to –</td>
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<td>(v)</td>
<td>a person who, at the time of the deceased’s death, is (or had been in the past and would have been likely in the near future, had the deceased not died, to again become) a member of the household of which the deceased was also a member;</td>
<td>(a) the deceased’s will, if any; and</td>
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<td>(b) any evidence of the deceased’s reasons for making the dispositions in the deceased’s will (if any); and</td>
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<td></td>
<td>(c) any other evidence of the deceased’s intentions in relation to providing for the eligible person.</td>
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</table>

s 91A(2):  
In making a family provision order, the Court may have regard to the following criteria:  
(a) any family or other relationship between the deceased and the eligible person, including –  
(i) the nature of the relationship; and  
(ii) if relevant, the length of the relationship;  
(b) any obligations or responsibilities of the deceased to –  
(i) the eligible person; and  
(ii) any other eligible person; and  
(iii) the beneficiaries of the estate;  
(c) the size and nature of the estate of the deceased and any charges and liabilities to which the estate is subject;
<table>
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<tr>
<th>Jurisdiction</th>
<th>List of Eligible Applicants</th>
<th>Grounds of Criteria</th>
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</table>
| Victoria cont. |                             | (d) the financial resources, including earning capacity, and the financial needs at the time of the hearing and for the foreseeable future of –  
(i) the eligible person; or  
(ii) any other eligible person; or  
(iii) any beneficiary of the estate;  
(e) any physical, mental or intellectual disability of any eligible person or any beneficiary of the estate;  
(f) the age of the eligible person;  
(g) any contribution (not for adequate consideration) of the eligible person to –  
(i) building up the estate; or  
(ii) the welfare of the deceased or the deceased’s family;  
(h) any benefits previously given by the deceased to any eligible person or to any beneficiary;  
(i) whether the eligible person was being maintained by the deceased before that deceased’s death either wholly or partly and, if the Court considers it relevant, the extent to which and the basis on which the deceased had done so;  
(j) the liability of any other person to maintain the eligible person;  
(k) the character and conduct of the eligible person or any other person;  
(l) the effect of a family provision order would have on amounts received from the deceased’s estate by other beneficiaries;  
(m) any other matter the Court considers relevant. |
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<tr>
<th>Jurisdiction</th>
<th>List of Eligible Applicants</th>
<th>Grounds of Criteria</th>
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<tbody>
<tr>
<td>Western Australia</td>
<td>Family Provision Act 1972</td>
<td>s 7(1):</td>
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<td></td>
<td>(a) a person who was married to, or living as the de facto partner of, the deceased person immediately before the death of the deceased person;</td>
<td>If any person (in this Act called the <em>deceased</em>) dies, then, if the Court is of the opinion that the disposition of the deceased’s estate effected by his will, or the law relating to intestacy, or the combination of his will and that law, is not such as to make adequate provision from his estate for the proper maintenance, support, education or advancement in life of any of the persons mention in section 7 as being persons by whom or on whose behalf application may be made under this Act, the Court may, at its discretion, on application made by or on behalf of any such person, order that such provision as the Court thinks fit is made out of the estate of the deceased for that purpose.</td>
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<td>(b) a person who at the date of the death of the deceased was receiving or entitled to receive maintenance from the deceased as a former spouse or former de facto partner of the deceased whether pursuant to an order of any court, or to an agreement or otherwise;</td>
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<td>(c) a child of the deceased living at the date of the death of the deceased, or born within 10 months after the deceased’s death;</td>
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<td>(d) a grandchild of the deceased –</td>
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<td>(i) who was being maintained wholly or partly by the deceased immediately before the deceased’s death; or</td>
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<td>(ii) who, at the date of the deceased’s death, was living and one of whose parents was a child of the deceased who had predeceased the deceased; or</td>
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<td>(iii) who was born within 10 months after the deceased’s death and one of whose parents was a child of the deceased who had predeceased the deceased;</td>
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<td>(ea) a step-child of the deceased who was being maintained wholly or partly or was entitled to be maintained wholly or partly by the deceased immediately before the deceased’s death;</td>
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<td>(eb) a step-child of the deceased, if</td>
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<td>(i) the deceased received or was entitled to receive property from the estate of a parent of the step-child, otherwise than as a creditor of that estate; and</td>
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<td>(ii) the value of that property, at the time of the parent’s death, is greater than the prescribed amount;</td>
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<td>a parent of the deceased, whether the relationship is determined through a legal marriage or otherwise, where the relationship was admitted by the deceased being of full age or established in the lifetime of the deceased.</td>
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<td>Jurisdiction</td>
<td>List of Eligible Applicants</td>
<td>Grounds of Criteria</td>
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<tr>
<td>New South Wales</td>
<td>s 57:</td>
<td>s 59:</td>
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<td></td>
<td>(1) The following are ‘eligible persons’ who may apply to the Court for a family provision order in respect of the estate of a deceased person:</td>
<td>(1) The Court may, on application under Division 1, make a family provision order in relation to the estate of a deceased person, if the Court is satisfied that:</td>
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<td></td>
<td>(a) a person who was the spouse of the deceased person at the time of the deceased person’s death,</td>
<td>(a) the person in whose favour the order is to be made is an eligible person, and</td>
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<td></td>
<td>(b) a person with whom the deceased person was living in a de facto relationship at the time of the deceased person’s death,</td>
<td>(b) in the case of a person who is an eligible person by reason only of paragraph (d), (e) or (f) of the definition of ‘eligible person’ in section 57 – having regard to all the circumstances of the case (whether past or present) there are factors which warrant the making of the application, and</td>
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<td></td>
<td>(c) a child of the deceased person,</td>
<td>(c) at the time when the Court is considering the application, adequate provision for the proper maintenance, education or advancement in life of the person in whose favour the order is to be made has not been made by the will of the deceased person, or by the operation of the intestacy rules in relation to the estate of the deceased person, or both.</td>
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<tr>
<td></td>
<td>(d) a former spouse of the deceased person,</td>
<td>(2) The Court may make such order for the provision out of the estate of the deceased person as the Court thinks ought to be made for the maintenance, education or advancement in life of the eligible person, having regard to the facts known to the Court at the time the order is made.</td>
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<td>(e) a person:</td>
<td>s 60:</td>
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<td></td>
<td>(i) who was, at any particular time, wholly or partly dependent on the deceased person, and</td>
<td>(1) The Court may have regard to the matters set out in subsection (2) for the purpose of determining:</td>
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<td></td>
<td>(ii) who is a grandchild of the deceased person or was, at that particular time or any other time, a member of the household of which the deceased person was a member,</td>
<td>(a) whether the person in whose favour the order is sought to be made (the “applicant”) is an eligible person, and</td>
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<td></td>
<td>(f) a person with whom the deceased person was living in a close personal relationship at the time of the deceased person’s death.</td>
<td>(b) whether to make a family provision order and the nature of any such order.</td>
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<td></td>
<td>(2) In this section, a reference to a child of a deceased person includes, if the deceased person was in a de facto relationship, or a domestic relationship within the meaning of the <em>Property (Relationships) Act 1984</em>, at the time of death, a reference to the following:</td>
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<td>(a) a child born as a result of sexual relations between the parties to the relationship,</td>
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<td>(b) a child adopted by both parties,</td>
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<td>(c) in the case of a de facto relationship between a man and a woman, a child of the woman of whom the man is the father or of whom the man is presumed, by virtue of the <em>Status of Children Act 1996</em>, to be the father (except where the presumption is rebutted),</td>
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<td>Jurisdiction</td>
<td>List of Eligible Applicants</td>
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<tr>
<td>(d)</td>
<td>in the case of a de facto relationship between 2 women, a child of whom both of those women are presumed to be parents by virtue of the Status of Children Act 1996,</td>
<td>(2) The following matters may be considered by the Court:</td>
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<tr>
<td>(e)</td>
<td>a child for whose long-term welfare both parties have parental responsibility (within the meaning of the Children and Young Persons (Care and Protection) Act 1998).</td>
<td>(a) any family or other relationship between the applicant and the deceased person, including the nature and duration of the relationship,</td>
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<td>(b) the nature and extent of any obligations or responsibilities owed by the deceased person to the applicant, to any other person in respect of whom an application has been made for a family provision order or to any beneficiary of the deceased person’s estate,</td>
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<td>(c) the nature and extent of the deceased person’s estate (including any property that is, or could be, designed as notional estate of the deceased person) and of any liabilities or charges to which the estate is subject, as in existence when the application is being considered,</td>
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<td>(d) the financial resources (including earning capacity) and financial needs, both present and future, of the applicant, of any other person in respect of whom an application has been made for a family provision order or of any beneficiary of the deceased person’s estate,</td>
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<td>(e) if the applicant is cohabiting with another person – the financial circumstances of the other person,</td>
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<td>(f) any physical, intellectual or mental disability of the applicant, any other person in respect of whom an application has been made for a family provision order or any beneficiary of the deceased person’s estate that is in existence when the application is being considered or that may reasonably be anticipated;</td>
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<td>(g) the age of the applicant when the application is being considered,</td>
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<td>(h) any contribution (whether financial or otherwise) by the applicant to the acquisition, conservation and improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person’s family, whether made before or after the deceased person’s death, for which adequate consideration (not including any pension or other benefit) was not received, by the applicant,</td>
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<td>Jurisdiction</td>
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<tr>
<td>New South Wales</td>
<td>cont.</td>
<td>(i) any provision made for the applicant by the deceased person, either during the deceased person’s lifetime or made from the deceased person’s estate,</td>
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<td>(j) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person,</td>
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<td>(k) whether the applicant was being maintained, either wholly or partly, by the deceased person before the deceased person’s death and, if the Court considers it relevant, the extent to which and the basis on which the deceased person did so,</td>
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<td>(l) whether any other person is liable to support the applicant,</td>
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<td>(m) the character and conduct of the applicant before and after the date of the death of the deceased person,</td>
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<td>(n) the conduct of any other person before and after the date of the death of the deceased person,</td>
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<td>(o) any relevant Aboriginal or Torres Strait Islander customary law,</td>
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<td>(p) any other matter the Court considers relevant, including matters in existence at the time of the deceased person’s death or at the time the application is being considered.</td>
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<td>Northern Territory</td>
<td>Family Provision Act 1970 s 7(1):</td>
<td>Subject to this section, each of the following persons is entitled to make application to the Court for provision out of the estate of a deceased person:</td>
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<td>(a) a spouse or de facto partner of the deceased person;</td>
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<td>(b) a former spouse or de facto partner of the deceased person;</td>
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<td>(c) a child of the deceased person;</td>
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<td>(d) a step-child of the deceased person;</td>
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<td>(e) a grandchild of the deceased person;</td>
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<td>(f) a parent of the deceased person.</td>
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<td>s 8(1):</td>
<td>Subject to this Act, upon application made by or on behalf of a person entitled to apply to the Court under section 7, if the Court is satisfied that adequate provision is not available, under the terms of the will of a deceased person or under the law applicable on the death of the person as an intestate or under the will and that law, from the estate of the deceased person for the proper maintenance, education and advancement in life of the person by whom, or on whose behalf the application is made, the Court may, in its discretion and having regard to all the circumstances of the case, order that such provision as the Court thinks fit be made out of the estate of the deceased person.</td>
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<tr>
<td>Jurisdiction</td>
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<td>Grounds of Criteria</td>
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<tr>
<td>Australian Capital Territory</td>
<td><em>Family Provision Act 1969</em> s 7(1):</td>
<td>s 8:</td>
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<td>Subject to this section, each of the following persons is entitled to make application to the</td>
<td>(1) On application by a person entitled, under section 7, to apply for provision</td>
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<td>Supreme Court for provision out of the estate of a deceased person:</td>
<td>out of the estate of a deceased person, the Supreme Court may order that the</td>
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<td>(a) a partner of a deceased person;</td>
<td>provision as that court thinks fit to be made for the applicant out of the estate.</td>
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<td>(b) a person (other than a partner of the deceased person) who was in a domestic relationship</td>
<td>(2) The Supreme Court shall only make an order under subsection</td>
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<td>with the deceased person for 2 or more years continuously at any time;</td>
<td>(1) if satisfied, in consideration of the criteria set out in subsection (3),</td>
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<td>(c) a child of the deceased person;</td>
<td>that as of the date of the order, adequate provision for the proper maintenance,</td>
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<td>(d) a step-child of the deceased person; a grandchild of the deceased person;</td>
<td>education or advancement in life of the applicant is not available –</td>
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<td>(g) a parent of the deceased person.</td>
<td>(a) under the will of the deceased; or</td>
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<td>(b) if the deceased died intestate – under the law applicable to that intestacy;</td>
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<td>or</td>
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<td>(c) under that will and that law combined.</td>
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<td>(3) The criteria for the Supreme Court’s decision under subsection (2) in relation</td>
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<td>to the deceased and the applicant are as follows:</td>
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<td>(a) the character and conduct of the applicant;</td>
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<td>(b) the nature and duration of the relationship between the applicant and the</td>
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<td>deceased;</td>
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<td>(c) any financial and non-financial contributions made directly or indirectly by</td>
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<td>or on behalf of either or both the applicant and the deceased to the acquisition,</td>
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<td>conservation or improvement of any of the property or financial resources of both</td>
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<td>persons;</td>
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<td>(d) any contributions (including any in the capacity of homemaker or parent) by</td>
</tr>
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<td></td>
<td>either the applicant or the deceased to the welfare of the other, or of any child</td>
</tr>
<tr>
<td></td>
<td></td>
<td>of either person;</td>
</tr>
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<td></td>
<td></td>
<td>(e) the income, property and financial resources of the applicant and the deceased;</td>
</tr>
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<td></td>
<td></td>
<td>(f) the physical and mental capacity of the applicant, and the deceased (during</td>
</tr>
<tr>
<td></td>
<td></td>
<td>his or her life), for appropriate gainful employment;</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>List of Eligible Applicants</td>
<td>Grounds of Criteria</td>
</tr>
<tr>
<td>------------------------------</td>
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<td>-------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Australian Capital</td>
<td></td>
<td>(g) the financial needs and obligations of the applicant and the deceased (during the life of the deceased);</td>
</tr>
<tr>
<td>Territory cont.</td>
<td></td>
<td>(h) the responsibilities of either the applicant or the deceased (during his or her life) to support any other person;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(i) the terms of any order made under the Domestic Relationships Act 1994, section 15 with respect to the property of the applicant or the deceased;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(j) any payments made to either the applicant or the deceased by the other, under an order of the court or otherwise, in respect of the maintenance of the other person or any child of the other person;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(k) any other matter the court considers relevant.</td>
</tr>
</tbody>
</table>

s 22:  
(1) The Supreme Court shall, in determining an application for an order under section 8 or 9A, have regard to the testator's reasons, so far as they are ascertainable, for making the dispositions made by will or for not making provision or further provision, as the case may be, for a person who is entitled to make an application under this Act.  

(2) The Supreme Court may receive in evidence a statement signed by the testator and purporting to bear the date when it was signed and to set out reasons for making or not making provision or further provision by the will of the testator for a person as evidence of those reasons.  

(3) If a statement of a kind referred to in subsection (2) is received in evidence, the Supreme Court shall, in determining what weight (if any) ought to be attached to the statement, have regard to all the circumstances from which any inference may reasonably be drawn about the accuracy of the matters referred to in the statement.
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>List of Eligible Applicants</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tasmania</td>
<td>s 3A:</td>
</tr>
<tr>
<td>Testator’s Family Maintenance Act 1912</td>
<td>An application under subsection (1) of section three for provision out of the estate of a deceased person may be made by or on behalf of all or any of the following persons, that is to say: (a) The spouse of the deceased person; (b) The children of the deceased person; (c) The parents of the deceased person, if the deceased person dies without leaving a spouse or any children; (d) A person whose marriage to the deceased person has been dissolved or annulled and who at the date of the death of the deceased person was received or entitled to receive maintenance from the deceased person whether pursuant to an order of a court, or to an agreement or otherwise; and (e) A person whose significant relationship, within the meaning of the Relationships Act 2003, with the deceased person had ceased before the date of the death of the deceased person and who was receiving or entitled to receive maintenance from the deceased person whether pursuant to an order of a court or to an agreement or otherwise.</td>
</tr>
<tr>
<td></td>
<td>s 3(1):</td>
</tr>
<tr>
<td></td>
<td>If a person dies, whether testate or intestate, and in terms of his will or as a result of his intestacy any person by whom or on whose behalf application for provision out of his estate may be made under this Act is left without adequate provision for his proper maintenance and support thereafter, the Court or a judge may, in its or his discretion, on application made by or on behalf of the last-mentioned person, order that such provision as the Court or judge, having regard to all the circumstances of the case, thinks proper shall be made out of the estate of the deceased person for all or any of the persons by whom or on whose behalf such an application may be made, and may make such other order in the matter, including an order as to costs, as the Court or judge thinks fit.</td>
</tr>
<tr>
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<td>s 7:</td>
</tr>
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<td></td>
<td>In granting or refusing any such application, and in fixing the amount of the provision to be made under this Act for any person who is entitled to make an application under subsection (1) of section three, the Court or judge shall have regard, inter alia, to – (a) the net value only of the estate of the deceased person, as ascertained by deducting from the gross value thereof all debts, testamentary and funeral expenses, and all other lawful liabilities to which the said estate is subject; and (b) whether any such person is entitled to independent means, whether secured by any covenant, settlement, transfer, or other provision made by the deceased person during his life or derived from any other source whatsoever.</td>
</tr>
<tr>
<td></td>
<td>s 8A:</td>
</tr>
<tr>
<td></td>
<td>(1) On the hearing of an application under subsection (1) of section three, the Court or judge may have regard to the deceased person’s reasons, so far as they are ascertainable, for making the dispositions made by his will, or for not making any provision</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>List of Eligible Applicants</td>
</tr>
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</tr>
<tr>
<td>Tasmania</td>
<td></td>
</tr>
<tr>
<td>Queensland</td>
<td></td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>List of Eligible Applicants</td>
</tr>
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<td>--------------</td>
<td>----------------------------</td>
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</tbody>
</table>
| (2)          | However, a person is a ‘spouse’ of a deceased person only if, on the deceased’s death –  
(a) the person was the deceased’s husband or wife; or  
(b) the following applied to the person –  
(i) the person was the deceased’s de facto partner, as defined in the AIA, section 32DA;  
(ii) the person and the deceased had lived together as a couple on a genuine domestic basis within the meaning of the AIA, section 32DA for a continuous period of at least 2 years ending on the deceased’s death; or  
(ba) the person was the deceased’s civil partner; or  
(c) for part 4, the person was –  
(i) a person mentioned in paragraph (a), (b) or (ba); or  
(ii) the deceased’s dependant former husband or wife or civil partner. |
| (3)          | Subsection (2) applies –  
(a) despite the AIA, section 32DA(6) and schedule 1, definition ‘spouse’; and  
(b) whether the deceased died testate or intestate. |
| (4)          | In this section –  
‘dependant former husband or wife or civil partner’, of a deceased person, means –  
(a) a person who –  
(i) was divorced by or from the deceased at any time, whether before or after the commencement of this Act; and  
(ii) had not remarried or entered into a civil partnership with another person before the deceased’s death; and  
(iii) was on the deceased’s death receiving, or entitled to receive, maintenance from the deceased; or  

Queensland cont.

(b) a person who –
   (i) was in a civil partnership with the deceased that was
terminated under the Civil Partnerships Act 2011,
section 19; and
(ii) had not married or entered into another civil partnership
before the deceased’s death; and
(iii) was on the deceased’s death receiving, or entitled to receive,
maintenance from the deceased.

s 40:
In this part –
‘child’ means, in relation to a deceased person, any child, step-child
or adopted child of that person.
‘dependant’ means, in relation to a deceased person, who was being
wholly or substantially maintained or supported (otherwise than for
full valuable consideration) by that deceased person at the time of the
person’s death being –
(a) a parent of that deceased person; or
(b) the parent of a surviving child under the age of 18 years of that
deceased person; or
(c) a person under the age of 18 years.

s 40A:
(1) A person is a step-child of a deceased person for this part if –
(a) the person is the child of the spouse of the deceased person; and
(b) a relationship of step-child and step-parent between the person
and the deceased person did not stop under subsection (2).
(2) The relationship of step-child and step-parent stops on the
divorce of the deceased person and the step-child’s parent.
(3) To remove any doubt, it is declared that the relationship of
step-child and step-parent does not stop merely because –
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>List of Eligible Applicants</th>
<th>Grounds of Criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(a) the step-child’s parent died before the deceased person, if the deceased person’s marriage to the parent subsisted when the parent died; or</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(b) the deceased person remarried after the death of the step-child’s parent, if the deceased person’s marriage to the parent subsisted when the parent died.</td>
<td></td>
</tr>
</tbody>
</table>
### APPENDIX 2 — CASES DECIDED UNDER THE *INHERITANCE (FAMILY PROVISION) ACT 1972 (SA)* FROM 2000 TO 2018

<table>
<thead>
<tr>
<th>Year</th>
<th>Case</th>
<th>Relationship of Claimant/s to Deceased</th>
<th>Value of Estate(^{204})</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>2018</td>
<td><em>Swanson v Reis</em> [2018] SASC 20</td>
<td>Adult son (aged 56).</td>
<td>$420 000.00</td>
<td>Application granted</td>
</tr>
<tr>
<td>2017 / 2016</td>
<td><em>Butler v Tiburzi</em> [2016] SASC 108 (This decision was subsequently affirmed in <em>Tiburzi v Butler</em> [2017] SASCFC 89)</td>
<td>Adult daughter (aged 67).</td>
<td>$1 567 850.55</td>
<td>The plaintiff was granted $725 000.</td>
</tr>
<tr>
<td>2016</td>
<td><em>Parker v Australian Executor Trustees Ltd</em> [2016] SASC 64</td>
<td>Five adult children (aged between 57 and 63). Most of the estate had been left to the defendant for charitable purposes.</td>
<td>$1 173 250.17</td>
<td>The plaintiffs were granted $75 000, $175 000, $150 000, $150 000, and $185 000 respectively.</td>
</tr>
</tbody>
</table>

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\(^{204}\) Monetary figures outlined in this table may not reflect the true value of the estate as some estates include transfers of interests which do not have a monetary value.
<table>
<thead>
<tr>
<th>Year</th>
<th>Case</th>
<th>Relationship of Claimant/s to Deceased</th>
<th>Value of Estate</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td><em>Carter v Brine [2015] SASC 204</em></td>
<td>Domestic partner.</td>
<td>$3 924 000.00</td>
<td>Application granted. The plaintiff had been left with life interests in the deceased’s principal residence, a French townhouse and an English apartment. The Court ruled that she had not been left without adequate provision for her proper maintenance, education or advancement in life.</td>
</tr>
<tr>
<td>2015</td>
<td><em>Broadhead v Prescott [2015] SASC 34</em></td>
<td>Adult children (aged between 61 and 63).</td>
<td>$333 423.81</td>
<td>Application dismissed. Each plaintiff to obtain a provision out of the estate in the amount of $47500.</td>
</tr>
<tr>
<td>2015</td>
<td><em>Daniel v Van Zwol [2015] SASCFC 38</em></td>
<td>Adult son (aged 66). The will provided that he would not receive any part of the deceased’s estate because he had never repaid the value of another property of the deceased’s that he had received earlier.</td>
<td>$326 761.12</td>
<td>Application dismissed. The deceased’s reason for excluding the plaintiff from any provision from her estate was held to be incorrect and the plaintiff was awarded equal shares with the other beneficiaries.</td>
</tr>
<tr>
<td>2014</td>
<td><em>Hynard v Gavros [2014] SASC 42</em></td>
<td>Adult daughter (aged 49).</td>
<td>$372 000.00</td>
<td>Application dismissed. The plaintiff would receive an amount equal to 55 per cent of the residue of the deceased’s estate.</td>
</tr>
<tr>
<td>Year</td>
<td>Case</td>
<td>Relationship of Claimant/s to Deceased</td>
<td>Value of Estate</td>
<td>Outcome</td>
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<tr>
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</tr>
<tr>
<td>2013</td>
<td><em>Kozlowski v Kozlowski</em> [2013] SASCFC 112</td>
<td>Adult son (aged 38).</td>
<td>$255,416.10</td>
<td>The adult son is entitled to half of three quarters of the balance of the estate, following the payment of funeral expenses and the costs of administration being paid from the proceeds of the sale of the estate property.</td>
</tr>
<tr>
<td>2013</td>
<td><em>Brennan v Mansfield</em> [2013] SASC 83</td>
<td>Domestic partner.</td>
<td>$2,825,000.00</td>
<td>The plaintiff is to receive the sum of $1,000,000, with an additional $900,000 from the residue of the deceased’s estate.</td>
</tr>
<tr>
<td>2013</td>
<td><em>R v Bong</em> [2013] SASC 39</td>
<td>Domestic partner. Whether the plaintiff and the deceased were domestic partners so as to enable the plaintiff to seek an order for provision out of the deceased’s estate.</td>
<td></td>
<td>The plaintiff was found to be a domestic partner from January 1989 – March 1990 and was so entitled to make an application for provision out of the deceased’s estate.</td>
</tr>
<tr>
<td>2011</td>
<td><em>Cavallaro v Cavallaro</em> [2011] SASC 123</td>
<td>Adult son (aged 76).</td>
<td>$1.2 million</td>
<td>The plaintiff’s right of residence of the home property to be converted to a life interest, and the plaintiff’s one-quarter remainder interest in the home property to be converted immediately into cash ($75,000).</td>
</tr>
<tr>
<td>2010</td>
<td><em>Pizimolas v Pizimolas &amp; Zannis</em> (2010) 108 SASR 153</td>
<td>Adult son (aged 53).</td>
<td>$650,000.00</td>
<td>Adult son would receive a legacy of $100,000 and one-third of the residue of the estate.</td>
</tr>
<tr>
<td>Year</td>
<td>Case</td>
<td>Relationship of Claimant/s to Deceased</td>
<td>Value of Estate</td>
<td>Outcome</td>
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<tr>
<td>2009</td>
<td><em>Hellwig v Carr</em> [2009] SASC 117</td>
<td>Adult children (aged 43 to 61).</td>
<td>$130,000.00</td>
<td>Application granted ($30,000, $30,000, $20,000, and $7,500 respectively).</td>
</tr>
<tr>
<td>2009</td>
<td><em>Wall v Crane</em> [2009] SASC 382</td>
<td>Two separate claims by deceased's adult daughter (aged 52) and deceased's grandson. The will provided that the testator's daughter would not receive any provision because financial assistance and adequate provision had been given to them during his lifetime.</td>
<td>$1,138,978.24</td>
<td>Application granted.</td>
</tr>
<tr>
<td>2007</td>
<td><em>Bowyer v Wood</em> (2007) 99 SASR 190</td>
<td>Adult daughter (aged 48). Appeal against the trial judge's order to dismiss the application because the Plaintiff had already received gift of $77,464 along with substantial financial assistance from the deceased during his lifetime and because the plaintiff and her husband were self-supporting.</td>
<td>$1.2 million</td>
<td>Application dismissed.</td>
</tr>
<tr>
<td>Year</td>
<td>Case</td>
<td>Relationship of Claimant/s to Deceased</td>
<td>Value of Estate</td>
<td>Outcome</td>
</tr>
<tr>
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<tr>
<td>2006</td>
<td>Armalis v Kasselouris [2006] SASC 198</td>
<td>Adult daughter with severe disabilities (aged 50).</td>
<td>$390 000.00</td>
<td>Application granted</td>
</tr>
<tr>
<td></td>
<td></td>
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<td></td>
<td>Plaintiff’s legacy of $40 000 increased to a one-half-share of the net estate.</td>
</tr>
<tr>
<td>2005</td>
<td>Fennell v Aherne [2005] SASC 280</td>
<td>Three adult sons and one adult daughter – all estranged from the deceased (aged 41 to 53).</td>
<td>$162 659.60</td>
<td>Application dismissed</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Plaintiffs would receive $10 000, $10 000, $25 000, and $25 000 respectively.</td>
</tr>
<tr>
<td>2005</td>
<td>Drioli v Rover [2005] SASC 395</td>
<td>Two estranged adult daughters (aged 45 and 48).</td>
<td>$443 337.16</td>
<td>Application dismissed</td>
</tr>
<tr>
<td></td>
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<td></td>
<td></td>
<td>One daughter would receive $12 500 and the other $75 000.</td>
</tr>
<tr>
<td>2004</td>
<td>Lock v Tower Trust Limited [2004] SASC 96</td>
<td>Adult son (aged 60). Appeal from a Master’s order to award $40 000 on the basis that it was inadequate.</td>
<td>Under $200 000.00</td>
<td>Appeal dismissed</td>
</tr>
<tr>
<td>2003</td>
<td>Barns v Barns (2003) 214 CLR 169</td>
<td>Adult daughter (aged 46). Whether a deed excluding the plaintiff from the estate is valid.</td>
<td>$206 730.65</td>
<td>Application allowed, and order that the deed (which precludes the plaintiff from provision out of the estate) should be set aside.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Plaintiffs excluded as eligible applicants to the estate.</td>
</tr>
<tr>
<td>2003</td>
<td>McGuffie v Korcynski [2003] SASC 178</td>
<td>Grandchildren applying for provision, where there was a dispute as to the paternity of the plaintiffs’ mother.</td>
<td>$1.7 million</td>
<td></td>
</tr>
<tr>
<td>2002</td>
<td>Delisio v Santoro [2002] SASC 65</td>
<td>Application by adult daughters (aged 52 and 46) and counterclaim by one adult son (aged 51).</td>
<td>$15 000 each for the plaintiffs and counterclaimant.</td>
<td></td>
</tr>
<tr>
<td>2000</td>
<td>Carraill v Carraill [2000] SASC 55</td>
<td>Application by adult son (aged 51) and counterclaim by adopted grandchildren.</td>
<td>$1.7 million</td>
<td></td>
</tr>
<tr>
<td></td>
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<td></td>
<td></td>
<td>Adult son would receive the deceased’s estate and interest in a particular plot of land absolutely. The adopted grandchildren would receive $10 000 each.</td>
</tr>
</tbody>
</table>
SOFT LAW AND PUBLIC LIABILITY: BEYOND THE SEPARATION OF POWERS?

I Introduction

Soft law is a general term for various types of non-statutory regulation.\(^1\) The nature of soft law is inherently debatable in a way that the nature of law is not. Despite this fact, or perhaps because of it, only relatively few legal academics have written about soft law.\(^2\) The judiciary has also had little to say.\(^3\) Each of these

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\(^3\) There have been two fleeting mentions to domestic soft law in the Federal Court: *Dallas Buyers Club LLC v iiNet Ltd* (2015) 245 FCR 129, 150 [90] (Perram J); *Luck v Chief Executive Officer of Centrelink* [2015] FCA 1234 (20 November 2015) [37] (Tracey J). The concept and term have also been referred to in State Supreme Courts:
points is understandable. It is far from surprising that judges have had little cause to consider soft law, because legal remedies do not apply perfectly to extra-legal modes of regulation. Academic consideration of soft law is dominated by writing on its application in international law, but in which its role, meaning and very existence are all still contested.\(^4\) It frequently focuses on the suitability of soft law to attracting political consensus in international relations where harder forms of regulation would likely have been resisted.\(^5\) Academic consideration of the operation of soft law in domestic legal systems is dominated by analysis of its regulatory functions. Far less attention is paid to what remedies might be appropriate where those subject to soft law regulation have suffered as a result of their reliance on it.

This introduction to soft law should not, however, lead anyone to conclude that soft law is itself ineffective or insignificant. To the contrary, I accept without further discussion the regulatory effectiveness of soft law and that it is unlikely to disappear from the regulatory landscape.\(^6\) It is nonetheless worth drawing a distinction between formality and informality of consequences. Legislation passed through both houses of Parliament has formal consequences, as does its breach. The same is true of delegated legislation made by statutory delegation to the executive. Soft law (such as rules, guidelines, policy documents and statements, procedure manuals and codes) also has consequences and, like legislation, those consequences are related to the identity of the entity that issued them. However, without the stamp of parliamentary procedure (or delegation by statute), the consequences of these examples of soft law are effective but informal.

Much of what causes soft law to be problematic is intrinsically linked to its effectiveness as a regulatory tool. It does not rely on formal consequences of breach for its effectiveness but on the general belief that soft law represents an officially-sanctioned norm. A useful hypothetical example is to ask people to imagine someone standing in the middle of a road directing the traffic to turn off and enter a one-way street from the wrong end. Would you obey? Does your answer change if we suppose that

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\(^5\) Soft law relies on influence for its effect rather than the capacity to determine legal outcomes conclusively. This probably explains its suitability to international law, which functions in a similar way.

the person is wearing the uniform of a police officer? The fact is that, just like the
person wearing the police uniform, soft law tends to come cloaked in the ostensible
authority of the state and owes much of its effectiveness to that fact.

Two worrying points flow from that conclusion. The first is that people are apt to treat
certain instruments as ‘law’, in reliance on the authority with which those instru-
ments are issued, whether or not they have formal consequences. The second is that,
because soft law instruments have no formal consequences, their effect is asymmet-
rical. An aggrieved individual who has suffered loss by relying on the continued
operation of soft law has far fewer remedial options with which to address its breach,
alteration or withdrawal by its issuing authority. The authority, by contrast, generally
has the benefit of its soft law being obeyed. Soft law therefore remains remedially
‘soft’. Another way of making this point is by reference to Australia’s strict separation
of powers doctrine, particularly as it applies to judicial functions. Soft law is at best
an imperfect fit to that doctrine. It represents a reality that is not reflected in ‘legal
reality’.

This article looks at the place of soft law in the legislative and regulatory sphere and
at why various remedial responses (in both private and public law) are ineffective
at dealing with it. It then considers the role of soft law as a regulatory tool and, in
Part IV, a number of examples of soft law currently being used in Australia. In doing
so, this article aims to make a broader point than merely to illustrate the effectiveness
(for regulators) and potential dangers (to those regulated) of regulation through soft
law. It uses these examples as a platform to consider in Part V whether and how the
separation of powers doctrine remains fit for purpose in Australia. The inadequacy of
the current tripartite separation of powers model has been noted before with regard
to various ‘integrity bodies’ which are nominally, but not functionally, part of the
executive branch. Soft law provides an excellent basis for such an inquiry, since at
base it amounts to a method of governing the general public that falls wholly outside
the tripartite separation of powers: it does not require legislation, is not accountable
in the usual manner of executive acts and it is generally irrelevant to considerations
of courts exercising judicial review functions. Viewed as a method of accountability,
the separation of powers is all but impotent to deal with soft law. This point is illus-
trated in Part VI by a consideration of the various methods by which loss caused by
reliance on soft law might be remedied. The fact that only the ‘soft’ remedies — such
as compensation following a recommendation from an Ombudsman — are likely to
be effective demonstrates this article’s thesis that soft law has become a regulatory
norm which operates without the oversight of the accountability mechanisms in the
separation of powers doctrine.

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7 This example was used in Weeks, Soft Law and Public Authorities, above n 1, 224.
8 Ostensible authority has a particular meaning which is rarely examined, but see Enid
Review 423.
II THE CHANGING NATURE OF REGULATION AND LEGISLATION

Regulation comes from a range of sources, including: Acts; delegated legislation; guidance documents directed to members of the executive; publicly available guidelines or policy statements; and private sector regulations (such as Industry Codes and co-regulatory instruments, and contracts used for regulatory purposes). One method by which these very different types of instrument might be distinguished from one another is according to their legal effect. In other words, we might distinguish ‘hard law’ from ‘soft law’ by looking at whether and how an instrument is legally binding. However, it is important to remember that the ‘hardness’ and ‘softness’ of legal instruments is relative; some soft law instruments are ‘softer’ than others. The difference between hard and soft law is nonetheless easier to discern on other bases.

First, soft law is not conclusively determinative of legal outcomes but relies on its influence to be effective. This is to say that, by treating soft law as though it were hard, people frequently (and usually unwittingly) expose themselves to potentially significant risks. The greatest of these is that reliance on soft law differs fundamentally from reliance on a statutory instrument because the public authority which has issued soft law can usually change its effect without warning or legal consequence. The fact that Australia lacks a doctrine of either public law estoppel\(^\text{10}\) or substantive enforcement of legitimate expectations\(^\text{11}\) will generally leave a person who has relied on soft law, and suffered detriment due to its alteration or removal, without legal recourse.\(^\text{12}\)

Secondly, it follows that, because Acts are conclusively determinative of legal outcomes, they are hard law. The same is true of delegated legislation, which has been authoritatively defined as comprising instruments of legislative effect made pursuant

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\(^{10}\) *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 196 (Neaves J), 218 (Gummow J); *A-G (NSW) v Quin* (1990) 170 CLR 1, 17–8 (Mason CJ), 40–1 (Brennan J).


\(^{12}\) This thesis is developed in considerably greater detail in Weeks, *Soft Law and Public Authorities*, above n 1.
to the authority of Parliament. Acts and delegated legislation can be respectively described as primary and secondary legislation. Soft law, or ‘tertiary legislation’, can be made without an express power to legislate conferred by an Act of Parliament, without which there is no, or at best unclear, statutory authorisation to make rules which are directly enforceable.

Sir Robert Megarry lamented in 1944 that ‘[n]ot long ago, practitioners could live with reasonable comfort and safety in a world bounded by Acts of Parliament, Statutory Rules and Orders and judicial decisions’ but that the previously confined world of legal certainty had become an ‘expanding universe’ due to the influence of what we now call soft law. While Megarry’s complaint was new, its target was not: Paul Craig has traced the use of the term ‘quasi-legislation’ (Megarry’s synonym for soft law) to the nineteenth century. Harry Arthurs cited examples of soft law being employed in Victorian England, including by emigration officers whose superior understanding of maritime engineering made them better placed than Parliament to decide whether ships were ‘seaworthy’. Indeed, even the Roman Senate in the first century BC issued decrees ‘which were, in practice, usually obeyed — though, as these did not have the force of law, there was always the awkward question of what would happen if a decree of the senate was flouted or simply ignored’. It is obvious that such decrees were a form of soft law and just as obvious that they would never be ignored.

This raises an important initial point about soft law, which is that it is inherently neither beneficial nor harmful as a category of instrument. Megarry conceded that some explanatory notes issued by government entities were ‘shining examples of

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15 The blurring of boundaries between law and unenforceable guidance is a constant theme in the analysis of soft law. There is of course a certain amount of statutory recognition of the existence of soft law instruments: see Harlow and Rawlings, above n 6, 193–94. Some statutes expressly confer the power or duty to create soft law. It is best to view such instruments as soft law which exists at the ‘harder’ end of the spectrum.


17 Paul Craig, Administrative Law (Sweet & Maxwell, 8th ed, 2016) 469.


19 Mary Beard, SPQR: A History of Ancient Rome (Profile Books, 2015), 32–33. See also Nicholas Barry, An Introduction to Roman Law (Oxford University Press, 1962) 16–7: ‘the Senate had in form no legislative power. Its resolutions (senatus consulta) were merely advice to magistrates, and though this advice was unlikely to be ignored, it had no legal effect until it had been embodied in either a resolution of the assembly or in a magisterial edict.’
official helpfulness’. Soft law can provide important guidance to those who read it and can be used by courts and tribunals to advance their understanding of established practices or to determine the appropriate duty of care where a standard exists. Sometimes, official advice will not be entirely welcome where there is scope to take advantage of uncertainty, but that is a question which relates to the reaction to soft law rather than its nature. We can characterise soft law as a tool, such as a sharp knife. Its sharpness might indicate that it is well-made, but that fact alone tells us nothing about the ‘good’ or ‘bad’ uses to which it might be put. Its potential for misuse is what causes concern. This potential comes from the fact that soft law is frequently treated by those to whom it is directed as though it were hard law.

Soft law instruments might mislead or confuse particularly where they have not been published. The requirement that law must be promulgated before it can be applied adversely to an individual is often given the status of a principle of the rule of law. The importance attached by courts to publishing policies and other forms of soft law varies. For example, the United Kingdom Supreme Court held in Lumba that the Home Office had acted ultra vires, in part by adopting and acting upon a secret policy, even though, while its application affected them, that policy was one with which the claimants were not actively able to comply. By contrast, there is no indication that an Australian court would hold an unpublished policy to be ultra vires on the same facts, although such a policy would not necessarily be enforceable against parties unaware of its existence.

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20 Megarry, above n 16, 126.

21 This metaphor was borrowed from Joseph Raz, ‘The Rule of Law and its Virtue’ in The Authority of Law (Oxford University Press, 1979) 210, 226; cited in Weeks, Soft Law and Public Authorities, above n 1, 74.

22 Megarry demonstrated sensitivity on this point to students’ ‘dismay at the prospect of being examined not merely on the law stricto sensu but also on its modifications’ through soft law: Megarry, above n 16, 127–8.


24 R (Lumba) v Secretary of State for the Home Department [2012] 1 AC 245, 266–9 (Lord Dyson) (‘Lumba’).

25 A High Court majority went no further than reserving this question for future discussion in Plaintiff S10/2011 v Minister for Immigration and Citizenship (2012) 246 CLR 636, 665 [91] (Gummow, Hayne, Crennan and Bell JJ).

26 Commonwealth legislation requires that a ‘person must not be subjected to any prejudice only because of the application to that conduct of any rule, guideline or practice in the unpublished information, if the person could lawfully have avoided that prejudice had he or she been aware of the unpublished information’: Freedom of Information Act 1982 (Cth) s 10(2). States and territories have similar legislative provisions: see, eg, Freedom of Information Act 2016 (ACT) s 27; Government Information (Public Access) Act 2009 (NSW) s 24(1); Right to Information Act 2009 (Qld) s 20(3)(c); Freedom of Information Act 1982 (Vic) s 9.
Some essential propositions about soft law have been set out above, including that: it can be made without legislative oversight; it is effective (in the sense that people nonetheless tend to comply with its directions); and it can be removed or altered at will. Taken together, these points represent a conundrum for the application of the separation of powers. This is because, while they are premised on the continued relevance of the traditional (and, in Australia, constitutionally mandated) tripartite model of that doctrine, it seems to follow from soft law’s greater capacity for the executive to ‘govern without Parliament’ that the separation of powers as we know it is ripe for review. Before considering that point further, however, this article will look in more detail at categories of soft law and some specific soft law instruments.

### III What Kinds of Instrument Can Be Categorised as Soft Law?

It is convenient to consider what falls under the soft law label by first excluding what does not. Not every non-statutory instrument is soft law. For example, contracts are not soft law because they derive their binding effect from the consent of the parties. Contracts do not rely on influence for their effectiveness, as soft law does, but are directly enforceable as between the parties. This does not change the fact that they are also frequently employed for regulatory ends:

The classic image of a contract is as an instrument of exchange, whilst the classic image of judicial review is the enforcement of express or implied legal rules, where ‘rules’ are seen as commands. However classical imagery can sometimes be misleading. Some government contracts are in reality rules, and the same is true of some non-contractual relationships adopting a seemingly consensual form.

Treaties also serve a regulatory function but are not soft law because they operate between states, without the intention that they should regulate the behaviour of individuals within countries unless and until such time as they are adopted into domestic law. Treaties and soft law are, however, broadly analogous in as much as there are

27 A more detailed discussion of this point can be found in Weeks, *Soft Law and Public Authorities*, above n 1, ch 2.
28 See Aronson, ‘Private Bodies, Public Power and Soft Law in the High Court’, above n 2, 3.
29 See *R v Disciplinary Committee of the Jockey Club; Ex parte Aga Khan* [1993] 2 All ER 853, 873 (Hoffmann LJ); *Griffith University v Tang* (2005) 221 CLR 99, 129 [82] (Gummow, Callinan and Heydon JJ).
ways in which the law and judicial review in particular is able to recognise that they have meaning, even if it cannot be directly enforced.\textsuperscript{31}

Soft law is a concept that can best be illustrated through examples, since it includes a range of different categories of instrument, which can best be observed along a spectrum rather than as a collection of like objects. In other words, soft law has variable degrees of ‘softness’. A rigid, taxonomic approach to determining what is included under the canopy of the term soft law would ignore that fact. The softness of law may differ between, for example, mere guidance or statements about an agency’s general practices on one hand and, on the other, soft law which is all but compulsory to follow because, for example, it sets out the process to be followed if you wish to obtain a benefit from government. Describing a particular instrument as ‘soft’ or ‘hard’ is meaningless if those adjectives purport only to divide things which are ‘law’ from those which are not. The truth of the matter is more complex: between law which is ‘hard’ (as in enforceable by and against government), and edicts which are so ‘soft’ as not to be considered law at all, there is a range of instruments in which softness and legality are mixed in varying concentrations. On the other hand, classifying instruments does not alone lead to a workable definition of soft law since instruments like codes of practice, guidance notes, circulars,\textsuperscript{32} policy notes, development briefs, planning instruments,\textsuperscript{33} practice statements, taxation rulings\textsuperscript{34} and concessions, codes of conduct, codes of ethics and conventions might either be

\textsuperscript{31}See, eg, the series of cases in which the NSW Court of Appeal has treated the United Nations Convention on the Rights of the Child as a mandatory consideration in child welfare cases, including: Re Tracey (2011) 80 NSWLR 261; JL v Secretary, Department of Family and Community Services [2015] NSWCA 88 (13 April 2015); Re Henry; JL v Secretary, Department of Family and Community Services [2015] NSWCA 89 (13 April 2015).


\textsuperscript{33}One example of this point is the development control plan (‘DCP’) which arises in New South Wales planning law under the Environmental Planning and Assessment Act 1979 (NSW) pt 3 div 3.6. Although DCPs are principally ‘to provide guidance’ under s 3.42(1) of the Act, they are nonetheless explained at length by legislation. As a result, DCPs are ‘harder’ than most varieties of soft law, but still fit within the latter appellation because they are designed to provide guidance rather than to bind; see Elachi v Council of the City of Shoalhaven (2016) 212 LGERA 446, 453 [18] (Basten JA). Local environmental plans, by contrast, are delegated legislation made by the Minister or his/her delegate in accordance with a delegation of power from Parliament and an exhaustively specified procedure. See Greg Weeks and Linda Pearson, ‘Planning and Soft Law’ (2018) 24 Australian Journal of Administrative Law 252, 260–2.

\textsuperscript{34}See Benjamin Alarie et al, ‘Advance Tax Rulings in Perspective: A Theoretical and Comparative Analysis’ (2014) 20 New Zealand Journal of Taxation Law and Policy 362. Taxation rulings are designed to influence behaviour and, like most soft law, they affect government and individual parties differently. However, they are unusual in the sense that the benefit of this asymmetry goes to the taxpayer because rulings are legislatively binding only on the revenue authority.
delegated legislation or soft law, depending on whether Parliament had expressly authorised their creation.\textsuperscript{35} It is useful, therefore, to look briefly at two common categories of soft law in order to see what that term \textit{includes} rather than to engage in the more difficult task of defining what it \textit{is}.

The first are policy statements. ‘Policy’, a word with a very broad scope in law, can be seen as a subset of soft law where it is developed to modify or direct behaviour. Given that much government policy is now generally available regardless of whether or not it is directed to the public, there is no reason to exclude ministerial or departmental policy directed to delegates and public servants from the definition of soft law.\textsuperscript{36} A written policy has greater power than an oral promise to create expectations, a point which reiterates what has long been recognised by the law relating to negligent misrepresentations: while not every representation is equally capable of creating reasonable reliance, a written and apparently official policy is at the end of the range where reliance is most likely to be reasonable. It follows that, if soft law of this type is capable of securing both the trust and compliance of reasonable people exposed to it, there is a functionally effective method of governing which owes nothing to the legislative process. There is a tension between governing in this way and the traditional conception of the separation of powers doctrine, since the mechanism through which government is performed escapes the accountability structures inherent to that doctrine.

The second is self-regulation, which shares a long history with business activity and is frequently undertaken in the shadow of an implicit threat that its failure (in the government’s terms) will increase the likelihood that it will be replaced with a legislative scheme. Self-regulation can achieve some outcomes that externally imposed regulation cannot. A voluntary, self-regulatory industry code can take on some of the aspects of soft law where there is government involvement, either through consultation during the formulation stage or as a consequence of accepting government funding. For example, the General Insurance Code of Practice was developed by the general insurance industry after the government stated its intention to have a mandatory code for the general insurance industry. The industry reacted to that announcement by initially regulating itself. The industry, in effect, self-regulated, but the Government was involved in drafting the Code, informally monitored its operation and expected to be involved in its review.\textsuperscript{37}

\textsuperscript{35} See Pearce and Argument, above n 13, 4–5. One of the immediate benefits of the \textit{Legislation Act 2003} (Cth) was that it eliminated the need to guess whether an instrument was delegated legislation or not based on what it was called (eg regulation, circular etc).

\textsuperscript{36} See the discussion of ‘secret’ policies in \textbf{Lumba} [2012] 1 AC 245.

Therefore, what had been a purely voluntary soft law scheme took on a hard law practical effect because of the broader involvement of government. The potential for such a result is implicit in treating self-regulation as delegating public powers to private bodies.

**IV Specific Examples of Soft Law Instruments**

Several compelling issues are raised by soft law instruments arising within the subject matter covered by state workplace health and safety, corrective services and health legislation, leaving aside the many interesting Commonwealth instruments that this article lacks the space to consider.

**A Work Health and Safety Codes**

Soft law codes are frequently issued to add detail to legislative schemes. A good example of this is the Code of Practice on asbestos removal reissued in September 2016 by SafeWork NSW. The *Work Health and Safety Regulation 2017* (NSW) requires (in summary) that a person conducting a business or undertaking ensure that health monitoring is provided to a worker if they are carrying out licensed asbestos removal work, other ongoing asbestos removal work or asbestos-related work and is at risk of exposure to asbestos when carrying out the work. It imposes a number of duties and sets out monetary penalties for their breach. The *NSW Asbestos Code* adds detail to these legislative requirements in the *NSW WHS Regulation* by setting out what a health monitoring report must include, when monitoring should occur, who carries it out, who pays for it and what information the doctor must be given.

The *NSW WHS Regulation* requires that an asbestos removalist must ensure there are signs to alert people to the presence of asbestos and barricades to delineate the

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38 See, eg, the Victorian position on OHS Codes of Practice explained in *Victorian WorkCover Authority v Stoddart (Vic) Pty Ltd* [2015] VSC 149, [32]–[57], [81]–[93] (J Forrest J).


40 *Work Health and Safety Regulation 2017* (NSW) pt 8.5 div 1 (*‘NSW WHS Regulation’*). The Victorian OHS Regulations impose similar requirements on employers, including that they arrange for medical examinations for employees exposed to asbestos (reg 311) and that they share the results of asbestos paraoccupational air monitoring (reg 293).
asbestos removal area, and provides monetary penalties for breach of those require-
ments.41 The *NSW Asbestos Code* provides practical detail that assists asbestos
removalists to do what the regulation merely says they ‘must ensure’ that they do.
This includes specifying the placement of signs, the requirement that they be ‘weath-
erproof, constructed of light-weight material and adequately secured so they remain
in prominent locations’.42 It refers to the relevant Australian Standard43 — itself a
soft law instrument — with regard to the necessary size, illumination, location and
maintenance of warning signs. The material on barricades is even more detailed.

The *NSW Asbestos Code* also provides detailed advice on the steps that should in
fact be taken to remove asbestos safely, rather than simply requiring that it must be
removed safely. It divides this advice in a practical way, covering what to wear,44 how
to launder clothing,45 what safety equipment is necessary,46 how to remove asbestos
from specific locations, who must be informed of the asbestos removal work,47 and
so forth. This is a level of detail that is generally inappropriate to legislative instru-
m ents since they are harder to update than soft law like the *NSW Asbestos Code*
in order to reflect the most current approach to the task of removing asbestos.

On the other hand, the *NSW Asbestos Code* is clearly at the ‘hard’ end of soft law.
It is prescriptive and rule-like. It has the potential to lead to direct penalties; for
example, an inspector may refer to breaches of the *NSW Asbestos Code* when issuing
improvement or prohibition notices.48 In other words, the purpose of this soft law is
not to guide the exercise of discretion so much as to add helpful detail to legislative
demands.

### B Corrective Services Manuals and Regulations

There are Standard Guidelines for Corrections in Australia,49 which all state and
territory governments apply and which ‘constitute outcomes or goals to be achieved by
 correctional services rather than a set of absolute standards or laws to be enforced’.50
Each state and territory must still develop its own standards which operate less at the

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41 *NSW WHS Regulation* reg 469.
42 SafeWork NSW, above n 39, 21.
43 Standards Australia, ‘Safety Signs for the Occupational Environment’ (Australian
45 Ibid 34.
48 Ibid 3.
49 Corrective Services Ministers’ Conference, ‘Standard Guidelines for Corrections in
d16d61ab-ea20-4277-9cfe-adc2ee5162d8/standardguidelines%2b2012.pdf>. These
guidelines were scheduled for review in 2018.
50 Ibid 3.
level of principle and more as sources of practical advice. Corrective Services NSW has an extensive suite of soft law contained in a comprehensive Operations Manual, most of which is directed internally to its own employees but which also has a significant effect on prisoners. Two particular instruments within the Manual, which relate respectively to the release of inmates and their classification, are noteworthy.

1 Release of Inmates

The part of the Crimes (Administration of Sentences) Regulation 2014 (NSW) (‘NSW Regulation’) which deals with the release of inmates from correctional centres is brief, comprising only two regulations. The section of the Operations Manual which addresses the same topic is much more detailed and practically oriented. For example, it deals with making arrangements with local Centrelink offices on behalf of released inmates, specific responsibilities with regard to carrying out exit screenings, the circumstances in which gratuities are payable to inmates upon their release, and so forth. Similar provisions can be found in the Victorian Correctional Management Standards for Men’s Prisons.


52 See, eg, the Level of Service Inventory — Revised (‘LSI-R’), a comprehensive risk assessment instrument designed to obtain: offenders’ social and offending history; a rating for their risk of re-offending upon release; factors related to that risk; and a listing of strengths, assets and positive opportunities which will mitigate against that risk: Corrective Services NSW, ‘Offender Classification and Case Management Policy and Procedures Manual: 3.1 Corrective Services NSW (CSNSW) Case Management Policy’ (January 2016) <http://www.correctiveservices.justice.nsw.gov.au/Documents/Related%20Links/open-access-information/offender-classification/3.1-csnsw-case-management-policy.pdf> [3.1.11]. It is Corrective Services’ policy to administer LSI-R to all sentenced offenders in custody with sentences of over six months, offenders who are subject to a full pre-sentence or pre-release report for a sentencing or releasing authority and all offenders subject to a supervision order in the community.

53 These are reg 172 (Inmates to check personal property and records) and reg 173 (Pre-release interviews). Specific provisions with respect to the information to be given to a person who is being released on parole are provided in reg 217.

54 Operations Manual, above n 51, 23.2.


The Operations Manual contains details of previous amendments, giving it a more legislative appearance. Although penalties for failure to adhere to this instrument are not made explicit, the mention of internal checklists, reporting requirements and regular audits makes it likely that disciplinary action would follow breach of this instrument by Corrective Services employees. The same sorts of disciplinary action against non-compliant staff members are implicit in the Victorian Standards.

2 Classification, Placement and Case Plan Reviews

At the other end of the process, the Operations Manual provides detail to Corrective Services employees about what they must do to classify new inmates for security purposes. Regulation 12 of the NSW Regulation specifies that inmates must be classified into one of seven categories, including:

- AA (special risk to national security);
- B (confined by secure physical barrier); and
- C2 (need not be confined by physical barrier but requires some level of supervision).

The Manual includes practical advice as to how such classifications are to be determined, for example specifying that having been refused bail or parole is not in itself an indication that the inmate is a security risk of the highest classification.

56 The instrument also has the role of assisting detection and resolution of issues where inmates allege that their property has been damaged or stolen while held by Corrective Services employees.

57 Corrections Victoria, ‘Correctional Management Standards for Men’s Prisons in Victoria’, above n 55, 88–9. Cf Stuart v Kirkland-Veenstra (2009) 237 CLR 215, where the appellant police officers failed to adhere to the relevant terms of the Victoria Police Manual. This point was not pressed before the High Court, but might nonetheless have resulted in some type of professional sanction.


59 These categories apply specifically to male inmates. Female inmates are classified under a different system: Crimes (Administration of Sentences) Regulation 2014 (NSW) reg 13. In Victoria, there are separate Correctional Management Standards for men’s prisons and women prisoners (both standards have a similar structure, making the gender-based distinction between ‘prisons’ and ‘prisoners’ interesting but unexplained).

Likewise, while consideration is given to an inmate’s custodial history, a poor custodial history does not per se restrict classification progression.\textsuperscript{61}

One interesting aspect of this instrument is that it raises questions as to whether and how an inmate might seek to have his or her security classification reviewed. For example, the Manual requires that inmates be present during their classification other than in exceptional circumstances.\textsuperscript{62} Does this indicate the practical content of procedural fairness and leave a classification conducted in an inmate’s absence open to challenge? Is it, on the other hand, no more than a soft law aspiration aimed at employees of Corrective Services which therefore creates no ground of challenge? Holding that procedural fairness might give meaning to soft law like this would not sit comfortably with recent cases which hold that transfer decisions are not subject to procedural fairness.\textsuperscript{63} If procedural fairness is now apparently limited in some aspects of prison administration, it seems unlikely that soft law instruments issued by corrective services officials can be seen as a source of fairness obligations.

\textbf{C Healthy Eating and Drinking}

Of a very different nature is the \textit{Healthy Food and Drink in NSW Health Facilities for Staff and Visitors Framework},\textsuperscript{64} which is sub-headed ‘healthy choices in health facilities’ and speaks of ‘support[ing] … healthy diets and lifestyles’ in staff and visitors and ‘identify[ing] ways to make it easy to be healthy in NSW’.\textsuperscript{65} It is almost immediately apparent, however, that the ‘choices’ in question have already been made within NSW Health and that the constant references to ‘support’ (25 of them in a 14 page document, with a further 20 references to ‘choice’ or ‘choose’) are directed to supporting people who comply with the choice of a healthy lifestyle identified by NSW Health. The ACT has a similarly prescriptive policy which is also set out in terms of ‘choice’, requiring that

\begin{quote}
healthy food and drink choices must be provided and promoted to staff, volunteers and visitors at: ACT Health facilities[; and] ACT Health activities including meetings, functions, events, education sessions and fundraising activities.\textsuperscript{66}
\end{quote}

\textsuperscript{61} Ibid 6.

\textsuperscript{62} Ibid 5.

\textsuperscript{63} See, eg, \textit{Moran v Secretary, Department of Justice and Regulation} (2015) 48 VR 119.


\textsuperscript{65} Ibid 3.

\textsuperscript{66} ACT Health, ‘Healthy Food and Drink Choices’ (Policy Statement No DGD18-003, 14 February 2018) \texttt{<https://health.act.gov.au/sites/default/files/2018-09/Healthy\%20Food\%20and\%20Drink\%20Choices.pdf>} \textsuperscript{1}. 
It is, of course, neither here nor there that a department of health has settled on a policy and publishes a framework communicating that policy.\footnote{By contrast, Victoria has no uniform or mandatory policy, but simply provides templates which individual health facilities, sports clubs and the like may adopt should they so choose.} In short, they mean that you cannot buy a Coke from a hospital vending machine or any of the cafeterias, newsagents or retail premises connected with NSW Health or ACT Health. Further, in NSW, ‘everyday’ foods and drinks comprise 75 per cent of the products for sale with ‘occasional’ products making up the remaining 25 per cent.\footnote{NSW Health, ‘Healthy Food and Drink in NSW Health Facilities for Staff and Visitors Framework’ (Guideline GL2017_012, 8 June 2017) \(<https://www1.health.nsw.gov.au/pds/ActivePDSDocuments/GL2017_012.pdf>\).} ACT Health categorises foods to similar effect by basing its nutrition standard on a ‘traffic light system’.\footnote{ACT Health, ‘Why and How We Developed ACT Health’s Healthy Food and Drink Choices Policy’ (Factsheet, December 2015) \(<https://www.health.act.gov.au/sites/default/files/2018-09/Healthy_Choices_Background_FINAL.pdf>\).} While one assumes that these health departments have at least indirect (but probably contractual)\footnote{ACT Health requires that the nutrition standard be incorporated into ‘all tenders, contracts, leases and management arrangements that relate to the supply of food and drinks via food outlets and vending machines’ and suggests that food outlets and vending machines covered by existing contracts, leases and management arrangements should be encouraged to ‘lead by example’ and adopt the Nutrition Standard voluntarily: ACT Health, above n 66, 2.} means of ensuring compliance with their policies by third parties who lease retail space in hospitals, there are no explicit penalties in either policy document.\footnote{Staff bear responsibility for implementing these policies and one assumes that disciplinary measures would follow any failure to adhere to these policies; see also the comment in footnote 57.} They are ‘soft’ in that respect but, as a policy with the clear support of the respective health departments, they are probably treated and operate as though they express ‘hard’ legal obligations. Perhaps a neutral description of these policy frameworks is as aspirational but with a hard edge.

This prevention of otherwise lawful activity has an interesting analogue with university campuses which have declared themselves to be entirely ‘non-smoking areas’. Presumably, universities could effect such a policy through amending their by-laws but it seems that they are using policy rather than more formal means to effect the goal of smoke-free campuses. The Australian National University (‘ANU’) has a smoke-free policy\footnote{Australian National University, ‘Smoke-Free’ (Policy, Document No ANUP_011807, 28 May 2015) \(<https://policies.anu.edu.au/pl/documen/ANUP_011807>\).} which prohibits all smoking and advertising of tobacco products anywhere on the University campus, with minor exceptions. The University of New South Wales (‘UNSW’) has a similar policy,\footnote{University of New South Wales, ‘Smoke-Free Environment Policy’ (Policy, Version 5.0, 21 June 2017) \(<https://www.gs.unsw.edu.au/policy/documents/smokefreepolicy.pdf>\).} although it is framed less...
as a prohibition and more in terms of a duty to observe the rights of others to a smoke-free environment. The policy draws support from relevant legislation, but has no legislative force itself. The ANU policy states that voluntary compliance will be encouraged but it is apparent from the terms of both policies that the universities intend to enforce them strictly. For example, both policies indicate that compliance is a condition of employment for staff and of continuing enrolment for students. One can observe that almost nobody smokes within these university campuses anymore, it having been sufficient that they put up signs telling people that they may not smoke on university grounds. Smoking was common at universities not so long ago and one suspects that the signs, as emanations of policy choices, have made a difference. The declaration by state health departments in NSW and the ACT that sugary drinks and the like are now forbidden will also be effective because people will believe that their effective ban under soft law is in fact a ban with hard lawful effect.

V Soft Law and the Separation of Powers

Although the tripartite separation of powers model has been justified in the past on the basis that each branch imposes accountability on the other two, and vice versa, the possibility that conduct with a quasi-legislative effect might operate outside this structure invites the question whether and how it is made accountable. The separation of powers is, after all, a political arrangement whose purpose is to set boundaries for certain organs of the state. There are presently three broadly defined groups of such organs — the legislature, executive government and the judiciary — but the terms upon which these groups are defined and their functions made accountable are ultimately the subject of a political process which can theoretically be renegotiated.

This conclusion is demonstrated by the way that the separation of powers operates in three democracies with broadly similar aims and values. In the United Kingdom, Parliament has been sovereign and the dominant branch of government since 1688 and, until recently, there was the capacity for people to serve simultaneously in

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74 See, eg, ‘[t]he University has a duty under the Work Health and Safety Act 2011 and its Regulations to ensure, so far as is reasonably practicable, the health and safety of staff, students and visitors’: Ibid 1.

75 Accountability has been described as a core public law value which is closely connected to the separation of powers doctrine: Ellen Rock, ‘Accountability: A Core Public Law Value?’ (2017) 24 Australian Journal of Administrative Law 189. It has also been seen as a constitutional value: Janina Boughey and Greg Weeks, ‘Government Accountability as a “Constitutional Value”’ in Rosalind Dixon (ed), Australian Constitutional Values (Hart Publishing, 2018) 99.

76 The operation of the separation of powers in Australia, the United Kingdom and the USA is considered at length in Peter Cane, Controlling Administrative Power: An Historical Comparison (Cambridge University Press, 2016).

77 Constitutional Reform Act 2005 (UK) c 4 pt 2.
both the judiciary and in a political role in either or both of the other branches.\textsuperscript{78} The constitutional role of English judges allows them to be more interventionist than Australian judges.\textsuperscript{79} In the United States, there is a strict separation between each of the branches of government\textsuperscript{80} a point most easily demonstrated by the fact that the President has no legislative role. Australia’s system is a blend of the English and American models, in which the Constitution requires that members of the Commonwealth ministry must serve in either the House of Representatives or the Senate. There is only a strict separation of judicial power,\textsuperscript{81} and the doctrine underlying it looks ‘unassailable’ despite being neither constitutionally required nor popular with prominent judges.\textsuperscript{82} In short, the separation of powers is not a constant but the reflection in specific jurisdictions of a political compact which is now centuries old. As John McMillan has pointed out, there is a need to ‘update our constitutional thinking’;\textsuperscript{83} if we were to draft a constitution from scratch now, it would not look much like the one we have for the simple reason that the one we have represents 19th rather than 21st century thinking about the role of government and its various organs.\textsuperscript{84}

Students are frequently warned that ‘judicial review is not the answer to everything’; in fact, its influence is relatively limited in some regards.\textsuperscript{85} What is troubling in regard to soft law is that almost none of the law’s existing remedial doctrines are effective to remedy loss caused by reliance on soft law.\textsuperscript{86} To the extent that such remedies are dependent on first establishing an instrument’s lack of legal validity, they miss the mark because soft law never relies on legal validity to be effective.\textsuperscript{87} Furthermore, there is no point to judicial supervision of the interpretation of soft law when it can be changed without legal formality, since ‘[t]he further a regulatory

\textsuperscript{78} For example, the Lord Chancellor held a Cabinet post in addition to presiding over the House of Lords and being the head of the judiciary in England and Wales.

\textsuperscript{79} The separation of judicial power is viewed in Australia as placing stringent jurisdictional limitations on the judicial review function; see Brennan J’s canonical analysis in \textit{A-G (NSW) v Quin} (1990) 170 CLR 1, 35–6.


\textsuperscript{81} This is due to the widely unloved, but unalterably entrenched, principle from \textit{R v Kirby; Ex parte Boilermakers’ Society of Australia} (1956) 94 CLR 254. See John McMillan, above n 9, 424.


\textsuperscript{83} John McMillan, above n 9, 423, 438.

\textsuperscript{84} See the discussion in Peter Cane, above n 76, 191–201.

\textsuperscript{85} John McMillan, above n 9, 427.

\textsuperscript{86} A point discussed in Part VI below.

\textsuperscript{87} This recalls Sir William Wade’s query about quashing an instrument with no legal effect: ‘How can it be \textit{ultra vires} if it has no \textit{vires} to be \textit{ultra}?’: H W R Wade, ‘Beyond the Law: A British Innovation in Judicial Review’ (1991) 43 \textit{Administrative Law Review} 559, 561.
regime travels from the legal paradigm, the less relevant is judicial review as an accountability device’.88

The temptation to increase the range of judicial remedies, for example to include damages for maladministration, must be yielded to only after accepting that any such change would alter the existing suite of judicial review remedies.89 While this point is true in other jurisdictions, those without a constitutionally embedded (at Commonwealth level) separation of powers doctrine have a greater number of other options available to them.

Practically speaking, the separation of powers model is stable in Australia, especially at the Commonwealth level, and neither it nor other associated doctrines is likely to change in the foreseeable future.90 On the other hand, there has been a marked increase in recent years in people (just as likely to be judges91 as academics92) addressing the need for a notional fourth ‘branch of government’ comprising bodies with a dedicated ‘integrity’ function. Whether one views this as a metaphor designed to stimulate greater discussion or as a call for actual constitutional reform of the separation of powers doctrine, there is greater consensus that the separation of powers does not reflect the complexity of modern government. This is an example of how the obligation to ‘update our constitutional thinking’ is a prerequisite to designing a functional separation of powers doctrine from scratch.

Much of soft law’s power in this regard comes as a result of it being a concept that falls betwixt the established categories of the separation of powers doctrine, which is the ‘most important doctrine in analysing government legal accountability’.93 It is a tool for governing, but it is not legislative. It emanates from the executive without the accountability mechanisms which accompany delegated legislation. It is a form

89 See the analysis of Spigelman CJ in New South Wales v Paige (2002) 60 NSWLR 371.
93 John McMillan, above n 9, 423.
of administrative action which is all but immune to judicial review. The thinking that was used to draft the *Australian Constitution* never contemplated anything like soft law, with the result that its ‘softness’ is simply another way of describing the fact that its legal effect is not matched by mechanisms for holding its use accountable. There is a strong case against the possibility that the application of the existing constitutional separation of powers doctrine might be adapted to take account of soft law. This is an issue not faced by countries without such a hard-edged version of that doctrine, with the result that the United Kingdom’s courts have fashioned some responses, of greater or lesser effectiveness, to the use of soft law by public authorities.94

It is an additional point of difficulty that soft law comprises instruments which require the imposition of accountability, whereas most challenges to the separation of powers come from statutory bodies which are themselves designed to bring accountability. John McMillan has noted that the ‘growth of non-judicial accountability bodies has not been constrained by the doctrine of the separation of powers, but equally this new system of government accountability does not fit easily within that doctrine.’95 It is every bit as true that soft law does not fit within the separation of powers doctrine as that the separation of powers doctrine has not constrained soft law’s growth. However, where statutory bodies like the Ombudsman have continued to thrive despite fitting comfortably within none of the constitutional branches of government,96 the satisfaction that accompanies such achievements is tempered by the fact that soft law is neither organised nor wholly benign.

If regulation imposes, by its nature, a certain order, soft law is more likely to emerge opportunistically, simply because it operates effectively in the absence of structure or even official approbation. Soft law does not require a place within the separation of powers doctrine for validation or the better to reflect reality. It needs neither of these things to be effective. We, however, need accountability mechanisms, like those inherent to the separation of powers doctrine, to control the use of soft law as a tool of government. As things stand, the effectiveness of soft law means that governments can use legislation in such a spartan fashion that the accountability measures to which it is subject are rendered all but otiose.97 However, as with anything connected with the *Australian Constitution*, formal change is hard to achieve and will happen slowly if it happens at all.

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94 One aspect of this approach is addressed in greater detail in Part VI below.
95 John McMillan, above n 9, 423.
VI THE REMEDIAL APPROACH TO SOFT LAW

Soft law is a bigger subject than it at first appears. Indeed, it initially seems to have virtually no content at all, particularly in Australia where public law remedies, and private law remedies as they relate to public law issues, are connected so fundamentally to breaches of law.98 In soft law cases, the source of power is virtually never relevant. A detailed examination of Australia’s public law remedies offers few promising approaches to dealing with soft law, although remedies which are also ‘soft’ can and do resolve some problems created by soft law. An antecedent issue is to try to determine just what soft law includes. A survey of various soft law instruments, like that undertaken above, demonstrates much of the reason why attempts to define it tend not to be wholly successful; they are varied in form and purpose and need to be considered on their own merits to discern what they mean, where they fit into a regulatory scheme and on what bases they might be challenged.

This is perhaps the most salutary point to be made about soft law. Much of this article’s attention has been on how soft law can be identified and challenged but few people, even those with some legal knowledge or commercial sophistication, think to differentiate between law and instruments which merely look like law. There are legislative protections in place, for example under the Legislation Act 2003 (Cth), which distinguish legislative instruments from mere soft law. However, a registry of statutory instruments seems understandably insufficient to inform most people. The nett result is that, while some soft law will continue to be a model of helpfulness to those to whom it is aimed, there will always be an undercurrent of danger caused by the fact that soft law’s power to convince people that it is ‘law’ makes it dangerous and leaves it open to abuse.

While there are few methods by which the misuse of soft law can be remedied,99 there are some issues worth noting. Soft law’s legal status is important where it is issued in order to bring consistency to the conduct or decision-making of numerous people, for example delegates of a Minister who have been given the task of exercising a discretion. Before discretion became the defining characteristic of administrative decision-making, it was once considered the central problem of administrative law. Dicey and those who followed him regarded exercises of executive discretion as arbitrary,100 with Lord Hewart CJ decrying it as leading to ‘despotism [and] …
the loss of those hardly won liberties which it has taken centuries to establish. Discretionary decision-making, including by delegates, is now broadly accepted as a fact of administrative life, made more palatable where soft law exists to bring decisions into line with each other and dispel the perception that they are being made on an arbitrary basis. Inconsistency in like cases is not unlawful, but it is better avoided.

A Remedies Based on Invalidity

There are few judicial remedies suited to dealing with soft law. As I have noted already, it is difficult to rationalise remedying the misuse of soft law on the same basis as for invalid decision-making. Judicial review attaches consequences to the invalidity of decisions which are required to be legally correct and this is the basis on which Australia’s axiomatically procedural judicial review remedies are granted. Soft law, by contrast, does not by its nature carry formal legal consequences. While it follows that one cannot speak of soft law being legally invalid per se, there are nonetheless some ways in which judicial review is able to deal with the unlawful consequences of soft law which contains legal errors. A declaration of invalidity might be the first step towards seeking remedies where an invalid application of soft law is an element of a private cause of action, such as for false imprisonment or resti-

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102 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 24 ALR 577, 639 (Brennan J).

103 *Segal v Waverley Council* (2005) 64 NSWLR 177.

104 See my discussion of judicial review in Part V.


106 See, eg, *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319, 358–60, in which the High Court declared that soft law manuals supplied by the Minister contained legal errors for which the Minister was responsible. The errors of law made by the contractors would have been jurisdictional errors had the Minister adopted them: Mark Aronson, Matthew Groves and Greg Weeks, above n 105, [15.110]–[15.120]. However, the High Court’s declaratory relief was, in Perram J’s term, ‘proleptic’: *Minister for Immigration and Border Protection v SZSNW* (2014) 229 FCR 197, 219 [106].

107 See the discussion in *Park Oh Ho v Minister of State for Immigration and Ethnic Affairs* (1989) 167 CLR 637.
tution for unjust enrichment using a reason for restitution directed only at public authorities.108

A decision-maker who applies soft law rules or policies inflexibly, without listening to submissions that an exception be made, will generally have committed a jurisdictional error.109 Calls to develop ‘inconsistency’ as a free-standing ground of review on this basis encounter some difficulty since the result would be two grounds of review taking opposed positions on a single issue.110 An inconsistency ground which hardens the application of soft law would have particular effect on soft law with a ‘promissory’ outlook, and would therefore raise many of the same objections as the substantive enforcement of legitimate expectations.111 For now, at least, inconsistency is more likely to remain an aspect of Wednesbury unreasonableness.112 The rule against fettering, on the other hand, recognises the existence of soft law and places some limits on its application.

Soft law is capable of generating limited procedural fairness obligations on the part of bodies which use it as a regulatory tool, although remedies for breach of those obligations will only ever be procedural and never substantive in Australian courts.113

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109 See British Oxygen Co Ltd v Ministry of Technology [1971] AC 610, 625 (Lord Reid). His Lordship did not use the term jurisdictional error, which is how the relevant conduct would be described in an Australian court today.

110 Mark Aronson, Matthew Groves and Greg Weeks, above n 105, [3.280]. As Deane J pointed out in Nevistic v Minister for Immigration and Ethnic Affairs (1981) 51 FLR 325, 334, ‘while consistency may properly be seen as an ingredient of justice, it does not constitute a hallmark of it’. See also Carol Harlow and Richard Rawlings, above n 6, 207–8.

111 See, eg, Matthew Groves, ‘Legitimate Expectations in Australia: Overtaken by Formalism and Pragmatism’ in Matthew Groves and Greg Weeks (eds), Legitimate Expectations in the Common Law World (Hart Publishing, 2017) 319. The High Court’s disdain for legitimate expectations (see above n 11) is sufficient reason to conclude that it will not give its blessing to a ground promising similar substantive results.


113 In contrast to the United Kingdom, Australian courts have not established (nor seem likely to do so) a fairness-based requirement for officials to consult about the formation or revision of soft law instruments; see Mark Aronson, Matthew Groves and Greg Weeks, above n 105, [7.220]–[7.230].
They operate most notably where the soft law amounts to a direct representation.\textsuperscript{114} Judicial review will respond to material breaches of soft law which cause ‘unfairness, not merely departure from a representation’.\textsuperscript{115} Procedural fairness might be guided by soft law but does very little to ‘harden’ its application. The extent to which soft law can remove or alter common law requirements of fairness is quite limited.

The failure to consider soft law by a decision-maker can amount to reviewable error if consideration of that soft law is mandatory, either under the terms of statute or as an inference from those terms.\textsuperscript{116} The failure to consider soft law might sometimes be the basis of reviewable error\textsuperscript{117} but there is a high barrier for soft law to exceed in order for judicial review to enforce its consideration. One could argue that the consideration of, or failure to consider, soft law is unreasonable, but this remains a very difficult ground to make out.\textsuperscript{118}

**B Private Law Remedies**

Remedies which are not dependent on proving invalidity are generally no more effective than judicial review remedies for individuals who wish to enforce the terms of a soft law instrument against a public authority. Australian law accepts that public authorities may sometimes owe a greater duty than would be owed by a private actor due to a superior capacity to prevent harm,\textsuperscript{119} but it is less certain whether a public authority’s common law duty of care when it exercises a statutory power or performs

\textsuperscript{114} Public authorities are sometimes held to their own soft law guidelines, as in Applicants M16 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 148 FCR 46; Cf SZTGV v Minister for Immigration and Border Protection (2015) 229 FCR 90, 112–13. However, there are representations and representations; those which are specific to a particular case are not soft law. See, eg, Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82.

\textsuperscript{115} Re Minister for Immigration and Multicultural Affairs; Ex parte Lam (2003) 214 CLR 1, 12 (Gleeson CJ).

\textsuperscript{116} See Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, 40 (Mason J). The view that applicable policy is ‘always a relevant consideration’ and that soft law must therefore be considered was proposed in Nikac v Minister for Immigration, Local Government and Ethnic Affairs (1988) 20 FCR 65, 81. Such an approach is broader than allowed by the usual test for jurisdictional error on the ground of failing to consider a mandatory consideration.

\textsuperscript{117} Craig v South Australia (1995) 184 CLR 163, 177.

\textsuperscript{118} See Minister for Immigration and Citizenship v Li (2013) 249 CLR 332, 377–8 (Gageler J). Notwithstanding the approach of a High Court majority in Li, subsequent cases examining unreasonableness in the Full Federal Court appear to have adhered to the ‘conservative’ view of Gageler J that unreasonableness is applied rarely and only after the application of a stringent test.

a statutory duty can be extended further to cover soft law obligations.\textsuperscript{120} What is certain is that soft law, for example in the form of standards, can have a significant impact on private law litigation by setting the required measure of fitness for purpose, or reasonableness of conduct, in contract or tort claims respectively.\textsuperscript{121}

A misrepresentation by a public authority which has a ‘special relationship’ with the party who acts in reliance on soft law\textsuperscript{122} is more likely than nonfeasance to lead to a finding that a public authority has negligently acted inconsistently with its soft law. Some types of communication from public bodies are designed to encourage reliance by the public at large. Others, for example ad hoc approvals of proposed courses of action, necessarily come with the unspoken warning that reliance is at one’s own risk. One way to determine reasonable reliance is therefore to ask whether the representation upon which a plaintiff has relied was intended to communicate that the public authority making the representation would bear the risk of that representation being incorrect.\textsuperscript{123} Not every statement of future intention which does in fact induce another party to act in reliance on the statement’s accuracy is sufficient to ground a duty of care. Cases in which reasonable reliance has been established tend to feature a direct and personal communication of the relevant representation to the reliant party. This is not the usual mode of soft law.

C Non-Judicial Remedies

The most effective remedies for misuse of soft law are likely also to be ‘soft’. In particular, the fact that courts have few current tools for dealing with soft law means that the Ombudsman\textsuperscript{124} bears a practical responsibility in that regard. The Ombudsman’s office investigates many thousands of complaints every year and endeavours to obtain a suitable remedy for each complainant. While the separation of powers dictates that the Ombudsman’s office cannot impose binding declarations of right on the public authorities which it investigates, it can recommend an appropriate course of action to the relevant public authority. It is this adaptability that makes the Ombudsman of such potential importance where individuals are adversely affected by applications or failures to apply soft law.

\textsuperscript{120} See \textit{Council of the Shire of Sutherland v Heyman} (1985) 157 CLR 424, 458, 467–8 (Mason J).

\textsuperscript{121} This point is developed in greater detail in Greg Weeks, \textit{Soft Law and Public Authorities}, above n 1, 52–3.

\textsuperscript{122} See \textit{Mutual Life & Citizens’ Assurance Co Ltd v Evatt} (1968) 122 CLR 556.

\textsuperscript{123} This point was alluded to by Lockhart J in \textit{Unilan Holdings Pty Ltd v Kerin} (Unreported, Federal Court of Australia, Lockhart J, 5 September 1993).

\textsuperscript{124} Along with other ‘integrity branch’ authorities; see discussion in Part V.
The influence of the Ombudsman can be used to good effect by recommending that a public authority provide financial compensation under an ex gratia payment scheme\textsuperscript{125} to an individual who has suffered loss as a result of defective administrative action. This might be because the authority failed to adhere to the terms of its soft law, in circumstances where the individual has no enforceable legal right to damages for that loss in judicial proceedings. A ministerial discretion to make an ex gratia payment is more likely to be engaged if the Ombudsman is involved. Providing financial compensation is not always sufficient to assist people who have relied on soft law to their detriment, but it remains one of few effective remedies.

\section*{D \ The United Kingdom Approach to Review of Soft Law}

While it is trite to point out that the United Kingdom’s approach to administrative law is now very different to that of Australian courts, it is worth making a couple of observations about the way in which the United Kingdom has recently approached instruments and mechanisms which are not legally binding in order to draw a contrast to Australian law and practice. The most obvious example of a difference between the two jurisdictions is that British courts are prepared to give substantive effect to promises and other forms of legitimate expectation.\textsuperscript{126} Although the High Court views all productive discussion of legitimate expectations to be at an end in this country,\textsuperscript{127} they are highly analogous to soft law.\textsuperscript{128} In the United Kingdom,\textsuperscript{129} there is a long history of mere promises (which Australian courts would see as having no legal content) being given significant legal consequences. This is a history that


\textsuperscript{127} See the cases cited above n 11.

\textsuperscript{128} Not all soft law makes a promise, but both depend on the creation of belief which causes a person to act on the faith of what they have been told. Neither is explicitly legal in its operation. There is a similar connection to promissory estoppel; see Greg Weeks, \textit{Soft Law and Public Authorities}, above n 1, 231.

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reaches back past Coughlan’s case: English courts were first intrigued by the possibility of enforcing estoppels in public law cases just after the Second World War. Australia, by contrast, has not deviated from the orthodox view that prevents a court from enforcing an estoppel which would result in a breach of the law or would fetter a statutory discretion.

The approach by which British courts have come to affix legal consequences to non-binding instruments has now reached beyond the enforcement of legitimate expectations to the recommendations of public Ombudsmen. The role of Ombudsmen in the public sector is also somewhat analogous to soft law in as much as they achieve results through influence rather than any direct decision-making power. However, although they lack express constitutional recognition in most jurisdictions, Ombudsmen would not generally be tempted to trade their influence, built upon goodwill accumulated throughout the public sector, to obtain it. In other words, Ombudsmen are effective because of (as opposed to despite) their lack of determinative powers, the use of which would likely see Ombudsmen become heavily involved in defending judicial review actions. Currently, this is something that Australian Ombudsmen rarely do. Strengthening the legal standing of Ombudsmen’s findings would be entirely counter-productive if it were to lead to increased pressure on their time and budgets.

The move to make the decisions of Ombudsmen binding in the United Kingdom came, interestingly, in litigation which sought not to challenge a discretionary decision of the Parliamentary Commissioner for Administration (‘PCA’) but to have

130 In R v North and East Devon Health Authority; Ex parte Coughlan [2001] 3 QB 213, the Court of Appeal substantively enforced a promise made to the claimant that she would have ‘a home for life’ in a certain health care facility. See Kirsty Hughes, ‘Coughlan and the Development of Public Law’ in Satvinder Juss and Maurice Sunkin (eds), Landmark Cases in Public Law (Hart Publishing, 2017) 181.


132 The most recent Australian cases (above n 10) followed the previous British orthodoxy: Maritime Electric Co Ltd v General Dairies Ltd [1937] AC 610; Southend-on-Sea Corporation v Hodgson (Wickford) Ltd [1962] 1 QB 416.

133 Operating to resolve disputes within an adversarial system, Ombudsmen have often been (wrongly) dismissed as ‘toothless tigers’. See Robin Creyke, John McMillan and Mark Smyth, Control of Government Action: Text, Cases and Commentary (LexisNexis, 4th ed, 2015) 263.

134 Cf the Victorian Ombudsman: Constitution Act 1975 (Vic) s 94E.

her findings enforced.\textsuperscript{136} \textit{R (Bradley) v Secretary of State for Work and Pensions}\textsuperscript{137} (‘Bradley’) considered a finding by the PCA that government maladministration had caused certain pension schemes to be underfunded. Both Bean J at trial and the Court of Appeal held that the respondent Secretary of State could not reject that finding if he lacked ‘cogent reasons’ to do so. Justice Bean in fact went further and held that ‘no reasonable Secretary of State could rationally disagree with’ the finding made by the PCA.\textsuperscript{138} This reasoning goes beyond the reality that findings and recommendations of Ombudsmen are usually accepted. It further goes beyond the notional existence (currently formally unsupported) of a convention that such findings and recommendations be accepted, despite the fact that they lack binding force. What they decide in effect is that a Minister who is under no legal obligation to accept an Ombudsman’s findings must have, on the Court of Appeal’s reading, objectively cogent reasons for choosing not to accept them. The view of Bean J at trial was even more demanding; having found that the PCA’s findings were ‘reasonably open’, his Honour moved headlong to the subsequent finding that the Secretary of State had breached the \textit{Wednesbury} standard. It is easily understandable that some in the United Kingdom have viewed the results of the approach taken in \textit{Bradley} askance.\textsuperscript{139}

While it is unlikely that a finding similar to \textit{Bradley} would ever be made in Australia, not least for separation of powers reasons, such a development would be unsupported in any case.\textsuperscript{140} First, as discussed above, whether or not Ombudsmen can or should be invested with power that they can use to bind elected officials, it is unlikely that Ombudsmen would in fact wish to ‘strengthen’ their powers in this way. More importantly, the conclusion that public bodies cannot simply choose to disagree with the Ombudsman begs the question why the elected and politically responsible Work and Pensions Secretary ought not to be allowed to read the PCA’s report, disagree with it and choose to follow another path.\textsuperscript{141} The Secretary of State would of course be exposed to questions as to why he had rejected the PCA’s findings, and properly so, since the consequences of the Secretary of State’s chosen course of action should be decided in the political realm, rather than in the courts based upon

\textsuperscript{136} See Carol Harlow and Richard Rawlings, above n 6, 564. The PCA has a closer relationship with the House of Commons than is the case for other Ombudsmen, a circumstance enshrined in the \textit{Parliamentary Commissioner Act 1967} (UK) c 13: Law Commission, \textit{Administrative Redress: Public Bodies and the Citizen}, Report No 322 (2010) 65 [5.78].

\textsuperscript{137} \[2009\] 1 QB 114.

\textsuperscript{138} \textit{Bradley} [2009] 1 QB 114, 138–9 [66]. This finding is clearly based on the dictum of Lord Greene MR in \textit{Associated Provincial Picture Houses Ltd v Wednesbury Corporation} [1948] 1 KB 223. The meaning of Bean J’s addition of the word ‘rationally’ is unclear.

\textsuperscript{139} See, eg, Carol Harlow and Richard Rawlings, above n 6, 564–5.


\textsuperscript{141} Cf Trevor Buck, Richard Kirkham and Brian Thompson, \textit{The Ombudsman Enterprise and Administrative Justice} (Ashgate, 2011) 216.
a judicial determination of the cogency of his reasons. It is hard to imagine on what basis any contention to the contrary might be justified, particularly in Australia.

*Bradley* is an isolated example of the more invasive approach that British courts take to bodies and instruments that do their work by the exercise of influence. There is also a lengthy body of precedent in which British courts have substantively enforced promissory statements of government, including soft law, which have caused damage.\(^{142}\) While it is worth noting this contrasting approach for its own sake, the important point for this article is that British courts have significantly greater freedom to fashion their responses to such issues than their Australian counterparts. This is in part due to the limitations imposed on Australian courts in the name of the separation of judicial power. It is also due to the fact that a constitutional, and stringently observed, separation of powers is hard to change, either legally or in the minds of those who operate within its confines. Whether the British courts’ approach to these issues is right or wrong, it displays a level of innovation that Australian courts simply cannot deploy.

**VII Conclusion**

Soft law does not fit within the separation of powers doctrine in Australia. This is not to say that there would not be significant benefits from exposing its use to the kind of accountability mechanisms that are inherent to that doctrine. However, it is a forlorn hope that the constitutional separation of powers will be altered to recognise more accurately the various integrity agencies that are already fixtures within our political and legal thinking. There is almost no chance of a referendum succeeding, by obtaining a majority of votes in a majority of states, to alter the constitutional separation of powers such that it would recognise and control government conducted through soft law. This is a pity, to say the least, since soft law is presently used with a bare minimum of judicial oversight, the acquiescence of the legislature and the active encouragement of the executive government. If bringing the use of soft law within the constitutional fold is practically impossible, more thought must be given to how it might otherwise be made subject to new or existing accountability measures.

\(^{142}\) Of particular note is a series of cases decided by Lord Denning: *Robertson v Minister of Pensions* [1949] 1 KB 227; *Wells v Minister of Housing and Local Government* [1967] 2 All ER 1041; *Lever (Finance) Ltd v Westminster Corp* [1971] 1 QB 222; *HTV Ltd v Price Commission* [1976] ICR 170. It was only following his Lordship’s retirement that the House of Lords first accepted public law estoppel in *R v Inland Revenue Commissioners; Ex parte Preston* [1985] AC 835 and subsequently placed its principles within a public law context in *R v East Sussex County Council; Ex parte Reprotech (Pebsham) Ltd* [2002] 4 All ER 58. See also Weeks, above n 131, 230–8.
This article examines the round of legislative changes to superannuation taxation that came into effect on 1 July 2017. It traces this process, beginning with the comments and recommendations made by the Murray Financial System Inquiry (the ‘Inquiry’). The Inquiry’s findings were predominantly aimed at abating what it perceived to be the disproportionate flow of superannuation tax concessions towards wealthier members of the community. A substantial number of its recommendations were eventually implemented, but only after a change of leadership within the government. Many of these legislative changes increase equity by improving the targeting of superannuation tax concessions, and they do so without any apparent substantial loss in economic efficiency, though there is an increase of complexity in the application of the superannuation system. Other changes, mainly those concerned with broadening eligible superannuation income streams, enhance the ability of some retirees to benefit from a reliable income stream. The article concludes that this recent phase in superannuation changes is a positive step in the evolution of Australia’s superannuation system.

I Introduction

The Australian superannuation system has been subject to many changes over time, and this evolution is likely to continue. A major feature of the system is its concessional tax treatment. A number of changes to the taxation of superannuation came into effect on 1 July 2017. Most of these changes can be traced back to the Financial System Inquiry Reports (‘Inquiry Reports’). This article discusses those changes, explains their background, and critically evaluates them. Specifically, Part II of this article begins by outlining the laws relating to superannuation taxation prior to the July 2017 changes. Part III discusses the benchmark for evaluating tax laws, the general role of superannuation tax concessions, their cost, and the extent to which they benefit taxpayers of different income levels. Part IV then discusses the background to the July 2017 changes. Specifically, it examines the relevant comments of the Inquiry Reports relating to the superannuation tax changes and
describes their implementation. Part V goes on to examine the specific July 2017 changes and their particular backgrounds, and offers a critical evaluation of each. Part VI concludes the discussion.

II Superannuation Taxation

Australia’s superannuation system is characterised by individual retirement accounts to which employers make compulsory contributions where the worker earns at least $450 a month. The current contribution rate is 9.5 per cent of a worker’s salary. That rate is legislated to gradually increase to 12 per cent by 1 July 2025. Voluntary contributions can also be made to superannuation accounts in the form of direct contributions by the member or increased contributions by their employer.

As is the case with retirement savings in many other jurisdictions, the Australian superannuation system is subject to concessional tax treatment. On 1 July 2017, a number of changes to the superannuation taxation regime commenced. It is worthwhile to examine the law prior to these changes and note, by way of background, that superannuation is potentially liable to taxation at three points: when money is contributed to the account; when the account earns a return on its investments; and when the account holder withdraws benefits.

A Superannuation Contributions Taxation

A superannuation contribution that is subject to tax in the hands of the superannuation fund when deposited is referred to as a ‘concessional contribution’. For a typical employee, concessional contributions will include the 9.5 per cent of salary which employers are mandated to pay as an employer superannuation contribution, as well as any other employer contributions. This means that amounts the employer must contribute pursuant to industrial agreements or through a salary sacrifice agreement are regarded as ‘concessional contributions’. Concessional contributions are tax

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1 Superannuation Guarantee (Administration) Act 1992 (Cth) s 27(2).
2 Ibid s 19(2).
3 Ibid.
6 Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016 (Cth).
7 When describing the law in this part of the article, the present tense is used for the law that is still current, and past tense for instances where it has been modified.
9 Ibid sub-div 295-C.
Superannuation contributions that are typically paid out of after-tax salary or savings and are ineligible for a tax-deduction are termed ‘non-concessional contributions’ and are not subject to a contributions tax when deposited into the superannuation funds. Although, unlike concessional contributions, there is no tax saving at the contribution stage, earnings on such contributions still benefit from the concessional tax savings that superannuation fund earnings are subject to. There is an annual non-concessional contribution cap, which until 1 July 2017 was $180,000. Those aged under 65 at any time during the financial year can bring forward three years’ worth of this cap, meaning that until 1 July 2017 they could make up to $540,000 in non-concessional contributions in a single year. However, such a contribution would result in a commensurate reduction in the cap for the next two financial years.

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10 Ibid sub-div 290-B.
12 Income Tax Rates Act 1986 (Cth) s 12(1) and sch 7 pt 1; Medicare Levy Act 1986 (Cth).
13 The concessional earnings of superannuation funds are discussed under sub-heading B below.
16 Ibid div 293.
17 Ibid div 293, later amended by Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016 (Cth) s 17.
18 Ibid s 292-90.
19 Ibid s 292-85, later amended by Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016 (Cth) sch 3.
20 Ibid.
Lower income earners can utilise some concessions that are potentially available to them at the contributions stage. One concession is the co-contributions scheme, which applies to non-concessional contributions made by lower income earners, resulting in the government contributing 50 cents (up to $500 annually) for every $1 of non-concessional contributions made by lower income earners.21 The second, which applied until 30 June 2017, was the Low Income Superannuation ContributionsOffset, which refunded up to $500 of the amount of contributions tax paid on the concessional contributions of those earning up to $37,000 annually.22

A tax offset is also available where one spouse contributes to the other’s superannuation account. The offset is set at a rate of 18 per cent of the contribution, but is limited to $540 a year.23 Further, until 1 July 2017, the full offset was only available where the recipient spouse earned no more than $13,000 in that year, with the $540 limit being reduced where the spouse earned between $10,000 and $13,000.24

B Earnings Taxation

Superannuation earnings are also highly concessionally taxed. In general, a superannuation account fund can be considered to be in either its ‘accumulation’ phase or its ‘income stream’ phase. Superannuation fund earnings made during its accumulation phase are taxed at the rate of 15 per cent,25 though this is reduced for capital gains on assets owned for at least 12 months, which are only subject to 10 per cent tax (due to such capital gains being subject to a 33.3 per cent discount).26 Importantly, unlike earnings on superannuation accounts in the accumulation phase, earnings supporting superannuation income streams are tax-free.27

In contrast, investment earnings made by individuals directly, such as interest on bank deposits or rental income, are generally taxed at their marginal tax rate. However, some non-superannuation earnings benefit from concessional tax treatment. For instance, if the capital gain is made on assets owned for at least 12 months, then the gain is discounted by 50 per cent before being taxed at normal progressive marginal tax rates.28 Notwithstanding this discount, due to the low superannuation earnings tax rate, in most cases capital gains are taxed more heavily on assets directly owned

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23 Income Tax Assessment Act 1997 (Cth) s 290-235.
24 Ibid, later amended by Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016 (Cth) sch 7.
25 Income Tax Rates Act 1986 (Cth) ss 26(1), 27(1), 27A.
26 Income Tax Assessment Act 1997 (Cth) s 115-100.
28 Income Tax Assessment Act 1997 (Cth) s 115-100.
by individuals. An exception occurs where there are relatively minor capital gains and the taxpayer earns little other income; in those cases, a substantial part of the capital gain will fall within the taxpayer's tax-free threshold which could result in less tax payable than had the gain been made by a superannuation account in its accumulation phase. Some other non-superannuation earnings are also subject to concessional tax treatment. For instance, owner-occupied housing is exempt from capital gains tax. Further, any interest on moneys borrowed to purchase investment assets is deductible, and to the extent that it exceeds the income generated by the assets, can be used to offset other income such as salary income.

Typically, superannuation accounts will be in their accumulation phase during the account holder's working life. Upon reaching preservation age, the law allows account holders who have fulfilled conditions relating to ceasing employment to access their superannuation in an unrestricted manner, meaning they can take it in the form of a lump sum or an income stream, or some combination of these. The preservation age was originally 55 for all account holders, but staggered rises now mean that only those born before 1960 have unrestricted access at that age, and the preservation age for anyone born after 1 July 1964 is now 60.

A superannuation income stream could be taken either as an annuity or an account-based pension. An account-based pension is a phased withdrawal product, where the balance is invested in a pool of investments. Account-based pensions are subject to age-based minimum withdrawal limits, in default of which they cease to benefit from tax-free earnings. However, account-based pensions are not subject to maximum withdrawal limits, meaning that they provide the benefit of liquidity. An annuity, on the other hand, offers less flexibility and entitles the taxpayer to receive regular and predictable income payments. Annuity income streams can be fixed, indexed to a set percentage, indexed to the Consumer Price Index ('CPI'), or indexed to Average Weekly Earnings ('AWE'), though in the case of CPI and AWE settings this amount can be capped by the annuity contract. Such annuities can be either term or life annuities. Retirees on a life annuity will get an income stream for the rest of their

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30 *Income Tax Assessment Act 1997* (Cth) sub-div 118-B.
32 *Superannuation Industry (Supervision) Regulations 1994* (Cth) sch 1 item 101, reg 6.01.
33 Ibid reg 6.01.
35 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 1.06.
36 Ibid reg 1.06(9A).
37 Ibid reg 1.05.
38 Ibid reg 1.05(11A), 1.05(13).
39 Ibid reg 1.05(11A).
lives, meaning that their income is free from investment risk and longevity risk, and if indexed, from inflation risk as well. An account-based pension is by far the more popular option of the income stream options.

In addition to the differential taxation of superannuation earnings, another major difference between accounts in income-stream and accumulation modes is that an accumulation account can receive deposits, while an income-stream account cannot.

Taxpayers who have reached preservation age but have not triggered other conditions of release such as ceasing employment can access their superannuation funds through a ‘transition to retirement income stream’. Such an income stream is essentially an account-based pension with the extra restriction that only a maximum of 10 per cent of the balance can be withdrawn in a financial year. Importantly, until 1 July 2017, the earnings of a transition to retirement income stream were tax-free, just like other account-based pensions income streams.

C Taxation of Superannuation Benefits Paid to Members

Taxing withdrawal of superannuation benefits is dependent on a number of factors. To the extent that the withdrawn portion can be traced directly to non-concessional contributions, it is termed a ‘tax free component’ and is not subject to tax. Other portions of the superannuation account — including amounts originating from concessional contributions as well as account earnings — constitute the ‘taxable component’.

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40 Ibid reg 1.05(11A).
41 Investment risk is the risk of the investments falling in value or otherwise underperforming. Longevity risk is the risk of the retiree outliving their savings. Inflation risk is the risk of inflation eroding the purchasing power of the retirement income. See Janemarie Mulvey and Patrick Purcell, ‘Converting Retirement Savings into Income: Annuities and Periodic Withdrawals’ (Congressional Research Service Report for Congress, 2008) 2–4.
43 Superannuation Industry (Supervision) Regulations 1994 (Cth) regs 1.05(1)(a)(ii), 1.06(1)(a)(ii).
44 Ibid sch 1 item 110, reg 6.01.
48 Ibid subdiv 307-C.
For those who have attained their superannuation preservation age but are under the age of 60, lump sum withdrawals, to the extent they represent the taxable component, are tax-free up to a certain indexed amount (which was $195,000 for the 2016–17 tax year), and above that amount are taxed at 17 per cent.\textsuperscript{50} Income-stream benefits for those who have reached preservation age but are under 60, to the extent they represent a taxable component, are subject to normal marginal tax rates less a 15 per cent tax offset.\textsuperscript{51} For account holders aged 60 and above, withdrawals are tax-free, whether the amount is withdrawn as a lump sum or taken out as a superannuation income stream.\textsuperscript{52}

\textbf{D Untaxed Funds}

About 10 per cent of superannuation funds in Australia are untaxed funds\textsuperscript{53} which for constitutional reasons do not pay tax on their contributions or earnings.\textsuperscript{54} These funds consist of a limited number of state government superannuation schemes covering some public servants, members of the judiciary, and politicians.\textsuperscript{55} To partially fill this lacuna in taxation, withdrawals from such funds are more heavily taxed at the benefits phase. Specifically, for those who are at least 60, the taxable components (up to an indexed threshold, which was $1,415,000 in the 2016–17 tax year) are taxed at up to 17 per cent, whereas amounts over the threshold are taxed at the top tax rate of 47 per cent.\textsuperscript{56} For taxpayers who have reached their preservation age but are under 60, withdrawals are taxed at up to 17 per cent (up to a lower indexed threshold, which was $195,000 for the 2016–17 tax year). Amounts between this lower threshold and the higher threshold ($1,415,000 in 2016–17) are taxed at 30 per cent, and anything over the higher threshold is taxed at the top marginal tax rate of 47 per cent.\textsuperscript{57} As far as income-stream withdrawals from such funds are concerned, those who are at least 60 are subject to normal marginal tax rates for such withdrawals, less a 10 per cent offset.\textsuperscript{58} On the other hand, those who have reached preservation age but are not yet 60 will be subject to normal marginal tax rates.\textsuperscript{59}

\textsuperscript{50} Ibid ss 301-20, 307-345.
\textsuperscript{51} Ibid s 301-25.
\textsuperscript{52} Ibid s 301-10.
\textsuperscript{54} Income Tax Assessment Act 1997 (Cth) s 50-25 item 5.3, s 995-1; Income Tax Assessment Regulations 1997 (Cth) reg 995.1; Australian Constitution s 114.
\textsuperscript{55} Income Tax Assessment Regulations 1997 (Cth) reg 995.1.04 and sch 4, reg 995.1.01.
\textsuperscript{56} Income Tax Assessment Act 1997 (Cth) s 301-95.
\textsuperscript{57} Ibid s 301-105. Until 30 June 2017 such sums were also subject to the additional 2 per cent temporary budget deficit levy: Income Tax (Transitional Provisions) Act 1997 (Cth) s 411.
\textsuperscript{58} Income Tax Assessment Act 1997 (Cth) s 301-100.
\textsuperscript{59} Ibid s 301-110.
III Background for Evaluating Superannuation Tax Laws

Given that superannuation is subject to its own particular concessional tax treatment, it is worthwhile to examine the general benchmark for judging tax laws. This examination is followed by a discussion of the specific purposes of the superannuation tax concessions as well as their fiscal cost and the way their benefit is distributed among income levels. The discussion includes an evaluation of the purpose of the superannuation system, as this is relevant to many of the July 2017 superannuation tax changes.

A Criteria for Evaluating Tax Laws

Tax laws, including the ones applicable to superannuation, are generally evaluated according to the criteria of equity, efficiency and simplicity.60 The first of these, equity, has vertical and horizontal aspects. Horizontal equity is the principle that those of similar financial means should be taxed similarly.61 Vertical equity is the principle that those of greater means should pay more tax,62 though to what degree they should do so is subject to a range of opinions.63 A progressive tax system plays an important role in attaining a measure of such equity.64

The criterion of equity is related to the concept of distributive justice, which is the principle that the tax system has a role in redistributing money from those who are financially well-off to those who lack resources — to the extent that people have arrived at their position through factors beyond their control.65 It has been argued that the equity of a tax system should be judged by a hypothetical outsider subject to a ‘veil of ignorance’ (not knowing what position they might occupy within a society, but expecting to become a random member of it). The greater the level and prevalence of poverty in such a society, the more likely it would result in the hypothetical person

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62 Ibid.

63 Commonwealth of Australia, Draft White Paper, above n 60, [1.4].

64 Liam Murphy and Thomas Nagel, The Myth of Ownership: Taxes and Justice (Oxford University Press, 2002) 120.

ending up in a negative situation, meaning that prior to entering the society, they would be more likely to believe in increasing its equity.\textsuperscript{66}

The criterion of efficiency calls for the tax laws to minimise the degree to which they cause economic distortions that could impede economic growth,\textsuperscript{67} whereas the criterion of simplicity calls for the law to be easy to understand and apply.\textsuperscript{68} In juxtaposition, these criteria often require trade-offs: for example, laws improving equity often result in less simplicity.\textsuperscript{69}

\textbf{B Purposes of Superannuation Tax Concessions}

There are several justifications for subjecting superannuation to concessional tax treatment. An important justification is that since superannuation is an income-smoothing regime, its funds should be taxed similarly to someone who is in retirement and therefore subject to comparatively lower tax rates, as their income is lower.\textsuperscript{70} A further reason for these concessions is that without them, after-inflation returns would in some cases be subject to excessive tax rates.\textsuperscript{71} Such an outcome would be regarded as inefficient, as it would skew decision-making against investing and towards consumption.\textsuperscript{72} It would also be inequitable to tax gains that represent inflation.\textsuperscript{73}

Another justification that has been argued for the concessions is that they will save future pension payments.\textsuperscript{74} However, this justification appears to lack substance, given that the evidence suggests the superannuation regime has a net cost, since the tax concessions cost more than savings on future pension expenditures.\textsuperscript{75} Notwithstanding this, a more targeted superannuation tax system would abate this cost, as

\textsuperscript{67} Commonwealth of Australia, \textit{Establishing Objectives, Principles and Processes}, above n 60, 63.
\textsuperscript{68} Commonwealth of Australia, Draft White Paper, above n 60, [1.8].
\textsuperscript{69} Ibid [1.10].
\textsuperscript{71} Ibid.
\textsuperscript{72} Commonwealth of Australia, ‘Re:Think’, above n 60, 58.
higher income earners are unlikely to be eligible for the age pension irrespective of their superannuation balances;\textsuperscript{76} reducing their entitlement to concessions will therefore result in a net fiscal saving.

Further, it has been argued that yet another reason for the superannuation tax concessions is that they increase voluntary superannuation contributions.\textsuperscript{77} However, research has indicated that they do so to a very minor extent.\textsuperscript{78} This is partially because higher income earners will merely increase their tax-preferred retirement savings at the expense of other savings vehicles.\textsuperscript{79} As far as other income groups are concerned, notwithstanding previous claims that tax concessions do increase their voluntary retirement savings,\textsuperscript{80} more recent research indicates that these groups generally do not respond to such incentives.\textsuperscript{81} Consequently, it would be hard to argue that this is a valid justification for such tax concessions.

\textbf{C Cost of Superannuation Tax Concessions}

According to the Commonwealth Treasury, the cost of superannuation tax concessions is substantial. Prior to these July 2017 changes, superannuation tax concessions were estimated to cost the government approximately $35 billion in lost revenue for the 2016–17 tax year, using traditional tax expenditure calculations.\textsuperscript{82} However, those estimates have been criticised as overestimating government revenue loss, for a number of reasons—most notably that the estimates do not fully take into account

\begin{itemize}
  \item Knox, above n 74, 304.\textsuperscript{78}
  \item Chetty, above n 78, 1215–6; Benjamin, above n 78, 1285; Attanasio, above n 78, 26.\textsuperscript{80}
  \item OECD Tax Policy Studies, ‘Encouraging Savings Through Tax-Preferred Accounts’ (No 15, 2007).\textsuperscript{81}
  \item Chetty, above n 78, 1215–16.\textsuperscript{82}
  \item Commonwealth of Australia ‘Tax Expenditure Statements’ (Treasury, January 2017), 77–82 \url{<https://static.treasury.gov.au/uploads/sites/1/2018/01/2017-TES.pdf>}. This takes into account the concessional taxation on superannuation contributions and earnings and incorporates items C1, C2, C3 and C4, less items C10 and C11.
\end{itemize}
the behavioural changes that would occur in the absence of such concessions. Consequently, the Commonwealth Treasury also models some of the aspects of the superannuation tax concessions that do take into account such behavioural changes. That modelling indicates that for the 2016–17 tax year, these concessions were responsible for a loss of revenue of a slightly more moderate $33 billion.

D Distribution of the Benefits of Superannuation Tax Concessions

A concessionally taxed, defined contribution system such as superannuation will by its nature lead to those with higher incomes getting a larger tax benefit. First, this is because superannuation contributions are, beneath a prescribed ceiling, taxed at a flat rate; higher income earners, being on a higher tax rate, benefit from a larger gap between their marginal tax rates and the superannuation contributions rate of 15 per cent. Second, people with higher incomes typically have larger amounts contributed to their superannuation accounts, meaning that more of their dollars are subject to the concessional contributions tax rate than subject to the taxpayer’s normal marginal rate. Third, higher income earners will typically have higher superannuation balances, so the extent of their benefit from the concessional superannuation earnings rate is greater.

The evidence indicates that for the pre-July 2017 rules, the benefit of superannuation tax concessions was highly skewed towards high income earners. The degree of this bias can be considered suboptimal for two reasons. First, it can be argued that this bias breaches the principles of vertical equity (although the extent to which

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86 Ibid.

87 Ibid.

vertical equity should be implemented is open to debate, and needs to be seen in the context of the overall tax system). Second, as the cost of superannuation is to some degree abated by reducing reliance on the age pension, and higher income earners are unlikely to rely on the age pension even without the benefit of superannuation tax concessions, it is more fiscally beneficial for superannuation benefits to be targeted away from higher income earners.

E Purpose of the Superannuation System

Parliamentary debates regarding the legislation that introduced compulsory superannuation indicate that a major reason for its implementation was to give retirees an adequate level of retirement income. Similarly, the more recent final Financial System Inquiry Report (‘Final Report’) stated that superannuation’s primary objective was ‘to provide income in retirement to substitute or supplement the Age Pension’ and listed some subsidiary purposes, which for the most part were concerned with the welfare of retirees. The government intends to legislate to formalise the stated purpose of superannuation to reflect the objectives stated in the report, although the legislation has yet to be passed. Consequently, although no one source authoritatively states the purpose of superannuation, the evidence indicates that the superannuation regime is in place primarily to enhance retirement incomes.

IV Background to the July 2017 Superannuation Changes

Due to political realities and the fact that policy settings incorporate a range of trade-offs whose relative importance is debatable, the taxation of superannuation has, over the years, been the subject of several government reviews and numerous changes.

For the most part, the July 2017 superannuation tax changes have their origins in comments and recommendations made by the Inquiry Reports. Consequently, it is useful to look at the relevant comments made in those reports and the political background against which they were implemented.

80 Ingles and Stewart, above n 75, 24–5.
81 Daley, Coates and Wood, above n 76, 26–7.
83 Murray, Final Report, above n 88, 95.
84 Superannuation (Objective) Bill 2016 (Cth).
A Inquiry Reports

In July 2014 the interim Financial System Inquiry Report (‘Interim Report’)96 was released with an invitation for public submissions. The Final Report97 was released in December 2014. The government responded to the Final Report in October 2015.98

The Inquiry Reports contained substantial commentary on the taxation of superannuation. Broadly speaking, the Final Report suggested that consideration should be given to two interrelated issues. First was a proposal to align the earnings tax rates in accumulation and income-stream modes.99 This recommendation has not been implemented. The second was to introduce policies to abate the problem of superannuation tax concessions disproportionately flowing to higher income earners.100

Regarding superannuation tax concessions, the Final Report specifically noted that the current superannuation tax arrangements disproportionately benefited higher income earners and those with large superannuation balances.101 It pointed to that situation as a misuse of resources, given that the superannuation balances of such fund holders are unlikely to contribute to any reduction in expenditure on pensions.102 The Final Report suggested that this concern be alleviated by better targeting of superannuation tax concessions, or through a larger earnings tax on those with high superannuation balance,103 though the latter is in reality a form of better targeting of the superannuation tax concessions.

As to the first suggestion, that of better targeting of tax concessions, the Final Report mentioned the progressive but concessional contributions tax system recommended by the Australia’s Future Tax System Review (also known as the ‘Henry Review’, a previous prominent tax review report).104 The Final Report then went on to more strongly advocate reducing the non-concessional contributions cap as a way of better targeting superannuation tax concessions.105

97 Murray, Final Report, above n 88.
99 Murray, Final Report, above n 88, 137–42.
100 Ibid 137–42.
102 Ibid.
103 Ibid 140–1.
104 Ibid 140.
105 Ibid.
In addition, the Final Report commented on superannuation income streams that benefit from tax-free earnings, suggesting that they be broadened to include a wider range of annuity-like products.\footnote{Ibid 122, 125.}

**B Background to the Implementation of the Inquiry Reports**

By way of background, the current Coalition Government, upon assuming power in 2013, initially expressed a reluctance to change the taxation of superannuation.\footnote{Australian Broadcasting Corporation, *Promise Check: No Unexpected Adverse Changes to Superannuation* (8 May 2016) <http://www.abc.net.au/news/2014-11-07/no-adverse-changes-to-superannuation-promise-check/5734364>.} The comments on superannuation reform in the Final Report, made in 2014, were made in anticipation of superannuation being subject to further consideration as part of a general tax review process that was ongoing at the time.\footnote{Murray, Final Report, above n 88, 137; Commonwealth of Australia, ‘Re:Think’, above n 60, 67–70.} Then, during September 2015, the Coalition government underwent a change of Prime Minister and Treasurer, and there were subsequent signs that the government was more willing to implement superannuation changes than under the previous leadership.\footnote{Shalailah Medhora, ‘Turnbull to Meet Business and Union Leaders to Outline Reform Agenda’, *The Guardian* (online), 29 September 2015. <http://www.theguardian.com/australia-news/2015/sep/29/turnbull-to-meet-with-business-and-union-leaders-to-outline-reform-agenda>.} Shortly afterwards, in October 2015, when the government released an official response to the Final Report, it did not comment on these specific superannuation tax matters. Instead, it deferred any decision until the tax review process had progressed further.\footnote{Commonwealth of Australia, ‘Government Response to the Financial System Inquiry’, above n 98.} However, by 2016, the government had retreated from that position and stated that there would be no final paper in the tax review process.\footnote{Laura Tingle, ‘Markets too Volatile for Big Tax Changes’, *Australian Financial Review* (online) 5 February 2016 <http://www.afr.com/news/politics/national/turnbull-rules-out-white-paper-denies-end-to-compulsory-super-20160204-gmmc59>.}

Despite the general tax review process being halted, consistent with the government’s earlier expression of willingness to reform superannuation the May 2016 budget outlined wide-ranging superannuation taxation reforms.\footnote{Commonwealth of Australia, ‘Budget 2016–17’ (Budget Paper No 2, 3 May 2016) 27 <https://www.budget.gov.au/2016-17/content/bp2/download/BP2_consolidated.pdf>.} After the government’s subsequent election victory, it made a further announcement on 15 September 2016 affirming its commitment to most of these budget announcements, though there was also some deviation from the original announcement.\footnote{Scott Morrison and Kelly O’Dwyer, ‘Even Fairer, More Flexible and Sustainable Superannuation’ (Media Release, 15 September 2016) <http://sjm.ministers.treasury.gov.au/media-release/096-2016/>.} During late November
2016, the government passed legislation which enacted the changes proposed in the September 2016 announcement. These changes to some extent implemented the suggestions and recommendations made by the Final Report. Specifically, they relate to the Final Report’s comments regarding abatement of the tax concessions flowing to higher income earners as well as widening the tax-free earnings exemption for a wider variety of income streams. However, the government has not shown any intention to implement a universal and unified earnings rate regime as suggested by the Final Report.

V July 2017 Superannuation Changes

There were numerous changes to the superannuation tax regime introduced on 1 July 2017. This part examines those changes, canvassing their background in the Inquiry Reports and evaluating them from a policy perspective. It considers, where relevant, the criteria of equity, efficiency and simplicity. In relation to efficiency, an issue that is potentially relevant for some of the changes is whether they have an impact on workforce participation.

A Lowering the Division 293 Threshold and Low Income Superannuation Tax Offset

One of the July 2017 changes originally mentioned in the 2016 budget was that the division 293 income threshold, which effectively makes concessional contributions subject to a 30 per cent tax rate rather than a 15 per cent tax rate, be lowered from an annual $300,000 to a $250,000 income amount. Further, also announced in the 2016 budget and then legislated, was the continuation of the Low Income Superannuation Contribution Offset, which had been intended to be phased out from 1 July 2017. It is now to continue under another name, the ‘Low Income Superannuation Tax Offset’. The effect of this offset is that the 15 per cent concessional contributions tax imposed on superannuation accounts is refunded in the case of lower income earners.

114 Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016 (Cth).
115 Murray, Final Report, above n 88, 137–42.
117 Income Tax Assessment Act 1997 (Cth) s 293-20, as amended by Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016 (Cth) s 17.
119 Ibid, as amended by Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016 (Cth) sch 4, pt 1.
120 Ibid.
1 Background of Changes to Division 293 and Maintaining Low Income Offset

The Final Report specifically suggested that superannuation concessions be taxed in a progressive manner to better target superannuation tax concessions away from higher income earners. The division 293 contributions tax and a low-income superannuation tax offset do to some extent provide, albeit in an inelegant manner, a three-tier concessional contributions regime. As such, although the Final Report’s suggestion of a progressive contributions tax was not explicitly implemented, maintaining the low-income superannuation tax offset and decreasing the division 293 threshold does to some extent mean that the system more effectively emulates a progressive regime.

2 Evaluation of Changes to Division 293 and the Maintenance of Low Income Offset

As discussed above, there are cogent arguments for better targeting of superannuation tax concessions for vertical equity and net fiscal impact. Changes that increase the progressivity of concessional contributions taxation do increase tax concession targeting. Further, one of the justifications for superannuation tax concessions is that retirement savings should be taxed at a lower rate because they represent income utilised when the taxpayer is in retirement, and so should be subject to a lower tax rate, since taxpayers in retirement would typically be on a lower tax rate. Consequently, it is fair that higher income earners pay a higher, but still concessional, tax rate on their contributions — as compared with lower income earners — as this more closely approximates the situation that would result if the money had been earned in retirement.

Further, although the lowering of the division 293 threshold amounts in some cases leads to an increased tax on the remuneration of higher income earners, this is unlikely to have any substantial impact on the workforce participation of such workers. This is due to the very modest size of the increase in taxes combined with the fact that higher income earners do not have a substantially higher relative tendency to reduce their work when subject to a higher tax burden. Further, the work disincentive effect of an increase in tax on retirement fund contributions is substantially less than it is from an increase in tax on take-home salary, given that the former is only realised in the future.

121 Murray, Final Report, above n 88, 140–1.
123 For example, the maximum amount of extra tax potentially paid on someone fully utilising the $25 000 concessional contributions cap would be $25 000 × 15% = $3750.
While the July 2017 changes still fall far short of a genuinely progressive concessional contributions tax, they are a step in that direction. However, the reality remains that the $250 000 threshold, although affecting substantially more taxpayers than the $300 000 threshold, raises only a relatively modest amount of extra revenue.126

B Limiting Non-Concessional Contributions Cap

The July 2017 changes included modifications to the non-concessional contributions cap. Specifically, the annual non-concessional contribution cap was lowered to $100 000. From a legislative perspective this has been accomplished by stating that it is equal to four times the concessional contribution cap.127 The ability to bring three years’ worth of contributions within this cap has been retained.128

Another important legislated change prevents any non-concessional contributions once a member has a superannuation balance of at least $1.6 million.129 The new provisions regarding the $1.6 million limit are also relatively simple, and expressed in terms of what the member’s superannuation balance is at the beginning of the relevant financial year.130 The superannuation balance is generally calculated by aggregating the value of the taxpayer’s accounts in accumulation phase as well as their ‘transfer balance cap’ (as discussed later in this article, the transfer balance cap is the amount used to calculate whether the taxpayer has reached the $1.6 million limit on superannuation income-stream accounts).131

1 Background to the Introduction of Changes Restricting Non-Concessional Contributions

The Final Report, in arguing for a reduction in the tax concessions flowing to higher income earners, strongly advocated a reduction in the non-concessional contributions cap as a way to achieve this.132 In response, the 2016 budget announced a severe limiting of the non-concessional contributions cap. Specifically, it was intended that this cap have a lifetime limit of $500 000 of non-concessional contributions, and that this limit come into effect from budget eve.133 Further, it was intended that any previous contributions made from 1 July 2007 be counted towards that limit.134

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126 Explanatory Memorandum, Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (Cth) 13.
128 Ibid ss 292-85(3)–(7).
131 Ibid s 307-230(1).
132 Murray, Final Report, above n 88, 140.
134 Ibid.
However, after sustained protest — some asserting that the limit was too low, others that the implementation was retrospective — the government announced, in September 2016, that it no longer intended to implement the $500,000 lifetime non-concessional contribution limit. Rather, it announced that from 1 July 2017 no further non-concessional contributions could be made if the taxpayer had a superannuation balance of at least $1.6 million. Further, from 1 July 2017, the annual non-concessional contribution limit would be lowered from $180,000 to $100,000.

2. Evaluation of the Changes Regarding Restriction of Non-Concessional Contributions

Non-concessional contributions benefit from concessional tax treatment on their subsequent earnings. As higher income earners are more likely to make large non-concessional contributions than others, the changes further restricting non-concessional contributions increase vertical equity. Further, as non-concessional contributions lead to increased future superannuation income, restricting such contributions also increases vertical equity in the sense of limiting the amount of future earnings that are tax-preferred, regardless of the salary incomes of the contributors.

The Final Report’s comment also made the accurate point that laws aimed at capping contributions will only abate high balances building in the future, and will not affect those who already have high balances. This does not preclude it being good policy, but if the aim is to increase vertical equity due to a reduction of the concessions flowing to higher income earners, then that approach should ideally be accompanied by other policies that target those with money already in the system. Overall, a superannuation tax reform that in one way or another reduces the ability to make non-concessional contributions does contribute to making the system more equitable.

Specifically, concerning the prohibition on contributions once a $1.6 million balance has been achieved, it could be argued that ultimately, given that a financial year is an arbitrary concept, non-concessional contributions should be limited according to some more policy-relevant principle than annual limits. While this could be achieved, as originally suggested, by a lifetime limit on non-concessional contributions, the legislation has instead utilised a prohibition on further contributions once a superannuation balance exceeds a set amount. Either of these alternatives is likely to increase equity, and both are consistent with superannuation functioning as a retirement tool rather than an inter-generational wealth-building vehicle.

135 Morrison and O’Dwyer, above n 113.
136 Ibid.
138 Daley, Coates and Wood, above n 76, 42.
139 Murray, Final Report, above n 88, 142.
On the other hand, while a lifetime cap or prohibition on further deposits once a set balance is achieved should ideally be the main way of limiting non-concessional contributions, the presence of some annual limit to accompany this lifetime mechanism also aids vertical equity. This is because, in the absence of annual caps, wealthy people could deposit large amounts of superannuation early in their working lives, which would maximise their tax benefits to a greater extent than it would if they made deposits in a more staggered manner (since early deposits result in a greater utilisation of concessional taxed earnings). However, as noted in the Final Report, an annual cap potentially removes flexibility from the system and may be to the detriment of those with broken work patterns.141

Given that there are arguments for both a non-concessional contributions cap once a certain balance is achieved and for annual limits, the next issue to consider is whether the limits that apply from 1 July 2017 are sound. Since the primary aim of the superannuation system is the provision of an income in retirement, ideally, that lifetime figure would be based on what is necessary for a comfortable retirement. Such a figure can never be devoid of subjectivities, and it will inevitably be partly based on community beliefs about the quantum of a ‘reasonable’ retirement income, assumptions on longevity, predicted future investment returns, and the degree of expectation that taxpayers should exhaust their capital. With this in mind, the $1.6 million balance at which taxpayers cannot make any further non-concessional contributions appears to be consistent with the primary role of superannuation, given estimates for what is required for a ‘comfortable retirement’.142 This change goes some way to improving the equity of the current system, albeit at the cost of losing some simplicity, given that previously, members’ superannuation balances were irrelevant to their ability to make contributions. In contrast, the initial proposed lifetime cap of $500,000, in a world where investment returns are increasingly modest, would be unlikely to generate the type of income that is generally regarded by retirees as sufficient for an adequate retirement.143 This would be exacerbated by the fact that recent changes to the age pension assets test mean that those with superannuation balances of $500,000 will be ineligible for much of a pension.144 Some characterised the initial budget

141 Murray, Final Report, above n 88, 140.
144 Social Security Act 1991 (Cth) s 1064, as amended by Social Services Legislation Amendment (Fair and Sustainable Pensions) Act 2015 (Cth) sch 3 pt 1.
changes as retrospective, especially as they affected non-concessional contributions made after 1 July 2007, though this was ultimately a matter of semantics.\footnote{Australian Broadcasting Commission, \textit{Fact Check: Are the Government’s Super Changes ‘Not at All’ Retrospective?} (27 May 2016) <http://www.abc.net.au/news/2016-05-26/fact-check--government-super-changes/7422540>.

However, the government’s lowered annual non-concessional contribution cap of $100,000 will apply to those with lower balances, so it will be a blunt instrument, though the retention of the ability to bring forward three-years of contributions does to some degree alleviate such a concern. In other words, it will no doubt increase equity by discouraging some higher income or higher wealth individuals from disproportionately using the superannuation system to reduce tax. However it will also affect those who might have a low superannuation balance for a number of legitimate reasons — such as broken work patterns or having a relatively low paid job for much of their career — but now have some funds they could deposit in the superannuation system if permitted to do so to help them attain a sufficient superannuation balance. As discussed, while the primary tool for limiting non-concessional contributions should be restrictions on lifetime contributions or a certain superannuation balance being reached, annual caps do have their place. Policy judgments on the size of annual caps always involve trade-offs and subjective assessments, but it is arguable that reducing the annual cap to $100,000 is not optimal policy.

\section*{C Limiting Tax-Free Earnings}

One of the more important July 2017 changes is the limiting of the balance of a member’s superannuation income stream that can benefit from tax-free earnings to $1.6 million.\footnote{\textit{Income Tax Assessment Act 1997} (Cth) s 294-35, as amended by \textit{Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016} (Cth) sch 1 pt 1.} Specifically, division 294 has been inserted in the \textit{Income Tax Assessment Act 1997} (Cth), and in effect deems each superannuation holder with a superannuation income stream to have a transfer balance account which must not exceed $1.6 million.\footnote{\textit{Income Tax Assessment Act 1997} (Cth) div 294.} Amounts in a superannuation income stream exceeding the $1.6 million cap will be subject to a 15 per cent tax for a first breach, and after 1 July 2018, subject to a 30 per cent tax for a second or subsequent breach.\footnote{\textit{Superannuation (Excess Transfer Balance Tax) Imposition Act 2016} (Cth) s 5.} This means that, depending on the breach, account holders would from a tax perspective be no worse off, and in some cases better off, keeping superannuation funds in excess of the cap in their accumulations phase, where earnings would be taxed at 15 per cent.\footnote{\textit{Income Tax Rates Act 1986} (Cth) ss 26(1), 27(1), 27A.}

Further, division 294 states that the transfer balance account is to be credited upon events such as the account holder having a superannuation income stream balance on 1 July 2017, or by transferring money into a superannuation income stream on or
after that time. However, earnings that increase the balance of the income stream are not a credit entry. Conversely, this account is to be debited upon the occurrence of certain events such as commuting an income stream back to the accumulation phase or making a lump sum withdrawal. However, it is not debited from normal account-based pension drawdowns that retirees typically use to fund living expenses, including ones that are required by the minimum age-based withdrawals limits. The $1.6 million limit is indexed to CPI to the nearest $100,000. For those entitled to a non-commutable, defined-benefit superannuation income stream, only the first $100,000 paid each year can benefit from a tax offset.

1 Background to Limiting Tax-Free Earnings

One of the main suggestions of the Final Report regarding the taxation of superannuation was to increase superannuation earnings tax for those with balances over a certain limit.

Previously, the Australian Labor Party (‘ALP’), while in government, also had plans to increase the earnings tax payable by wealthier people. Specifically, it planned to introduce a tax on all superannuation income-stream earnings exceeding $100,000 in any particular financial year, at the rate of 15 per cent (rather than being tax-free). This was not implemented. Subsequently, after losing the election and becoming the opposition party in 2013, the ALP announced its intention to implement a more restrictive version of this policy, whereby income-stream earnings in excess of $75,000 in a particular year would be subject to a 15 per cent tax.

It should be noted that the Final Report’s suggestion was not identical to the one proposed by the ALP. Specifically, the ALP’s proposal was aimed at making some tax-free income-stream earnings for targeted taxpayers subject to the same tax rate as earnings on superannuation accumulation funds. The Final Report’s proposal,

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151 Explanatory Memorandum, Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (Cth) [3.57].
153 Explanatory Memorandum, Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (Cth) [3.100].
155 Ibid sub-div 294-D.
156 Murray, Final Report, above n 88, 142.
158 Ibid.
160 Shorten and Swan, above n 157.
on the other hand, was not targeted at increasing tax solely on the earnings of income-stream accounts, but on the earnings of both accumulation and income-stream accounts when the member’s total superannuation balance exceeded a certain threshold. A further difference between the Final Report’s proposal and that of the ALP is that the Final Report’s proposal uses the superannuation fund’s balance, rather than its earnings, as the criterion for determining whether the higher earnings rate is applicable.

The current government initially announced, prior to the publication of the Inquiry Reports, that it would not implement a means-tested increase to the superannuation earnings rate. It justified this on the basis that such a change would lead to higher compliance costs for superannuation funds, and avoiding it would help to bring certainty to the superannuation system. However, in the 2016 budget, as a manifestation of the change of direction, the government announced that from 1 July 2017 the maximum amount that could be retained in tax-free earnings mode would be $1.6 million per taxpayer.

2 Evaluation of Law Limiting Tax-Free Earnings

Putting a limit on the amount that can benefit from tax-free earnings promotes vertical equity, given that earnings are in substance a form of income accruing to the account holder. It is also fiscally positive, as it targets the concessions away from those who are unlikely to utilise the age pension, even though the concept of a transfer balance account comes at some cost to administrative simplicity. However, ultimately, whether the earnings or the balance of the account should be the criterion for a higher level of tax, and at what threshold it should apply, are matters of debate.

The advantage of using earnings as opposed to account balance as the criterion for limiting tax-free earnings is that the long-term returns on assets can change over time, meaning that in a world of unpredictable investment returns, the balance required to support a comfortable requirement today might be inadequate in the future if long-term returns fall. Further, the most targeted way for such a policy to increase vertical equity would be to set earnings as the relevant criterion, since earnings are in essence a form of income.

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161 Murray, Final Report, above n 88, 141.
163 Murray, Final Report, above n 88, 141. The Final Report did suggest that the compliance issue could be overcome by placing the liability for tax on income stream earnings directly on the taxpayer rather than on their superannuation funds, but that the taxpayer have the option of withdrawing funds from their superannuation account should they wish to access their superannuation money to pay the tax liability (at 141).
However, given that the legislation uses the account balance as the criterion for the limit of tax-free earnings, it is also important to consider whether $1.6 million is an appropriate threshold. As discussed, it appears to be a reasonably suitable figure for the balance at which the legislation disallows further non-concessional contributions, given the funds required for a comfortable retirement. Consequently, it is consistent to say that $1.6 million is a fair figure for the limit to which funds can benefit from tax-free earnings. Further, arguments that it is insufficient ignore the presence of the tax-free threshold, which in many instances enables retirees to withdraw a portion of their superannuation funds and earn tax-free money outside of superannuation.

Overall, the introduction of the transfer balance cap appears to be a positive step in increasing equity, notwithstanding the increased administrative complexity it introduces and that, arguably, earnings would be a more suitable criterion than account balance. It could also be argued that a regime where earnings on superannuation balances in excess of $1.6 million were subject to non-concessional personal marginal tax rates would even further enhance equity. To avoid arbitrariness, such a hypothetical system would realistically have to be applied to all superannuation balances, not just to income streams. Under such rules, those able to access their superannuation would obtain no tax advantage by retaining excess funds in superannuation. However, such a measure would add complexity, and potentially erode a major aim of superannuation, which is to avoid excessively taxing after-inflation returns.

In terms of efficiency, workforce participation is very unlikely to be negatively affected by the introduction of a transfer balance cap, given that the evidence suggests that mature workers eligible for receiving retirement income while participating in the workforce are more likely to continue to participate if their retirement income is more highly taxed.

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166 Income Tax Rates Act 1986 (Cth) s 12(1), sch 7 pt 1.

D Broadening Income Streams Subject to Earnings Tax Exemptions

On 1 July 2017, both deferred life annuities and ‘innovative income streams’ were characterised as income streams that benefit from tax-free earnings. Specifically, superannuation accounts holding deferred lifetime annuities can now benefit from tax-free earnings, as the legislation now states that these can constitute ‘superannuation income streams’. Deferred lifetime annuities, as their name suggests, are like other life annuities, except that they commence payment only after the retiree reaches a pre-determined age.

Further, the government has also allowed ‘innovative income streams’ (which are income streams that do not necessarily satisfy the conditions of being an annuity or an account-based pension, but do fulfil the four legislative conditions of being an innovative income stream) to constitute superannuation income streams that can benefit from tax-free earnings. This in itself is a radical reform, in that it introduces a whole new category of superannuation income streams. Specifically, for an income stream product to constitute an ‘innovative income stream’ four conditions need to be fulfilled. First, the taxpayer must have satisfied a condition of release, such as reaching preservation age and retiring, before being entitled to any benefits. Second, once commenced, the payments must be payable to the holder for the rest of their life. Third, there cannot be an unreasonable deferral of payments from the instrument after payments have commenced. Fourth, the instrument cannot

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170 Murray, Final Report, above n 88, 125.

171 Income Tax Assessment Regulations 1997 (Cth) sub-reg 995-1.01(1), as amended by Treasury Laws Amendment (2017 Measures No 1) Regulations 2017 (Cth) sch 1 item 9; Superannuation Industry (Supervision) Regulations 1994 (Cth) regs 1.03, 1.06, 1.06A, 1.06B, as amended by Treasury Laws Amendment (2017 Measures No 1) Regulations 2017 (Cth) sch 1 items 11, 16, 20.

172 Superannuation Industry (Supervision) Regulations 1994 (Cth) sub-reg 1.06(1)(a), 1.06A(3)(a).

173 Ibid sub-reg 1.06A(3)(b).

174 Ibid sub-reg 1.06A(3)(c).
provide for more than a maximum amount to be commuted to a lump sum. This maximum amount is based on a straight-line, sliding scale, calculated from the date on which the instrument commences until the actuarially estimated life expectancy of the holder of the instrument. For instance, if a taxpayer starts receiving an innovative income stream payment at 70 and their expected life expectancy is 82, then at half way through that point, at 76, the instrument must not allow them to be refunded anything more than half of the capital used to purchase the instrument. Clearly, an instrument that did not allow any capital commutation would fulfil this requirement.

1 Background of Laws that Broader Superannuation Income Streams

The Final Report recommended legislative changes to bring deferred lifetime annuities and pooled products under the tax-free earnings net. Specifically, pooled products allow contributors to pool assets in return for each being entitled to a regular income stream for life. Although such pooled products protect against individual longevity risk, unlike traditional life annuities, they do not protect against systematic longevity risk, and they do carry investment risk. As far as systematic longevity risk is concerned, any rise in community-wide life expectancies that exceeded predicted levels would lead to lower annuity payments under such a scheme. The government’s response stated that it would take action on this recommendation.

Also in 2014, a separate document, the Retirement Income Stream Regulation discussion paper addressed the issue of widening the range of instruments that could benefit from tax-free earnings, and invited public submissions on that issue. In 2016 this was followed by the final paper on Retirement Income Stream Regulation, which recommended the expansion of superannuation income streams. Specifically, it recommended that the legislation be changed to allow deferred lifetime annuities and innovative income streams (the latter of which would include pooled products).

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175 Ibid sub-reg 1.06A(3)(d), reg 1.06B.
176 Ibid.
177 Murray, Final Report, above n 88, 125.
178 Ibid.
179 Ibid.
180 Ibid.
184 Ibid 15.
2 Evaluation of Changes regarding Laws Broadening Superannuation Income Streams

Traditional lifetime annuities provide a regular, reliable income stream for the rest of the holder’s life that is safe from investment and longevity risk. A related point is that these annuities can theoretically provide a higher retirement income than an account-based pension. This is because choosing a rate of spending with an account-based pension requires a trade-off between the risk of outliving one’s savings (by consuming resources too fast, on the assumption of dying at the actuaria-aerially predicted age) and being risk averse (under-consuming, on the assumption that one might materially outlive one’s predicted life expectancy). Despite their benefits, for a variety of reasons, lifetime annuities are unpopular internationally. As annuities and annuity-like instruments can enhance the security and size of retirement incomes, widening the variety of forms they are available in is consistent with the primary purpose of superannuation.

Specifically, extending the earnings tax exemption to deferred life annuities will in some cases result in annuitisation becoming a more attractive option. Deferred life annuities are characterised by a deferred start time, as compared with immediate lifetime annuities. Since annuities have in-built fees, deferred life annuities provide better value for money, in the sense that less money needs to be spent on them because their commencement date is delayed. In other words, because they only provide a secure income for the later part of life, where longevity is relatively uncertain, less money needs to be spent on their purchase, so that less is lost on the annuity fee loading. As such annuities provide a greater opportunity for providing a reliable retirement income stream, there is good reason for including their earnings under the tax-free umbrella of other superannuation income streams.

Similarly, changing the definition of ‘superannuation income streams’ to include innovative income streams (including eligible pooled annuities) that potentially hold many of the benefits of traditional lifetime annuities, though with greater risk, is a positive policy move. Pooled annuity products are cheaper and offer higher incomes than traditional life annuities. There are behavioural reasons why people might

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185 Mulvey and Purcell, above n 41, 2–4.
187 Ibid.
191 Murray, Final Report, above n 88, 125.
192 Murray, Interim Report, above n 96, 4–27.
prefer such annuities. Consequently, as such instruments will assist some retirees to enjoy a higher retirement income, it is consistent with the aims of superannuation that such instruments should also fall under the tax-free net applying to other superannuation income streams. Although widening the range of eligible income streams does add some complexity to the legislation, such impact is limited, because compliance will for the most part fall on superannuation funds, who are already well-equipped in dealing with complex legislative frameworks.

E Deductible Personal Concessional Contributions

One of the announcements made in the 2016 budget, and now legislated to apply from 1 July 2017, concerns making it possible for salary earners to make concessional contributions together with an accompanying tax deduction. Until 1 July 2017, taxpayers could only make concessional contributions individually if they earned less than 10 per cent of their income from their salary. This means that the typical salary earner could in the past only make what was in effect additional concessional contributions if their employers agreed to a ‘salary sacrifice arrangement’. This change, effective from 1 July 2017, allows salary earners to arrive at the same tax and economic outcome by making their own contributions as if they had entered into salary sacrifice arrangements. This change was not based on any recommendations or suggestions by the Inquiry Reports.

This appears to be a very positive change in the law, as it frees employees from having to rely on their employer’s willingness to make additional concessional contributions to increase their superannuation balance. Further, it enhances simplicity, as it reduces the administrative complexity of having to enter into salary sacrifice arrangements.

F Changes to Concessional Contributions Cap

It was announced in the 2016 budget, and subsequently legislated, that from 1 July 2017 the concessional contribution cap for all age groups would be reduced to $25 000. The legislation reduced the pre-July 2017 limits of $35 000 (for those

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194 Income Tax Assessment Act 1997 (Cth) s 290-150, as amended by Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016 (Cth) sch 5.
197 Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016 (Cth) sch 2 pt 1.
at least 50 years of age) and $30,000 (for others). Further, also announced in the 2016 budget and now legislated, from 1 July 2018 unused concessional cap amounts can be rolled over for up to five years (meaning that the ability to utilise previously unused caps will only be available from 1 July 2019).

While these changes were not specifically raised by either of the Inquiry Reports, they are consistent with the general arguments made in the Final Report that superannuation taxation benefits are excessively geared to wealthier members of our community.

1 Evaluation of Reduction in Concessional Contribution Cap and Ability to Rollover Unused Concessional Contribution Caps

Given that higher income earners are more likely to use a higher concessional contribution cap, having it lowered to an annual limit of $25,000 will increase vertical equity, especially given that the previous cap appeared generous by some measures. As discussed, limiting non-concessional contributions also increases vertical equity, and preventing such further contributions once a certain superannuation balance has been obtained, as opposed to an over-reliance on annual limits, is fairer in that it does not rely on the arbitrary concept of a financial year. However, with concessional contributions there is a stronger argument for exclusive reliance on annual caps. This is because a substantial proportion of concessional contributions are compulsory employer contributions, and differentially disallowing these would be administratively complex (for example, the existence of a lifetime concessional contributions cap would mean some employees would not be entitled to receive any mandatory contributions).

On the other hand, the scrapping of a larger limit for older workers is suboptimal in some cases, since older workers have had a limited amount of time to participate in a mature mandatory superannuation system, given that compulsory superannuation


201 Murray, Final Report, above n 88, 137–8.


204 Daley, Coates and Wood, above n 76, 40.
was introduced in the early 1990s and was initially set at a low contribution rate. Consequently, there is an argument for older workers being able to participate at a higher cap level to assist them to provide for an adequate retirement income. The precise level of the higher cap could partly be based on an actuarial analysis of the extent to which mature workers have been disadvantaged by their limited participation in a mature superannuation system. Such a higher cap could be limited to mature workers who have a superannuation balance below a certain threshold, as was proposed by the previous government but never implemented. In the alternative, a higher annual cap could be allowed for people of all ages until they reach a certain superannuation balance threshold. This would recognise that there may be legitimate reasons other than mature age to have insufficiently participated in the superannuation system, such as the broken work patterns of those raising a family. However, this would have the disadvantage of a greater loss in tax revenue.

The lower concessional contribution cap is unlikely to have any impact on efficiency as far as workforce participation is concerned, given its size and the fact that tax increases on retirement contributions have less of an impact on work incentives than tax increases on take-home pay.

The related change that allows rollovers of unused concessional contributions caps has much merit. Allowing rollovers for up to five years for unused concessional contributions is a good step towards taking a longer-term view. As discussed, broken work patterns, especially for women, can compromise a person’s ability to fully utilise their concessional contribution limits to help build an adequate superannuation balance, and this to some extent allows such people more flexibility. This means that such a policy will abate, and in some cases have a benefit that exceeds, the reduction in the annual concessional contributions caps. While anyone seeking to take advantage of the rollover will need to access their contribution records for previous years, leading to some loss of simplicity, this is likely to have a limited impact, given that modern technology would allow members to access the relevant


208 For example, for someone on the top tax rate the inability to no longer use the $30,000 cap results in an increase in tax of ($30,000 – $25,000) × (47% – 15%) = $1600. For those previously able to use the $35,000 cap the amount would be double this, $3200.

209 McClelland and Mok, above n 124, 22–3.

210 Senate Economics References Committee, above n 207.
government website holding such records. However, while any limit to the rollover period will by its nature be arbitrary, arguably it should be more than five years to allow those whose superannuation has fallen behind a greater chance to catch up, though this needs to be balanced against potential government tax revenue loss and administrative complexity. Further, it could be argued that limiting the right to exercise the use of this rollover to those with balances up to $500 000 sets it at too low a threshold, given current low returns, and that $500 000 falls drastically short of what is required for a comfortable retirement. 211 On the other hand, there are arguments for making this threshold lower than the $1.6 million fund balance limit after which further non-concessional contributions are disallowed, 212 given that concessional contributions have a substantially higher fiscal cost compared with non-concessional contributions. 213

Overall, while there are arguments for a higher concessional contributions cap for those with lower balances, especially older workers, the introduction of the ability to rollover unused concessional contribution caps is a positive policy move that offers a greater number of people an opportunity to build up a higher superannuation balance.

### G Spouse Contribution Offset

A further July 2017 change announced in the 2016 budget, 214 and now legislated, 215 involved increasing the threshold income of the recipient at which the spouse contribution offset is applicable. The pre-July 2017 threshold for the full offset was $10 000, with a shading-out for higher amounts and no entitlement at income levels of $13 000 or over. 216 From 1 July 2017 these thresholds were raised to $37 000 and $40 000 respectively. 217 As this change will cost the government very little from a fiscal point of view and allow a greater number of spouses to build up their superannuation balances, it appears to be a positive measure. 218 On the other hand, the fact that revenue loss is estimated to be very limited means that the offset is unlikely to be utilised to any substantially greater degree than is currently the case.

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211 Australian Securities and Investments Commission, How Much is Enough?, above n 142.
H Transition to Retirement Income Streams Changes

Another of the superannuation tax changes announced in the 2016 Budget\(^\text{219}\) and now legislated concerns earnings made from transition to retirement income streams no longer being tax-free as of 1 July 2017.\(^\text{220}\)

While changing the taxation of transition to retirement income streams was not an issue specifically covered in the Inquiry Reports, these changes are consistent with its comments to the effect that superannuation tax concessions could benefit from improved targeting.\(^\text{221}\)

I Evaluation of Reduction in Concessional Contribution Cap and Ability to Rollover Unused Concessional Contribution Caps

Transition to retirement income streams were originally intended to be used by taxpayers transitioning from full to part-time work, and in doing so, dipping into their superannuation to make up for their lower income.\(^\text{222}\) However, in reality, their predominant use has turned out to be by full-time workers who use it as a tax minimisation strategy.\(^\text{223}\) Subsequently, the policy of making transition to retirement income stream earnings subject to the same rate of tax as those of accumulation funds will reduce their effectiveness as a tax minimisation vehicle while leaving it possible for those who use them for legitimate purposes to continue to do so. As the ability for full-time workers to effectively gain a tax benefit from utilising a transition to retirement income stream strategy was dependent on a reasonable superannuation balance,\(^\text{224}\) and such balances correlate to higher incomes,\(^\text{225}\) these changes increase vertical equity. Further, the evidence suggests that the changes are unlikely to have any negative impact on workforce participation of mature workers, given that the introduction of the transition to retirement provisions in their original form did not increase mature worker participation.\(^\text{226}\)

\(^{219}\) Ibid, 30.

\(^{220}\) Income Tax Assessment Act 1997 (Cth) s 307-80, as amended by Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016 (Cth) sch 11.

\(^{221}\) Murray, Final Report, above n 88, 137–8.


\(^{223}\) Explanatory Memorandum, Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (Cth) [10.12].

\(^{224}\) Under Superannuation Industry (Supervision) Regulations 1994 (Cth) reg 6.01(2), a transition to retirement income stream can only distribute a maximum of 10 per cent of its balance, meaning that someone utilising it as a tax minimisation strategy to replace concessional contributed funds requires a reasonable superannuation balance.

\(^{225}\) Daley, Coates and Wood, above n 76, 61.

One consequence of this new law is that the few part-time workers who legitimately used such income streams for retirement purposes are treated the same as the full-time workers who utilised them to minimise their tax. In contrast, an alternative theoretical policy of quarantining the utilisation of the transition to retirement income stream tax concessions to those who work part-time would have the advantage of enabling the few who use them legitimately to continue to benefit from their concessional tax treatment.

VI Conclusion

A superannuation system free from taxes would provide retirees with substantially higher retirement balances and incomes. However, for the purposes of equity and revenue raising, some degree of superannuation taxation is desirable. This means that a consideration of superannuation taxation raises many complex issues and involves value judgments.

Specifically, lowering the division 293 threshold, maintaining the offset for lower income earner contributions, limiting tax-free earnings, and placing extra limitations on contribution caps, all increase the equity of the system. The other changes, involving broadening the range of income streams that can benefit from superannuation tax concessions and increasing the spouse contribution offset, while not aimed at increasing vertical equity, are consistent with the superannuation system’s purpose of providing retirees with a reasonable retirement income. While some of the changes — mainly the introduction of the transfer balance cap and limitation of non-concessional contributions — do increase complexity in managing superannuation funds, they will only affect those with higher balances, who are likely in most cases to have the resources to comply with the new laws. Further, there is no indication of substantial economic distortions caused by these changes.

The Australian superannuation system is a never-ending work-in-progress, and policy debate relating to its taxation is likely to continue indefinitely. This article has found that as a whole, the latest round of changes — while far from ideal — make the system more sustainable and fair.
RETHINKING THE REINSTATEMENT REMEDY IN UNFAIR DISMISSAL LAW

Abstract

Reinstatement is said to be the primary remedy for unfair dismissal under the *Fair Work Act 2009* (Cth). The Fair Work Commission is granted a broad discretion to determine whether to award reinstatement, but in the vast majority of cases it does not do so. This article considers the purpose of reinstatement by reference to the context and history of the unfair dismissal provisions, and argues that it is aimed at protecting the individual interests of the employees. This statutory context must be considered when the Fair Work Commission exercises its discretion in granting or refusing reinstatement. It is argued that the Fair Work Commission, in exercising its discretion, has overlooked some of this context and frustrated some of the purposes of the Act. This article makes some suggestions for reform of the law of reinstatement.

I Introduction

Under the *Fair Work Act 2009* (Cth) (‘*Fair Work Act*’), reinstatement is to be the ‘primary remedy’ for unfair dismissal, with compensation being awarded only if reinstatement is inappropriate. However, reinstatement is awarded only rarely in Australia. Of 182 dismissals found to be unfair by the Fair Work Commission (‘FWC’) in 2016–17, only 25 resulted in an award of reinstatement.

Without further empirical research, it is not possible to conclusively determine exactly why reinstatement is so rarely awarded. In many cases, the jurisdictional and procedural requirements for unfair dismissal claims may hinder the ability of some workers, or some classes of workers, to seek unfair dismissal remedies. For example, Joanna Howe, Laurie Berg and Bassina Farbenblum argue that a ‘range of practical

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1 Explanatory Memorandum, Fair Work Bill 2008 (Cth) [1555].
2 Ibid; *Fair Work Act* s 390(3).
and legal obstacles’ impede the ability of temporary migrant workers to bring unfair dismissal claims.4

This article is limited to consideration of the legal principles on reinstatement. It argues that in some cases, the FWC has exercised its remedial discretion in a way that is inconsistent with the purposes of the Fair Work Act and the norms recognised and created by the Act. In particular, it argues that in some instances, the FWC has too readily denied reinstatement on the basis of an employer’s alleged loss of trust and confidence in the employee.

Some of the FWC’s decisions involve an incongruity with the purposes of the Fair Work Act and the norms recognised by it. The notion of incongruity is drawn from issues that arise in other areas of private law, including contracts, negligence and trusts, where common law principles interact with statutes containing explicit or implicit recognition of norms of conduct. The potential incongruity arises where the Fair Work Act recognises a norm of conduct relating to the injustice, harshness or unfairness of dismissing an employee for a particular reason, but the FWC allows the employer, in relying on that same reason in exercising its discretion, to deny reinstatement to the employee.

Part II of this article briefly outlines the law of unfair dismissal and reinstatement in Australia and explores the justifications for reinstatement as a remedy. Part III analyses loss of trust and confidence as a ground for denying reinstatement. Part IV states the key conclusions of the article: first, that reinstatement is aimed at protecting workers from unfair treatment; and, second, that the discretion to grant an unfair dismissal remedy should be exercised in accordance with legal norms including this purpose.

II Unfair Dismissal and Reinstatement

A Unfair Dismissal

Employee protections under the common law employment contract were generally regarded as unsatisfactory.5 An employment contract could provide that the employer did not breach the contract even by dismissing the employee for no reason, and whether or not the employer afforded the employee procedural fairness.6 Even where


a dismissal was in breach of contract, the employee’s remedy would generally be limited to damages. Throughout the 20th century, courts generally refused to award specific performance or injunctive relief for either an employer’s wrongful dismissal or an employee’s failure to serve.\(^7\) Later in the century, courts were more likely to depart from this general rule,\(^8\) but the perception remained that it was very difficult for an employee to obtain specific relief: as late as 1995, a majority of the High Court considered that ‘exceptional circumstances’ were required to justify such relief.\(^9\)

The concept of unfair dismissal, and the remedy of reinstatement, were devised to rectify this inadequacy in the common law. In their modern incarnation, they are contained in pt 3-2 of the *Fair Work Act*. Section 381 sets out the overall object of pt 3-2, providing that ‘[t]he procedures and remedies … [for unfair dismissal] and the manner of deciding on and working out such remedies, are intended to ensure that a “fair go all round” is accorded to both the employer and employee concerned’.

Section 385 of the *Fair Work Act* defines unfair dismissal:

A person has been *unfairly dismissed* if the FWC is satisfied that:

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy.

Section 385 includes the clearly normative criteria of ‘harsh, unjust or unreasonable’. The origins of this formulation are in the *Termination, Charge and Redundancy Case*,\(^10\) which approved the use of the words in a standard award clause. In interpreting the words ‘harsh, unjust or unreasonable’, the High Court has held that a dismissal may be unfair for both procedural and substantive reasons; ‘Procedures adopted in carrying out the termination might properly be taken into account in determining whether the termination thus produced was harsh, unjust or unreasonable’.\(^11\)

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10 (1984) 8 IR 34.

However, the Court has clarified that it is ‘relevant also to examine the nature and seriousness of the conduct itself.’

The unfair dismissal test must also be interpreted in light of the object of pt 3-2 as ensuring a ‘fair go all round’, as set out in s 381 and adopted in *Re Loty and Holloway v Australian Workers’ Union.* In *Loty,* Sheldon J identified some criteria of fairness as including

- the importance but not the inviolability of the right of the employer to manage his business, the nature and quality of the work in question, the circumstances surrounding the dismissal and the likely practical outcome if an order of reinstatement is made.

The concept of fairness in the *Loty* test involves not just individual justice, but industrial justice or fairness more broadly; as such, the interests of the employer are relevant to the exercise of the discretion to award an unfair dismissal remedy.

Howe observes that the idea of a ‘fair go’ has an especially pronounced place in Australian political culture and in its application to ‘underdogs’. Of course, in the context of *Loty,* a ‘fair go’ is to be afforded to all affected parties, including the employer, in the pursuit of industrial justice. Thus, as Howe points out, the ‘fair go’ test may be used to deny remedies to the employee where the grant of those remedies would be inconsistent with the employer’s right to manage their business or where the employer successfully argues that they have lost trust and confidence in the employee.

It is important to make explicit the distinction between wrongful dismissal and unfair dismissal. Wrongful dismissal is merely a termination of the employee in breach of contract. It does not require proof that the dismissal was ‘harsh, unjust or unreasonable’, and a breach of contract need not be any of those things. Conversely, unfair dismissal need not be in breach of contract: a contract may allow an employer to dismiss an employee in circumstances that are harsh, unreasonable or even unjust. Unfair dismissal necessarily involves the making of a normative judgment about

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13 [1971] AR (NSW) 95 (‘Loty’).

14 Ibid 99.


16 Ibid 261.


18 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 466 (McHugh and Gummow JJ), citing *R v Industrial Court of South Australia; Ex parte General Motors-Holden’s Pty Ltd* (1975) 10 SASR 582, 586 (Bray CJ).
the actions of the employer, but wrongful dismissal does not. Establishing a breach of contract does not involve establishing fault or blame on the part of the breaching party. An employer who unfairly dismisses an employee causes a harm that the legislature has seen fit to protect against and provide a remedy for. The normative element in unfair dismissal, which arises from the nature of that harm, necessarily affects the manner in which the procedures and remedies for unfair dismissal should be applied, as will be argued later.

B Reinstatement as a Discretionary Remedy

It is useful to first explain the legal framework within which the FWC makes decisions to grant or refuse reinstatement. The key provision conferring on the FWC the power to award unfair dismissal remedies, and setting out when that power should be exercised, is s 390:

(1) Subject to subsection (3), the FWC may order a person’s reinstatement, or the payment of compensation to a person, if:

(a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and

(b) the person has been unfairly dismissed (see Division 3).

(2) The FWC may make the order only if the person has made an application under section 394.

(3) The FWC must not order the payment of compensation to the person unless:

(a) the FWC is satisfied that reinstatement of the person is inappropriate; and

(b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

As discussed below, a decision to reinstate is not an exercise of judicial power; it does not uphold an existing right, but creates a new one. A finding of unfair dismissal has been described as a function performed in the exercise of arbitral power.

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21 Ibid 665–6. Given that it is no longer necessary for the powers of industrial tribunals to be founded in the conciliation and arbitration power (s 51(xxxv) of the Constitution), the characterisation of a power to order reinstatement as a form of ‘arbitral power’ is likely to no longer be necessary or important.
References to a ‘duty to reinstate’ have long been read not as references to a pre-existing legal duty, but as a duty ‘imposed by considerations of industrial fairness’. The role of the FWC is to ascertain what industrial fairness requires, as confirmed by the reference in s 381 to a ‘fair go all round’. The language of a ‘fair go all round’, and the lack of any specific criteria for the award of reinstatement other than ‘appropriateness’, gives the FWC a broad discretion in deciding whether to award reinstatement.

Francis Bennion identified the defining features of a discretionary power as follows:

Discretion is applied where the empowering enactment leaves it to the chosen functionary to make a determination at any point within a given range … In reaching a decision, D [the decision-maker] is not required to assume there is only one right answer. On the contrary D is given a choice dependent to a greater or lesser extent on personal inclination and preference.

It may seem that discussion of legal principle is of limited relevance where the relevant decision-maker has a broad discretion and is free, to an extent, to make determinations ‘dependent to a greater or lesser extent on personal inclination and preference’. However, no statutory discretion is unconfined. The other element of Bennion’s definition — that such an exercise of power must still be ‘within a given range’ — must be borne in mind. A purported exercise of discretion outside that range will be unlawful. Whether an exercise of discretion is outside that range depends on whether the decision-maker correctly applied relevant legal principles. As the Full Court of the Federal Court recently affirmed:

it does not follow that, because a discretion is expressed in general terms, Parliament intended that the courts should refrain from developing rules or guidelines affecting its exercise. One very significant strand in the development of the law has been the judicial transformation of discretionary remedies into remedies which are granted or refused according to well-settled principles …

The FWC’s discretion under s 390, however broad, must still be guided by principle. In that respect, it is no different to any other exercise of statutory power, the principles governing which are well known. Such powers must be exercised in a manner that is ‘legal and regular, not arbitrary, vague and fanciful’ and ‘according to the rules of reason and justice’. Decision-makers must only take into account relevant

22 Ibid 660, citing Australian Iron & Steel Ltd v Dobb (1958) 98 CLR 586, 598 (Dixon CJ).
23 Toms v Harbour City Ferries (2015) 229 FCR 537, 545 [30].
26 Minister for Immigration and Citizenship v Li (2013) 249 CLR 332, 363 [65] (Hayne, Kiefel and Bell JJ).
considerations. Where the statute does not comprehensively enumerate the considerations that may and may not be taken into account and instead confers a discretion without explicit limits, as s 390 does, such limits must be identified by ‘implication from the subject-matter, scope and purpose of the Act’.

The remainder of this article identifies a particular way in which the FWC’s power to deny reinstatement should be limited. It argues that the FWC has, in some cases, too readily denied reinstatement because of the employer’s asserted loss of trust and confidence in the employee. In so doing, it may have had regard to considerations that it was bound not to consider, or failed to have regard to considerations that it was bound to consider.

C The Purpose of Reinstatement

Part III below will place some reliance on the purposes of the Fair Work Act and the norms of conduct it recognises. As the exercise of a discretionary power is conditioned by its subject-matter, scope and purpose, it is necessary to consider the text, context and history of the Act insofar as those matters shed light on the purposes of the Act. As a preliminary to this discussion, however, Dixon J’s cautionary observation about analyses of parliamentary intention should be kept in mind:

an intention to give, or not to give, a private right has more often than not been ascribed to the legislature as a result of presumptions or by reference to matters governing the policy of the provision rather than the meaning of the instrument. Sometimes it almost appears that a complexion is given to the statute upon very general considerations without either the authority of any general rule of law or the application of any definite rule of construction.

Any attempt to discover the purposes of an Act of Parliament must proceed by reference to accepted rules of construction and the meaning of the text. Propositions about the general policy that the legislation is aimed to fulfil are of limited utility. This is particularly so given that, as McHugh and Gummow JJ observed in the context of industrial legislation, such propositions tend to ‘disguise the compromises between contradictory positions which may be involved in obtaining the passage of legislation’. Further, ‘no legislation pursues its purposes at all costs’.

28 Ibid 40; see also Minister for Immigration and Citizenship v Li (2013) 249 CLR 332, 364.
29 O’Connor v S P Bray Ltd (1937) 56 CLR 464, 478.
1 Text and Context

The text of the Fair Work Act provides limited guidance about the purposes to which it is intended to give effect. The objects clause\(^{32}\) provides that the object of the Act is ‘to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians’, including by

\[\text{enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, }\]

\[\text{protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms }\ldots\]^{33}

For the reasons set out in the remainder of this part, the unfair dismissal provisions can be characterised as giving effect to the purpose of ‘protecting against unfair treatment and discrimination’.

A conclusion like this must be drawn with care. In addition to the problem of legislation that strikes a balance between competing interests, there are three major reasons why objects sections should be used with caution: (i) they may be so general as to be unhelpful;\(^{34}\) (ii) they may be qualified by specific provisions;\(^{35}\) and (iii) they might not provide sufficient grounds to depart from the ordinary meaning of specific provisions where such provisions are not ambiguous or uncertain.\(^{36}\) However, the use of s 3(e) to interpret s 390 does not suffer from these issues. First, while s 3(e) is general, it still directs attention to the interest of workers in not being treated unfairly as a specific element of a ‘balanced framework for cooperative and productive workplace relations’.\(^{37}\) Second, s 390 does not place clear or specific qualifications on s 3(e), providing that reinstatement is to be refused only where it is ‘inappropriate’. Given that the language of ‘inappropriate’ calls for consideration of the broad purposes of the Act, as explained in Part II B of this article, this qualification makes the objects clause more, rather than less, significant. Third, the language of ‘inappropriate’ is uncertain and can be illuminated by considering the general purposes of the Act.

The text of some of the specific provisions dealing with unfair dismissal and reinstatement in pt 3-2 are set out above. Despite the title of ch 3, ‘[r]ights and responsibilities of employees, employers, organisations etc.’, pt 3-2 is drafted so as

\(^{32}\) Fair Work Act s 3.

\(^{33}\) Fair Work Act s 3(e) (emphasis added).


\(^{35}\) See, eg, IW v City of Perth (1997) 191 CLR 1, 12 (Brennan CJ and McHugh J).

\(^{36}\) See, eg, Re Credit Tribunal; Ex parte General Motors Acceptance Corporation, Australia (1977) 14 ALR 257, 260 (Barwick CJ); Victims Compensation Fund Corporation v Brown (2003) 201 ALR 260, 263 [13].

\(^{37}\) Fair Work Act s 3.
not to prohibit unfair dismissal, in a manner that suggests that it is not intended to protect the rights of employees. Part 3-2 confers no explicit right not to be unfairly dismissed. The contrast with pt 3-1 div 3 is stark. That division creates what are explicitly called ‘workplace rights’ and explicitly prohibits ‘adverse action’ taken in relation to workplace rights.\(^{38}\) In pt 3-2, the FWC is instead given a discretion to award an unfair dismissal remedy if it is ‘satisfied’ that an employee who was ‘protected from unfair dismissal … has been unfairly dismissed’.\(^{39}\) The drafting of pt 3-2 indicates that, as has always been the case with federal unfair dismissal law, employees are not conferred any right against unfair dismissal.

Even in the guide to the operation of ch 3 of the \textit{Fair Work Act},\(^{40}\) the same contrast appears. The language of ‘protection’ and ‘workplace rights’ is used in relation to the pt 3-1 protections in s 6(2). On the other hand, the unfair dismissal provisions are described in a separate subsection stating that pt 3-2 ‘deals with unfair dismissal … and the granting of remedies when that happens’.\(^{41}\)

Further, the \textit{Fair Work Act} balances the interests of all parties. As noted above, the guiding principle of a ‘fair go all round’ requires consideration of employers’ interests. The unfair dismissal provisions, and the remedy of reinstatement, are aimed at protecting employees, but only to a limited extent. In s 390, this is reflected by the allowance that reinstatement is to be denied if the FWC considers it inappropriate.\(^{42}\)

It might be thought that these matters weigh against an interpretation of reinstatement as being designed to protect the individual interests of employees. However, they only show that unfair dismissal law is not about creating or protecting substantive, legislatively enshrined rights. The text of the unfair dismissal provisions does not qualify the purpose set out in s 3(e): it simply provides for how the purpose is to be achieved, which is by a different mechanism to the mechanism for protecting workplace rights. The mechanism created by the unfair dismissal provisions is the FWC’s power to review, and apply standards of reasonableness to, employers’ decisions to terminate employees.

Two other considerations support the conclusion that the unfair dismissal provisions, and reinstatement specifically, are aimed at protecting employees. These are the purpose of labour law and the history of unfair dismissal law in Australia.

2 \textit{The Purpose of Labour Law}

One consideration is the purpose of labour law as a whole. As unfair dismissal is a subset of labour law, the objectives of labour law provide valuable context in

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\(^{38}\) Ibid s 340.

\(^{39}\) Ibid ss 385, 390.

\(^{40}\) Ibid s 6.

\(^{41}\) Ibid s 6(3).

\(^{42}\) Ibid s 390(3)(a).
understanding the purposes of unfair dismissal law. Since Otto Kahn-Freund’s seminal text, labour law has generally been understood as serving as a ‘countervailing force’ to the ‘inequality of bargaining power which is inherent … in the employment relationship.’Richard Mitchell goes so far as to say of this statement that ‘most labour law courses, most labour law texts and most labour law policy … can (or at least could) be understood or related to almost entirely in light of these sentiments’. On this view, labour law is a system of laws aimed at ‘securing “justice” for employees’ by addressing the inherent imbalance of power between employer and employee.

In his discussion of the origins of labour law as a field of study, Mitchell lists the areas of law put in place to address the power imbalance inherent in the employment relationship: ‘the establishment and maintenance of collective rights, collective bargaining, other dispute resolution mechanisms, the rights of trade unions and rights to industrial action.’ It is clear that the scope and subject matter of the Fair Work Act continues to reflect this conception of labour law.

The scope and subject matter of the Fair Work Act — which, in addition to its purposes, are the considerations that limit the scope of a discretionary statutory power — support Mitchell’s conclusions. Among other things, the Fair Work Act deals with:

- Setting minimum standards for employment (pts 2-2 and 2-3, establishing the National Employment Standards and modern awards);
- Creating a mechanism for such standards to be negotiated through collective bargaining and reviewed by an impartial body (pt 2-4, dealing with enterprise agreements, and pt 2-5, empowering the FWC to make workplace determinations);
- Minimum wages (pt 2-6);
- Equal pay between genders (pt 2-7);
- Protection from adverse action (pt 3-1);
- Regulation and facilitation of industrial action (pt 3-3); and
- Various non-curial dispute resolution mechanisms (pts 5-1 to 5-2, and throughout the substantive parts of the Act).

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45 Ibid.
46 Ibid 49.
47 See above nn 26–8 and accompanying text.
This view of labour law associates it with the protection of workers. Rosemary Owens, Joellen Riley and Jill Murray similarly argue, in the context of labour law, that ‘the protection of the worker’ is among ‘the most significant of the traditional functions for law’. This is, again, due to the inequality of bargaining power between employers and employees. According to Owens, Riley and Murray, labour law protects workers in two ways: first, it may impose ‘standards to govern the work relation’ that override the contractual arrangement; and second, it may ‘establish mechanisms that enable workers to join together to bargain with business’.

Of these two methods, unfair dismissal law is clearly an example of the first. The unfair dismissal provisions of the Fair Work Act establish standards of fairness that must be met by the employer in dismissing a worker who is protected from unfair dismissal. These standards are different in character from the standards set by the general protections provisions in pt 3-1, or other provisions of the Fair Work Act such as the National Employment Standards, which contain more substantive rights that employees must be afforded.

3 Legislative History

Another consideration is the history of unfair dismissal law in Australia. The ‘existing state of the law’ is part of the “context” in its widest sense’ against which all legislation must be construed. This history suggests a move, at the federal level, from a collective approach to labour law to one more focussed on protecting individual interests, particularly when unfair dismissal provisions were first inserted into federal legislation. This change was partly driven by constitutional considerations.

(a) Constitutional Considerations

Unfair dismissal law has been heavily shaped by its constitutional and historical background. When the FWC finds that an employee has been unfairly dismissed, and awards an unfair dismissal remedy, it is not adjudicating on the existence of pre-existing rights but deciding whether to create new rights and obligations. An employee’s legal rights are not violated when he or she is unfairly dismissed: the FWC simply recognises that the dismissal of the employee fits a particular legal

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49 Ibid.
50 Ibid 22.
51 Fair Work Act pt 2-2.
52 A more detailed discussion of the history of unfair dismissal legislation can be found in Breen Creighton and Andrew Stewart, Labour Law (Federation Press, 5th ed, 2010) 627–60.
54 Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers’ Union of Australia (1987) 163 CLR 656, 666.
description (‘unfair, unjust or unreasonable’) and has an administrative discretion to award reinstatement or compensation as a result. This framing of unfair dismissal followed constitutional difficulties that troubled earlier attempts at establishing industrial relations regimes administered by non-judicial tribunals.

The *Boilermakers’ Case*\(^{55}\) established that the judicial power of the Commonwealth cannot be exercised by any non-judicial body, such as an arbitral tribunal, including in relation to unfair dismissal.\(^{56}\) This would prevent any non-judicial body from determining questions about pre-existing rights, and in *R v Gough; Ex parte Meat and Allied Trades Federation of Australia*, an award provision allowing an arbitral body to order reinstatement in resolving a dispute was struck down by the High Court as an impermissible conferral of judicial power on a non-judicial body.\(^{57}\)

There were previously additional constitutional obstacles.\(^{58}\) There had to be an ‘industrial dispute’ extending ‘beyond the limits of any one State’ for s 51(xxxv) of the *Constitution*, the ‘industrial relations power’, to enable the enactment of federal industrial relations legislation. It was once thought that the industrial relations power could not support laws regulating the relationship between employers and former employees,\(^{59}\) although the High Court later resiled from that view.\(^{60}\) Almost all of these constitutional obstacles have now been circumvented by the Commonwealth’s reliance on the external affairs power\(^{61}\) and the corporations power\(^{62}\) to support industrial relations legislation,\(^{63}\) as well as the state referrals of legislative power in support of the *Fair Work Act*.\(^{64}\)

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55. *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 (‘Boilermakers’ Case’).
56. (1956) 94 CLR 254.
57. (1969) 122 CLR 237, 245 (Windeyer J). Justice Menzies and Justice Owen reached the same conclusion on the basis that the power was non-arbitral.
59. See, eg, *R v Portus; Ex parte City of Perth* (1973) 129 CLR 312.
61. *Constitution* s 51(xxxi).
62. Ibid s 51(xx).
63. *Workplace Relations Act 1996* (Cth) (‘WR Act’) s 170CB(1)(c), read with s 4(1), definition of ‘constitutional corporation’.
The first federal legislation to create a comprehensive unfair dismissal regime was the Industrial Relations Reform Act 1993 (Cth), which amended the Industrial Relations Act 1988 (Cth) (‘IR Act’). As McCallum has argued, federal Australian labour law had a heavily collectivist focus until the 1970s, partly because it was primarily dealt with in the realm of conciliation and arbitration.\(^{65}\) Creighton has argued that the Conciliation and Arbitration Act 1904 (Cth) was ‘strongly collectivist in character’, and industrial law retained this character for most of the 20th century.\(^{66}\) This began to change when the ideals of international human rights law rose in influence in Australian politics.\(^{67}\)

**(b) Changes and Continuities in Federal Unfair Dismissal Law**

The 1993 reforms were heavily influenced by the International Labour Organisation (‘ILO’) instruments to which Australia was a signatory.\(^{68}\) Mitchell et al identify this as the most significant legislative change in Australian labour law over the past 40 years.\(^{69}\) Post-1993, the IR Act had relatively strict pre-conditions for termination, including an absolute requirement that there be a ‘valid reason … connected with the employee’s capacity or conduct or based on the operational requirements of the undertaking, enterprise or service’.\(^{70}\) Reasons for dismissal would not be valid if the dismissal was ‘harsh, unjust or unreasonable’.\(^{71}\) Where an employee was unfairly dismissed, the Industrial Relations Court could award reinstatement or compensation, or make a declaration.\(^{72}\) Justice Gray described these laws as constituting ‘a charter of rights for employees’ and as ‘directed towards the protection of the existing jobs of employees’.\(^{73}\)

As Anna Chapman has argued, the ILO’s influence decreased with the Liberal-National Government’s WR Act.\(^{74}\) She points out that the changes made by the WR

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67 McCallum, above n 65, 45.
70 IR Act s 170DE(1).
71 Ibid s 170DE(2).
72 Ibid s 170EE(1), (2).
Act to unfair dismissal law were driven by the view that the previous scheme was ‘far too detailed, too prescriptive and too legalistic and hence a disincentive to employment’.75 The 1993 reforms were also affected by the High Court’s declaration of the invalidity of s 170DE(2) of the IR Act (prohibiting dismissals that were ‘harsh, unjust or unreasonable’).76

Among other things, the WR Act removed the requirement of a valid reason. As in the Fair Work Act, the ‘harsh, unjust or unreasonable’ test, read in light of the ‘fair go all round’ test, was a ground to apply to the Australian Industrial Relations Commission for an unfair dismissal remedy at the Commission’s discretion.77 Chapman argues that the primacy of the ‘harsh, unjust and unreasonable’ and ‘fair go all round’ tests reflects a preference for Australian concepts over international ones, such as the requirement for a ‘valid reason’.78

The Work Choices legislation,79 amending the WR Act, drastically reduced the scope of unfair dismissal protections. The two major limitations it imposed were the exception for employees dismissed for a ‘genuine operational reason’ (who would not be treated as unfairly dismissed) and the small business exception (which exempted businesses of less than 101 employees from federal unfair dismissal law).80 Moreover, WR Act s 16 excluded the application of state and territory industrial laws in relation to unfair dismissal where the WR Act could apply, taking advantage of the constitutional ascendancy of federal over state legislation.81 This was particularly significant for the reinstatement remedy, as by this point, reinstatement was available under all state unfair dismissal legislation.82

The Fair Work Act reversed these limitations. The Explanatory Memorandum noted that an additional three million workers employed by over 100 000 employers would be protected from unfair dismissal compared to under the Work Choices regime due to the removal of the small business exception.83 However, it also introduced a

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77 WR Act ss 170CE(1)(a), 170CA(2).
78 Chapman, above n 74, 130.
79 Workplace Relations Amendment (Work Choices) Act 2005 (Cth) (‘Work Choices’).
81 Constitution s 109.
82 Fair Work Act 1994 (SA) s 109; Industrial Relations Act 1979 (WA) s 23A; Industrial Relations Act 1984 (Tas) s 30; Industrial Relations Act 1996 (NSW) s 89; Industrial Relations Act 1999 (Qld) s 78.
longer minimum employment period (one year) for small business employees before they would be protected from unfair dismissal. The ‘genuine operational reason’ exception was also removed.

As explained above, federal unfair dismissal law changed significantly after 1993, but it retained several features throughout this period. These include the availability of reinstatement as a remedy, an emphasis on the question of whether a dismissal is ‘harsh, unjust or unreasonable’, and an emphasis on the question of whether there is a valid reason for the dismissal. An important difference between the 1993 legislation, and all subsequent unfair dismissal legislation, is that subsequent legislation involves the application of the ‘fair go all round’ standard. Justice Gray pointed out that the 1993 legislation did not involve a balancing of employers’ and employees’ interests or the application of the ‘fair go all round’ standard when he described it as a ‘charter of rights for employees’.

However, it is also notable that the exception to this — what Gray J called ‘a discretion of the most minimal kind’ — was the discretion for the Industrial Relations Court to order compensation rather than reinstatement if reinstatement would be ‘impracticable’. This feature of the unfair dismissal regime has remained the same, suggesting that the purpose of reinstatement has remained constant. Of course, differences in the type of conduct that enliven the power to order reinstatement are important — even in the unfair dismissal context, ‘[t]he remedy cannot be divorced from the right’. Nonetheless, the concepts of ‘harsh, unjust and unreasonable’ and of a ‘valid reason’ for dismissal continue to be central to the existence of the power to order reinstatement and focus the inquiry on the fair treatment of the worker.

The development of unfair dismissal law from 1993 to the Fair Work Act reflects differing views of the balance that should be struck between the interests of employees and employers. The value of job security has been weighed against the regulatory burden on employers, particularly small businesses. As a result, the purpose of federal unfair dismissal law is not perfectly coherent. However, some core features of the 1993 reforms have clearly been retained. These include the language of ‘harsh, unjust or unreasonable’ and the importance of a ‘valid reason’ for dismissal, even if these concepts do not play the same role as they did in 1993. The availability of a reinstatement remedy, which did not exist at the federal level until 1993, is also an important continuity. These continuities suggest that the objectives of the 1993 reforms were not completely abandoned by subsequent legislative regime. The differences related mostly to the extent to which those objectives should be pursued.

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84 Fair Work Act s 383(b).
86 Ibid.
88 See generally Owens, Riley and Murray, above n 48, 473–83.
89 McCallum, above n 65, 42.
The above discussion of the purposes of reinstatement informs the next part of the article: a doctrinal examination of the case law on reinstatement, focused particularly on the ‘loss of trust and confidence’ ground for refusing reinstatement to an unfairly dismissed employee.

III Loss of Trust and Confidence

Much has been written on trust and confidence in the context of terms implied into the employment contract.90 This part will discuss the loss of trust and confidence as a relevant consideration in denying reinstatement, on which there is considerably less literature. Employers frequently rely on the loss of trust and confidence to argue that reinstatement is inappropriate.91 The key conclusions of this analysis are: that whether reinstatement should be denied due to a loss of trust and confidence is a largely objective question, despite trust and confidence being subjective concepts in ordinary language; the relevance of such loss is conditioned by the purposes of the Fair Work Act and the norms of conduct it creates; and a more structured approach would assist in ensuring that these objective principles are properly applied.

A Principles

The leading case is Perkins v Grace Worldwide (Aust) Pty Ltd (‘Perkins’).92 In Perkins, the manager of a furniture removal company was dismissed based on allegations that he had supplied marijuana cigarettes to two other employees. The Industrial Relations Court, at first instance, held that the allegations were unfounded and the dismissal was unfair. However, it denied reinstatement. The employer successfully argued that it had lost trust and confidence in the applicant. The applicant appealed to the Full Bench, which reversed the decision and ordered his reinstatement. In doing so, it set out what has now become the leading statement of principle on the trust and confidence consideration. The Court, constituted by Wilcox CJ, Marshall and North JJ said that,

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90 See, eg, Joellen Riley, “‘Mutual Trust and Confidence’ on Trial: At Last’ (2014) 36 Sydney Law Review 151, 151–2 and the works there cited.


92 (1997) 72 IR 186. Perkins was decided under the old legislation under which reinstatement would be denied if ‘impracticable’, but it is generally accepted that the test for ‘impracticability’ is the same as that for ‘inappropriateness’: Lambley v DP World Sydney Ltd [2012] FWA 1250 (21 March 2012) [55], affirmed in King v Catholic Education Office Diocese of Parramatta [2014] FWC 6413 (7 October 2014) [55]. Both terms confer a broad discretion that appears to be confined only in the manner discussed above.
trust and confidence is a necessary ingredient in any employment relationship ... So we accept that the question whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is impracticable, provided that such loss of trust and confidence is soundly and rationally based.93

Two aspects of this passage are worth considering in further detail. First, the Court said that ‘whether there has been a loss of trust and confidence is a relevant consideration’94 in determining whether reinstatement should be denied. It did not say that loss of trust and confidence is a criterion for reinstatement being denied. Loss of trust and confidence is neither necessary nor sufficient for a denial of reinstatement. Even if the employer establishes that there has been a loss of trust and confidence, it does not necessarily follow that reinstatement must be denied. The overall test remains the one created by the statute — it must be ‘inappropriate’ to grant reinstatement, and any loss of trust and confidence must, even if it is a ‘relevant’ loss of trust and confidence, be balanced against other considerations in determining whether reinstatement is inappropriate.

Second, the Court said that ‘such loss of trust and confidence [must be] soundly and rationally based’. This principle applies an objective overlay to the notion of trust and confidence. In ordinary language, trust and confidence are subjective notions. Whether one has trust and confidence in another person depends entirely on one’s actual mental attitude to that person. The fact that one’s loss of trust and confidence is unfounded or unreasonable does not change the fact that one has lost it. Perkins qualifies this position by considering that an irrational or unsound loss of trust and confidence is of no relevance to the question of reinstatement.

The Court continued,

[t]rust and confidence are concepts of degree. It is rare for any human being to have total trust in another. What is important in the employment relationship is that there be sufficient trust to make the relationship viable and productive. Whether that standard is reached in any particular case must depend upon the circumstances of the particular case.95

Loss of trust and confidence is not by itself enough to justify denying reinstatement, even if it is rationally based: it must be a loss of trust and confidence that makes the employment relationship unworkable. For example, as other cases have explained, a greater loss of trust and confidence might be tolerable in a corporate environment where no close personal relationship exists between the employer and employee.96 Obviously, a slight loss of trust and confidence might not, in most cases, mean that reinstatement is inappropriate: ‘In most cases, the employment relationship is

94 Emphasis added.
95 Ibid.
96 AMIEU [2000] FCA 627 (12 May 2000) [42].
capable of withstanding some friction and doubts’. 97 In others, where the employer and employee depend on each other for their personal safety, even minor doubts about the employee may mean that reinstatement should be denied. 98 In all cases, as Gostencnik D-P reiterated in Colson v Barwon Health, ‘assessment must be made as to the effect of the loss of trust and confidence on the operations of the workplace’. 99

The ordinary subjective notion of trust and confidence does relatively little work in an analysis of whether reinstatement should be denied. Most of the work is done by the principles, just discussed, which supply the objective aspect of trust and confidence. It follows that the dictionary meanings of the words ‘trust’ and ‘confidence’ are of questionable relevance, despite the FWC’s consideration of them in Haigh v Bradken Resources Pty Ltd (‘Haigh’). 100 It is easy for an employer to give evidence that it has subjectively lost trust and confidence in an employee in the ordinary sense of the words. Whether reinstatement should be denied will not turn on that evidence alone or its credibility: as Gray J said in AMIEU, ‘[r]esort to an assertion that trust and confidence in a particular person have been lost cannot be a magic formula for resisting … reinstatement’. 101 It will turn on the application of objective principles which govern the relevance of a loss of trust and confidence. Establishing a loss of trust and confidence in the ordinary subjective sense is only the first step of the inquiry.

B Legal Norms in the Fair Work Act

‘Inappropriate’ is a statutory criterion, and words in a statute are to be given their ‘grammatical meaning’ but with ‘due consideration of the relevant matters drawn from the context (using that term in its widest sense)’. 102 There is no reason to abandon this principle where, as in s 390, the statutory word in question confers a broad remedial discretion. Any such discretion must still be exercised in accordance with established legal principles. 103 Context ‘in its widest sense’ includes, inter alia, the prior state of the law, the mischief the legislation was enacted to remedy, the overall scheme of the Act and the language and purpose of other provisions of

98 Ibid.
100 [2013] FWC 7493 (3 October 2013) [31]–[33].
103 Norbis v Norbis (1986) 161 CLR 513, 519 (Mason and Deane JJ).
the same legislation.\footnote{104} Moreover, the Acts Interpretation Act 1901 (Cth) s 15AA requires that of the possible interpretations of a provision, the one to be adopted is the one that best furthers the purposes of the Act.

In determining what considerations are relevant to exercising the s 390 discretion, decision-makers must therefore have regard to context and purpose in this wide sense. From that context can be derived what will here be called ‘legal norms’.\footnote{105} Legal norms include community values and expectations recognised by the law as well as norms of conduct created by the Fair Work Act itself — importantly, given that statutes are presumed to give effect to harmonious ends\footnote{106} — and other legislation. Legal norms are especially important when interpreting a criterion like inappropriateness because it is a broad and open-ended term. Much like with the prohibition of misleading or deceptive conduct in trade or commerce,\footnote{107} or authorising copyright infringement,\footnote{108} Parliament has mostly left it to the decision-makers to set out detailed principles on applying the criterion.\footnote{109} In setting out those principles, there is nowhere else to look but the context and purpose of the statutory provision and whatever assistance is available from general community standards. Relatively little assistance can be gained from looking at the bare words of s 390.

Legal norms have always been important in the law of unfair dismissal. The aim of an industrial tribunal was famously said to ensure ‘a fair go all round’,\footnote{110} words which are now enshrined in the Fair Work Act s 381. The discretion in ordering reinstatement was once described by the High Court as largely guided by considerations of fairness.\footnote{111} Giving content to this notion of fairness requires consideration of community expectations and norms created by statute.

A legal norm makes trust and confidence relevant to the question of inappropriateness in the first place. Simply looking at the words of s 390 will not reveal that

\footnotesize{\begin{itemize}
\item Examples of the High Court affirming this broad understanding of context are numerous and include Project Blue Sky (1998) 194 CLR 355, 381 (McHugh, Gummow, Kirby and Hayne JJ), Singh v Commonwealth (2004) 222 CLR 322, 349–50 [54] (McHugh J); Newcrest Mining Ltd v Thornton (2012) 248 CLR 555, 570 [30] (French CJ); Minister for Immigration and Border Protection v Kumar (2017) 91 ALJR 466, 471–2 [20] (Bell, Keane and Gordon JJ).
\item There is no magic in this label; it is simply one adopted for convenience to denote those standards, values, and normative expectations that have a legitimate place in the exercise of statutory discretions and which can be identified by considering the context and purposes of the Act.
\item Ross v The Queen (1979) 141 CLR 432, 440 (Gibbs J).
\item Competition and Consumer Act 2010 (Cth) sch 2 s 18.
\item Copyright Act 1968 (Cth) s 36.
\item Loty [1971] AR (NSW) 95, 99 (Sheldon J).
\item Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers’ Union of Australia (1987) 163 CLR 656, 665.
\end{itemize}}
trust and confidence is relevant to the question of inappropriateness. One must also understand that mutual confidence has traditionally been considered a requirement of an employment relationship. So much is clear from the statement in Perkins that it is a ‘necessary ingredient’ of any employment relationship,\(^\text{112}\) as well as the historical reluctance of courts to grant specific relief requiring an employer to re-hire an employee.\(^\text{113}\) This reluctance was based in large part on equity’s hesitation to force the parties into a relationship of servitude where they no longer had confidence in each other.\(^\text{114}\)

There is much literature on the status of mutual trust and confidence as an essential element in the employment relationship, and what implications this has for how the common law of implied contractual terms should develop in light of statutory regulation of employment.\(^\text{115}\) Phillipa Weeks and Riley have argued that judges have avoided developing the common law of implied contractual terms out of fear that they might undermine legislative policy choices.\(^\text{116}\) It might be thought that these fears would also make the FWC hesitant to guide its decision-making by reference to legal norms. This is especially so given that, in Commonwealth Bank of Australia v Barker, one major reason for the rejection of an implied term of mutual trust and confidence was its potential to intrude into subject matter best left to the legislature and already subject to significant legislative intervention.\(^\text{117}\)

However, those issues should not prevent the consideration of legal norms in the context of reinstatement, where mutual trust and confidence may legitimately be taken into account by the FWC. This is because legal norms are to be used only


\(^{113}\) *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282, 298 (Dixon J) (‘*J C Williamson*’).

\(^{114}\) See *Quinn v Overland* [2010] FCA 799 (“28 July 2010”) [97] (‘*Quinn*’); *Gregory v Phillip Morris* (1988) 80 ALR 455, 482; Wheelwright, above n 5, 175. The other major reason was that such an order would require the continued supervision of the court. However, *contra Quinn* [2010] FCA 799 (28 July 2010), caution should be taken in uncritically accepting that these factors were the *primary* reasons for denying specific enforcement of an employment contract. In *J C Williamson* (1931) 45 CLR 282, 298, Dixon J’s decision appeared to substantially be based on lack of mutuality in the available remedies. Courts will not compel an employee to work for an employer, as that would be tantamount to slavery; as a result, damages are the only remedy available for the employer; and courts of equity will not grant specific relief to one party where the other would only be able to get damages at law. Neither the requirement of mutual confidence nor the issues relating to continued supervision are necessary to this line of reasoning.

\(^{115}\) See above n 90.


\(^{117}\) (2014) 253 CLR 169, 195 [40] (French CJ, Bell and Keane JJ), 217 [118] (Gageler J).
where the legislature itself confers a broad discretion on a decision-maker. Where the decision-maker exercises that discretion by reference to legal norms and in the absence of specific rules or choices by the legislature, there is no risk of legislative policy choices being disturbed.

Just as a legal norm justifies the relevance of a loss of trust and confidence, other legal norms qualify its relevance. The previously mentioned requirement that any loss of trust and confidence be ‘soundly and rationally based’\(^\text{118}\) is one such norm. Again, simply looking at the words of s 390 does not reveal the requirement of a rational basis. The rational basis requirement might simply be the result of a general community expectation that people should act reasonably toward each other.

### C Incongruity with Legal Norms

*Nguyen*\(^\text{119}\) establishes that the inappropriateness criterion must be applied in a way that is coherent, or not incongruous, with other legal norms created by the *Fair Work Act*.

The employees in *Nguyen* were teachers at a Vietnamese language school. They made various complaints about being underpaid by the employer. Eventually, tensions came to a head and they were dismissed. All parties accepted that the dismissal was unfair.\(^\text{120}\) Senior Deputy President O’Callaghan, at first instance, determined that reinstatement should be denied. He found that the relationship between the parties had deteriorated to such an extent that it could not be re-established.\(^\text{121}\) He made his finding partly because the employees had continued to seek relief for the employer’s alleged underpayment, and ‘continued litigation relative to the applicants’ underpayment claims is likely and will bring with it continuing ill-will between the parties’.\(^\text{122}\) On appeal, the Full Bench affirmed the Senior Deputy President’s orders, but held that he erred in considering the underpayment claims as relevant to denying reinstatement. The Full Bench found that the employees were exercising a workplace right within the meaning of s 341(1)(b) of the *Fair Work Act*, namely the right to complain in relation to their employment. The Full Bench held that

‘[i]t would be incongruous if the exercise of a workplace right operated as a barrier to reinstatement in an unfair dismissal proceeding in circumstances where Part 3-1 of the FW Act prohibits an employer from terminating the employment of an employee who exercises a workplace right.’\(^\text{123}\)


\(^\text{119}\) [2014] FWC 4314 (8 July 2014).

\(^\text{120}\) Ibid [6]. No finding was made as to whether the unfairness was due to lack of a valid reason or denial of procedural fairness.

\(^\text{121}\) Ibid [15].

\(^\text{122}\) Ibid [14].

The Senior Deputy President erred in treating the employees’ complaints as relevant to the appropriateness of reinstatement.

Again, this finding of the Full Bench cannot be justified solely by a literal reading of the *Fair Work Act*. While employers are prohibited from taking adverse action against employees for exercising workplace rights, there is no provision of the *Fair Work Act*, which prohibits the FWC or a court from denying a remedy due to the employee’s exercise of a workplace right. However, we would argue that the Full Bench’s decision on this point was clearly correct. The *Fair Work Act*’s protection of certain workplace rights creates a legal norm that employees are not to be disadvantaged by their exercise of those rights.

The reference to incongruity calls to mind the treatment of illegality as a defence to actions in negligence, contract and trusts and more general notions of coherence in private law. In such areas the High Court has described coherence — the opposite of incongruity — as a central policy consideration, for example in determining whether a plaintiff’s illegal conduct should preclude her from recovering damages for negligence. According to the leading negligence case on the issue, *Miller v Miller*, the relevant question is whether it would be incongruous for the law to prohibit the relevant conduct yet allow the plaintiff to recover damages for loss suffered while engaging in that conduct. Central to the rule is ‘the recognition that there are cases where the breach of a norm of conduct stated expressly or implied in the statutory text requires the conclusion that an obligation otherwise created or recognised is not to be enforced’. Incongruity can arise because, in prohibiting certain behaviour, the statute creates a ‘norm of conduct’ which allowing a negligence claim would undermine in some way. In the earlier case of *Gala v Preston*, Brennan J described the question as whether allowing the negligence claim would undermine the ‘normative influence’ of the statutory norm. However, courts must be cautious in undertaking this inquiry because ‘the legislature has in fact expressed no intention on the subject’. Care must be taken in ensuring that any purpose or norm attributed to

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126 Ibid 455 [16].

127 Ibid 459 [27].


129 *O’Connor v S P Bray Ltd* (1937) 56 CLR 464, 477–9 (Dixon J), cited in ibid 459 [29].
the statute must be justifiable by reference to its words, structure and context and not ‘conjured up by judges’.  

The parallels with reinstatement and Nguyen are obvious: in Nguyen, the norm of conduct was the norm against taking adverse action against a person for exercising their workplace rights. The question asked by the Full Bench was whether it would be incongruous for the law to prohibit adverse action for an employee’s exercise of a workplace right, yet allow an employer to deny the employee a remedy because of the employee’s exercise of a workplace right. It answered that question in the affirmative. Nguyen, then, suggests the existence of another principle that qualifies the relevance of trust and confidence. Loss of trust and confidence is only relevant to the appropriateness of reinstatement if denying a remedy because of it would not be incongruous with other norms created by the statute.

The Full Bench might not have recognised the full extent of the incongruity issue. The reasons in Nguyen do not explain exactly why the relationship between the employer and employees broke down because it was conceded that there was no valid reason for the dismissal. The fact that the dispute appears to have arisen largely because of the wage complaint raises the possibility that the denial of reinstatement was based on a natural consequence of the employees’ exercise of a workplace right. Naturally, where an employee complains about their working conditions, there will be tensions in the employment relationship. If the exercise of a workplace right is an impermissible consideration, surely so is any deterioration of the relationship to the extent that the deterioration was a natural consequence of the exercise of that right. However, conduct subsequent to the termination — in this case, the Commissioner relied on the employees’ conduct at a compulsory conference — could have justified the decision where that conduct was not directly connected to the exercise of the workplace right.  

The denial of reinstatement might also have been justified by some ground other than loss of trust and confidence, for example, if the position no longer existed. The interests of an innocent third party, such as a person hired in place of the unfairly dismissed employee, would also need to be considered. Where such a person is hired, and the employer is unable to re-employ the unfairly dismissed worker as a result, it would likely be appropriate to deny reinstatement. Such a case would be analogous to a case where the employee’s position no longer exists.

Millard v K & S Freighters Pty Ltd (‘Millard’) is illustrative of another legal norm and a less direct form of incongruity. The employee was a truck driver who was dismissed based on his employer’s allegation that he tampered with a truck camera.

130 Sovar v Henry Lane Pty Ltd (1967) 116 CLR 397, 405, cited in Miller v Miller (2011) 242 CLR 446, 459 [29].  
131 Koulouris v Ludowici Sealing Solutions Pty Ltd [2016] FWC 5636 (3 November 2016) [58]–[64]; Lama v Konute Enterprises [2016] FWC 1814 (19 April 2016) [40]; both cases involved the denial of reinstatement based on conduct subsequent to the termination.  
He had a previous history of work incidents, including multiple minor collisions.\textsuperscript{134} Commissioner Gregory found that the dismissal was unfair, partly because there was no valid reason for the employee’s dismissal: his dismissal was not ‘sound, defensible or well founded’,\textsuperscript{135} because the allegation was based on insufficient evidence and even if proved, it would only be a minor instance of misconduct.\textsuperscript{136} Nonetheless, he subsequently held that it would be inappropriate to order reinstatement of the employee because the employer had lost trust and confidence in him, and that loss of trust and confidence was soundly and rationally based.\textsuperscript{137} The employee’s history of work incidents justified the employer’s loss of trust and confidence.

The potential incongruity that arises from \textit{Millard}\textsuperscript{138} is this: if the employee’s conduct was objectively sufficient for the employer to lose trust and confidence in him, why was it not sufficient to provide a valid reason for his termination? Further, why did the FWC nonetheless find that the termination was not just wrongful (in the sense of a ‘mere’ breach of contract), but ‘harsh, unjust or unreasonable’ (as required for a finding of unfair dismissal)? When a decision-maker finds that a dismissal was unfair because there was no valid reason for it, the decision-maker recognises the dismissal as being a breach of a legal norm, namely the norm that employees should not be unfairly dismissed. When the decision-maker makes such a finding, but then allows the employer to deny the employee a remedy by relying on the justification that was found to be invalid, the decision-maker seems — to use Brennan J’s language — to undermine the normative influence of the rule against unfair dismissal.

Where an employee is found to have been unfairly dismissed yet the employer pleads a loss of trust and confidence, the FWC must consider whether accepting the employer’s claim would undermine the influence of the norm against unfair dismissal. As in the private law cases, that is to be determined by ascertaining the purposes of the statute creating the norm.\textsuperscript{139} In \textit{Miller v Miller},\textsuperscript{140} that was partly ascertained by looking at the legislative history, which showed that the relevant illegal conduct was taken increasingly seriously by the legislature. The same considerations are apparent in the \textit{Fair Work Act}. As explained in Part II, one objective of the \textit{Fair Work Act}’s unfair dismissal provisions is to protect the interests of individual employees. That objective would be undermined if an employer can too easily prevent the award of the primary remedy Parliament has created for unfair dismissal.

\begin{itemize}
\item \textsuperscript{134} Ibid [94].
\item \textsuperscript{135} Ibid [68], quoting \textit{Selvachandran v Peteron Plastics Pty Ltd} (1995) 62 IR 371, 373 (Northrup J) (‘\textit{Selvachandran}’), applying \textit{Fair Work Act s 387(a)}. The employer also failed to afford procedural fairness: \textit{Farmer} [2014] FWC 6539 (22 September 2014) [66].
\item \textsuperscript{136} \textit{Millard} [2017] FWC 105 (6 January 2017) [77]–[78].
\item \textsuperscript{137} Ibid [93].
\item \textsuperscript{138} [2017] FWC 105 (6 January 2017).
\item \textsuperscript{139} \textit{Miller v Miller} (2011) 242 CLR 446, 473 [74] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
\item \textsuperscript{140} (2011) 242 CLR 446.
\end{itemize}
It is also important that in Millard and cases like it, the FWC found the dismissal unfair not just on procedural grounds, but because there was no valid reason for it. The explanation relied on by the employer was not ‘sound, defensible or well-founded’, but ‘capricious, fanciful, spiteful or prejudiced’,\footnote{Selvachandran (1995) 62 IR 371, 373.} which is clearly normative language. To find that an employee was unfairly dismissed for no valid reason is to find, within the framework of the unfair dismissal provisions, that the reason relied on by the employer cannot justify the employer’s actions. It is to make a normative assessment not only of the employer’s conduct, but an assessment, required by the statute,\footnote{Fair Work Act s 387(a).} of the reason relied on by the employer. After making such an assessment, it would be incongruous for the FWC to use that very same reason to deny a remedy to the employee.

That may be what happened in Millard.\footnote{[2017] FWC 105 (6 January 2017).} McCulloch v Calvary Health Care Adelaide (‘McCulloch’) is similarly problematic.\footnote{[2014] FWC 9191 (19 December 2014).} The employee was dismissed for allegedly verbally abusing a colleague. Commissioner Wilson held, again, that there was no valid reason for the dismissal. Nonetheless, he denied reinstatement because of that conduct combined with, first, ‘serious allegations to an external authority about the hospital’s conduct that were investigated by the external authority and found to be without substance’; and second, ‘comments … at the time of their altercation that [the employee] was going to leave and meet with … the CEO’,\footnote{Ibid [83].} though the later was said by the employee to be for an unrelated matter (and his evidence to that effect was not rejected by the Commissioner). The Commissioner said that taking all these matters together showed that the employee was someone who ‘reacts poorly to things around him, including when he does not have all the relevant information’.\footnote{Ibid [85].}

First, it appears that the employee’s allegations to the external authority may have been an irrelevant consideration per Nguyen\footnote{[2014] FWCFB 7198 (21 October 2014).} as protected complaints under s 341. The exact details of the complaint were not set out in the Commissioner’s reasons, so it is not possible to determine whether the complaint was made in relation to the employee’s employment. The Commissioner should have considered this possibility before making the determination. Second it is not clear how the employee’s conduct, despite not providing a sufficient reason for dismissal, could be relied upon by the employer to deny a remedy. Unlike in Millard,\footnote{[2017] FWC 105 (6 January 2017).} the Commissioner took both the unfounded allegations to the external authority, and the comments about meeting with the CEO, into account in determining that the dismissal was unfair.\footnote{[2014] FWC 9191 (19 December 2014) [45]–[46].}

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\begin{flushright}
142 Fair Work Act s 387(a).
145 Ibid [83].
146 Ibid [85].
149 [2014] FWC 9191 (19 December 2014) [45]–[46].
\end{flushright}
between the finding of an unfair dismissal and the denial of reinstatement appears to arise in *McCulloch*.

It is notable that cases in which this kind of incongruity is raised will be cases where the dismissal is unfair specifically because of a lack of a valid reason. It will not be raised in cases where there is a valid reason, but the employer failed to afford procedural fairness: in *Mora v QUBE Pty Ltd*, Asbury D-P rightly observed that the existence of a valid reason to dismiss the employee, and the procedural nature of the unfairness, was relevant to the denial of reinstatement. It might be raised where there is a valid reason, but for other substantive (as opposed to procedural) reasons the dismissal is still considered harsh, unjust or unreasonable. Where the reason relied on by the employer is found to justify termination, there is no incongruity for the employer to rely on that same reason to deny reinstatement. That observation sheds some light on how incongruity can be tested for in the first place. There is no incongruity because the unfairness of the dismissal, if it is purely procedural, has no connection to trust and confidence issues. Similarly, in *Nguyen* and *Millard*, the denial of reinstatement may have been based on conduct that was subsequent to the unfair dismissal, and if so then the unfairness of the dismissal would have no connection to that subsequent conduct. The fact that the employee does not want reinstatement would, again, be a relevant factor that does not raise incongruity issues because of its lack of connection to the unfairness of the dismissal.

The test for incongruity would then mirror the test in negligence law. In negligence law, the test is whether there is a direct connection between the illegality and the injury; here, the test would be whether there is a direct connection between the reason previously held to be invalid and the reason subsequently relied on to deny reinstatement. This test would explain why no incongruity issue arises when reinstatement is denied because the employee’s position no longer exists: there is no

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150 [2014] FWC 9191 (19 December 2014); see also *Farmer* [2014] FWC 6539 (22 September 2014); *Goodwin* [2016] FWC 4317 (7 July 2016).


152 The issue thus arises in *Jin v University of Newcastle* [2013] FWC 1049 (15 February 2013), where Smith D-P found the employee’s dismissal to be for a valid reason, but held that it was harsh: at [1]. Reinstatement was denied in circumstances very similar to *Brambleby v Australian Postal Corporation* [2014] FWCFB 9000 (16 December 2014), discussed in detail below.


connection between that rationale and the reason for dismissal which was found to be invalid.

D A Complication

The Full Bench of the FWC considered, and rejected, a submission raising this incongruity in Brambleby v Australian Postal Corporation (‘Brambleby’). The facts in Brambleby were superficially similar to Millard. The employee was unfairly dismissed for misconduct. That dismissal was unfair because it was unreasonable. It was unreasonable because it was disproportionate: a lesser sanction, such as demotion, would have been more appropriate. This conclusion amounts to a finding that the employer did not have a valid reason to dismiss the employee — only to impose a lesser sanction. Reinstatement was not, however, denied on the basis of a loss of trust and confidence: the Full Bench found that any such loss could not be rationally based. Nonetheless, in rejecting the employee’s incongruity argument, it did say something that may seem to be in tension with the argument so far: ‘it does not necessarily follow that where there is a finding that termination was not justified based on employee misconduct there must be some other factor, other than the misconduct, to make reinstatement inappropriate’.

There was, however, no incongruity between the finding of an unfair dismissal and the denial of reinstatement. The case can be distinguished from McCulloch and similar cases. The reason reinstatement was denied in Brambleby was not because the employer had rationally lost trust and confidence in the employee such as to make a productive working relationship impossible. Rather, it was a result of the fact that an employee cannot be reinstated to a lower position: reinstatement must be ‘to the position in which the person was employed immediately before the dismissal’. Thus, it was open for the Full Bench to say, as it did, that (i) it was unfair for an employee to be dismissed, but (ii) it would be inappropriate for the employee to remain in their supervisory position, and (iii) because reinstatement would require reappointment to that supervisory position, it is inappropriate.

There is no incongruity in that overall conclusion because the employer could point to a relevant distinction between what conclusion the misconduct supported in the context of the dismissal, and what conclusion the misconduct supported

158 [2014] FWCFB 9000 (16 December 2014) [56].
161 [2014] FWCFB 9000 (16 December 2014) [52].
162 Ibid [81].
163 Ibid [56].
165 [2014] FWCFB 9000 (16 December 2014) [56].
166 Fair Work Act s 391(1)(a).
167 Brambley [2014] FWCFB 9000 (16 December 2014) [94].
in the context of the denial of reinstatement. In the context of the dismissal, the employer tried to say that the misconduct justified removing the employee from the workplace altogether. That was unreasonable. However, in the context of the denial of reinstatement, the employer said that the misconduct justified — perhaps even required — removing the employee from his supervisory position and re-appointing him to a lower position. That was reasonable.

The decision in *Brambleby*\(^{168}\) does not undermine the normative influence of the legislation because the norm against unfair dismissal is not a norm against demoting an employee — it is a norm against dismissing an employee. To deny reinstatement on the basis that an employee’s demotion is justified will not lessen the normative force of the unfair dismissal norm. It could even be said that the main reason the employee is denied reinstatement is not their misconduct but the requirement in s 391(1) that reinstatement cannot be to a lower position.

*Brambleby*\(^{169}\) does indicate that s 391(1) is unduly restrictive. The Full Bench found that the employer could not rationally have lost trust and confidence in the employee, so re-appointing the employee to a non-supervisory position would have been appropriate, but because that was not an option available to it, the employee was left with compensation. It is likely that the requirement for an employee to be reappointed to the position they were in immediately before the dismissal exists to protect the employee by ensuring that employers do not reappoint employees but on significantly less favourable terms to punish employees. This is suggested by the wording of the alternative ‘no less favourable’ requirement in s 391(1)(b) (that is, no less favourable to the employee). As in *Brambleby*,\(^ {170}\) however, the provision can be used to deny reinstatement due to the lack of a middle ground between denying reinstatement and reinstatement on terms no less favourable. Section 391(1), though inserted to protect employees, has instead operated to deny employees the primary remedy of reinstatement.

It is submitted that s 391(1) should be amended to provide that middle ground and enable the FWC to reinstate an employee to a lower position, perhaps in the following terms:

(c) If the FWC is satisfied that

(i) it would be inappropriate to reappoint the person to the position the person held immediately before the dismissal; and

(ii) it would be inappropriate to appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal; and


\(^{169}\) Ibid.

\(^{170}\) Ibid.
(iii) it would not be inappropriate to reinstate the person to a lower position, or a position on terms and conditions less favourable than those on which the person was employed immediately before the dismissal;

an order for the person’s reinstatement may be an order that the person be appointed to a position on terms and conditions less favourable than those on which the person was employed immediately before the dismissal.

E Structuring the Inquiry

Even though objective principles and legal norms largely govern, or should govern, any inquiry as to whether reinstatement is inappropriate due to a loss of trust and confidence, the FWC’s consideration of trust and confidence is largely unstructured. There is no clear analytical framework through which it conducts that inquiry. As a result, decisions have been made which do not rule out the possibility that some of the considerations relied on were irrelevant because of their incongruity with a legal norm. Sometimes, this is because (as in Nguyen and Millard) the FWC did not set out the facts in sufficient detail — it did not, for example, make clear whether the employee engaged in conduct subsequent to the termination which supported a finding that there was a loss of trust and confidence. The principles set out in Perkins and the analysis of incongruity suggest that the following structure should be applied by the FWC.

First, the FWC must be satisfied that the employer has subjectively lost trust and confidence in the employee in accordance with the ordinary meaning of the words. The direct evidence of management witnesses can easily establish this, but the following stages of the inquiry limit the relevance of this first stage.

Second, it must be satisfied that the loss of trust and confidence, including all the events and conduct relied upon to demonstrate a loss of trust and confidence, are relevant considerations. It will not be relevant if, and to the extent that, it is not rationally based. It will also not be relevant if relying on it to deny reinstatement would be incongruous with a legal norm created or recognised by the Fair Work Act. Thus, any loss of trust and confidence based on or evidenced by the employee’s exercise of a workplace right would be an irrelevant consideration. So would any loss of trust and confidence which was a natural consequence of the employee’s exercise of a workplace right. So would any loss of trust and confidence which is directly connected to the unfairness of the dismissal of the employee. In determining questions of incongruity, it must be asked whether there is a direct connection between the reason found to be invalid and the reason relied on to deny reinstatement. However, due to the current requirement that reinstatement be to the employee’s previous position or one no less favourable, it would not be incongruous for the FWC

to deny reinstatement based on its view that the employer’s reason justified demoting the employee but not dismissing them.

Third, the FWC must be satisfied that the employer’s loss of trust and confidence is such that no productive or workable employment relationship is possible, and that the relationship cannot be reconciled.

It is important to keep stage two conceptually separate from stage three. Perkins\textsuperscript{174} makes it clear that it is wholly impermissible to consider a loss of trust and confidence that is not rationally based. An irrational loss of trust and confidence does not just carry less weight; it is simply not a relevant consideration. Similarly, Nguyen\textsuperscript{175} makes it clear that it is wholly impermissible to consider a loss of trust and confidence if to do so would be incongruous with the employee’s workplace rights. Such considerations must be excised from the inquiry.

### IV Conclusion

The unfair dismissal provisions of the \textit{Fair Work Act} pursue competing objectives and must balance incompatible interests. However, at least one objective they pursue is protecting individual employees from unfair treatment, particularly in relation to the termination of their employment. The discretion to award reinstatement as a remedy for unfair dismissal is conferred in broad terms. This makes it particularly important to pay attention to the subject matter, scope and purposes of the \textit{Fair Work Act} in deciding how the decision of whether to award reinstatement should be made. This article has argued that the FWC has sometimes paid insufficient attention to the purposes of the \textit{Fair Work Act}. Legal norms are founded on those purposes, and the possibility of incongruity with those norms makes the FWC’s current approach unsatisfactory.

\textsuperscript{174} Ibid.

\textsuperscript{175} [2014] FWCFB 7198 (21 October 2014).
THE VULNERABILITY OF OLDER AUSTRALIANS IN BANKRUPTCY:
INSIGHTS FROM AN EMPIRICAL STUDY

Abstract

This article presents the results of the first empirical study focused on older Australians in bankruptcy. Our study — based on the examination of a large and unique dataset obtained by the authors from the bankruptcy regulator, the Australian Financial Security Authority, offers valuable insight into the severe financial challenges faced by many older Australians. Our analysis provides insights into the most significant causes of bankruptcy for older Australians as well as some possible explanations for their financial vulnerability. Our findings include that older Australians comprise an increasing proportion of those in bankruptcy and are far more likely to cite excessive credit as the cause of their bankruptcy compared to younger and middle-aged bankrupts. We also find that the key salient features of older Australians in bankruptcy are their very high credit-card debts, particularly in light of their low incomes and modest levels of assets. While older Australians tend to own real estate (such as their own home) and can be described as being ‘asset-rich’, we observe that only a very small proportion of older Australians in bankruptcy own real estate.

I Introduction

Australia’s population is ageing — in 2016, there were around 3.7 million Australians aged 65 and over — and the number of older Australians is expected to increase considerably in the coming decades due to longer life.
expectancy. In today’s society, Australians are increasingly needing to access credit to obtain basic necessities, such as housing and healthcare. This is occurring within the context of governments having a reduced role in the direct provision of social welfare. For older Australians on low incomes and with modest assets, this has meant a greater reliance on credit, particularly high-risk credit, and is reflected by increasing levels of over-indebtedness and bankruptcy.

This article contributes to the developing body of Australian empirical bankruptcy research by providing results of an empirical study focused on older bankrupts in Australia. We focus our analysis on the most prominent causes of bankruptcy involving older Australians, and the salient financial characteristics which distinguish older Australians in bankruptcy from other bankrupts and older Australians more broadly. There has been considerable empirical research on the subject of older Americans in bankruptcy in the United States. However, the application of this research to Australia is limited due to differences in the legal, economic and social ramifications of bankruptcy.

Our empirical study is based on the examination of a large and unique dataset obtained by the authors from the regulator, the Australian Financial Security Authority (‘AFSA’). In line with its privacy policies and its commitment to facilitating

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bankruptcy research, AFSA has provided a dataset of nearly 29,000 de-identified records of individual bankruptcies initiated between 2007 and 2016.

Our examination of older people in bankruptcy, and the reasons why they face bankruptcy, provides an empirical account of a subset of the bankruptcy population that has yet to be examined in Australia. We analyse the data to form a clearer understanding of the salient features of bankruptcies involving older Australians that occurred during the period identified. We find that in some respects, older Australians in bankruptcy share characteristics with bankrupts of other age groups. For example, a typical older bankrupt has never been bankrupt before, and seeks bankruptcy via a debtor’s petition (ie voluntarily) for non-business-related reasons.

However, older Australians in bankruptcy also differ in several key aspects from other bankrupts, and from other older Australians. We focus on these aspects in our article. We find that older Australians in bankruptcy are far more likely to cite excessive credit as the cause of their bankruptcy compared to younger and middle-aged bankrupts. Further, older bankrupts have very high credit-card debts, both in absolute terms, and relative to their modest incomes and assets, raising questions of how and for what reasons older people with limited assets — many of whom are pensioners — accumulate such large debts. We also observe that only a very small proportion of older Australians in bankruptcy own real estate, such as their own home. These findings are particularly surprising given the broad view that older people are both ‘asset-rich’, and tend to be conservative borrowers.

Our empirical findings can play an important role in informing bankruptcy policy and law reform by helping to develop a profile of older Australians in bankruptcy. Our findings also provide insight into the severe financial challenges faced by many older Australians.

The analysis is structured in five parts. Part II provides an overview of the bankruptcy law in Australia. Part III sets out the methodology and the results of our empirical study of older Australians in bankruptcy. Part IV discusses the implications of our findings. Part V concludes.

II AUSTRALIAN BANKRUPTCY LAW

Bankruptcy is a legal process enabling people with unmanageable debt to obtain a release from their financial obligations. The current bankruptcy law in Australia is set out in the Bankruptcy Act 1966 (Cth) (‘Bankruptcy Act’).

While the earliest English bankruptcy laws were enacted in the 16th century and were essentially punitive in nature, the sanctions imposed on bankrupts have become

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7 The data spans the period from 1 July 2007 to 20 June 2016. On 1 July 2007, AFSA adopted its current data management and reporting system.
considerably less severe over time.\(^8\) Bankruptcy has been part of Australian law since the early 19th century.\(^9\) Current Australian bankruptcy law, as set out in the *Bankruptcy Act*, has evolved to focus on the pragmatic goal of equitable asset distribution, rather than the punishment of debtors.\(^10\)

Under Australian bankruptcy law, bankruptcy can be sought voluntarily by the debtor via the presentation of a ‘debtor’s petition’.\(^11\) A debtor’s petition is often sought as a last resort by debtors seeking a fresh start after experiencing the most severe financial crises. Alternatively, the bankruptcy of a debtor can also be sought against the debtor’s wishes, where the court issues a sequestration order following the lodgement of a petition by a creditor.\(^12\) The consequences of an involuntary bankruptcy are likely to be more serious for the debtor.

When a debtor becomes bankrupt, they are provided with protections from unsecured creditors.\(^13\) However, the bankrupt’s assets, subject to certain exemptions,\(^14\) are transferred to the trustee in bankruptcy who is able to sell them and use the proceeds to repay creditors.\(^15\) For a certain period (usually three years, but up to eight years on application by the trustee in certain circumstances), these individuals face certain legal restrictions.\(^16\) For example, an undischarged bankrupt

- is required to give their passport to the trustee;\(^17\)

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11 Bankruptcy Act s 55.

12 Ibid s 43(1).

13 Secured creditors’ rights to realise or otherwise deal with their security are not affected by bankruptcy: ibid s 58(5).

14 Debtors are entitled to retain certain types of assets, including ordinary household goods, items of sentimental value, and tools of trade: see, eg, ibid s 116(2).

15 Ibid s 129.

16 Ibid ss 149, 149A(2)(a)(i).

17 Ibid s 77(1)(a)(ii).
• cannot leave Australia without the written consent of the trustee (a failure to do this is punishable by imprisonment);\textsuperscript{18}

• is restricted from continuing or commencing legal proceedings, with certain exceptions;\textsuperscript{19}

• is excluded from certain occupations (such as managing corporations);\textsuperscript{20} and

• is disqualified from standing for, or holding, a federal or state parliamentary seat.\textsuperscript{21}

During this period, bankrupts are required to make contributions towards their debts, if their incomes exceed a certain threshold.\textsuperscript{22} At the end of this period, bankrupts are freed from their legal restrictions and their remaining debts are discharged.\textsuperscript{23} The bankrupt’s details are permanently listed on the National Personal Insolvency Index (‘NPII’), a searchable public register listing insolvency proceedings in Australia.\textsuperscript{24} A record of the bankruptcy is also retained by credit reporting agencies for up to seven years.\textsuperscript{25}

In 2016, the Federal Government announced its intention to reduce the period of bankruptcy from three years to one year.\textsuperscript{26} However, it is yet to introduce legislation implementing such a change. If implemented, these changes would further emphasise the pragmatic, rather than punitive, function of Australian bankruptcy law.

\textsuperscript{18} Ibid s 272(1)(c).

\textsuperscript{19} Ibid s 60.


\textsuperscript{21} Senate and Federal House of Representatives: see Australian Constitution s 44(iii). Similar provisions are in place in the states and territories: see Constitution Act 1902 (NSW) ss 13A(1)(e); Parliament of Queensland Act 2001 (Qld) s 64(2)(f); Constitution Act 1934 (SA) ss 17(1)(d), 31(1)(e); Constitution Act 1934 (Tas) ss 34(d); Constitution Act 1975 (Vic) ss 44(2)(c), 55(e); Constitution Acts Amendment Act 1899 (WA) ss 32(1)(2), 38(d).

\textsuperscript{22} Bankruptcy Act pt VI Division 4B.

\textsuperscript{23} Certain unsecured debts, such as child support and maintenance, HECS and HELP debts, court-imposed penalties and fines, are not extinguished when the debtor is released from bankruptcy: Bankruptcy Act 1966 (Cth) s 153(2).

\textsuperscript{24} Following discharge, the NPII is updated to reflect the status of the person as a discharged bankrupt. The Bankruptcy Regulations 1996 (Cth) pt 13 provides detail on what is to be entered on the index.

\textsuperscript{25} Privacy Act 1988 (Cth) s 20X(1).

\textsuperscript{26} Australian Government, ‘Improving Bankruptcy and Insolvency Laws’ (Proposals Paper, Treasury, April 2016) 5.
An important aspect of personal insolvency law in Australia is the existence of debt agreements as an alternative to bankruptcy.\(^\text{27}\) As discussed in the next part of the article, the popularity of debt agreements has increased rapidly since their introduction in 1996. Eligible insolvent debtors may propose to enter a debt agreement and then creditors vote on the offer. While not all consequences and restrictions that apply to bankruptcy apply to debt agreements, the proposal of a debt agreement is in itself an act of bankruptcy, which may be used by a creditor to apply for a sequestration order before creditors have the opportunity to vote on the agreement. It has been suggested that one of the reasons for the growth in the number of debt agreements in Australia is that these agreements do not carry the same stigma that comes with bankruptcy.\(^\text{28}\)

### III Empirical Study

#### A Methodology

AFSA provided the authors with 28,683 records entered between 1 July 2007 and 20 June 2016. The sample represents 10 per cent of all bankruptcies filed during this period, and has been selected randomly, to ensure it is broadly representative of the bankrupt population.

The dataset includes a number of characteristics for each bankrupt individual, including their gender, age, occupation, income, source of income, and whether the bankruptcy is business-related. The dataset also includes the cause of bankruptcy, either as nominated by each individual when completing his or her Statement of Affairs (‘SOA’) form at the commencement of bankruptcy, or, in the case of an involuntary bankruptcy, based on information supplied by creditors. Also included are details of each individual’s unsecured assets and liabilities at the time of bankruptcy.

While this dataset is extremely rich, it has several limitations. In the first instance, the data is provided by bankrupts themselves, at the commencement of their bankruptcies. The period leading up to bankruptcy is frequently marked by intense stress and a sense that one’s financial problems have become overwhelming and unmanageable.\(^\text{29}\)

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\(^\text{27}\) For a discussion of debt agreements, see generally Vivien Chen, Lucinda O’Brien and Ian Ramsay (2018) 44(1) ‘An Evaluation of Debt Agreements in Australia’ *Monash University Law Review* 151 <https://www.monash.edu/__data/assets/pdf_file/.../Chen,-OBrien-and-Ramsay.pdf>. Another alternative to bankruptcy in Australia is entry into a Part X agreement, however the prevalence of these agreements has declined significantly over time: see AFSA, below n 34.


For this reason, it is likely that some of the data reported by debtors at the commencement of bankruptcy is inaccurate or incomplete.

The format of the dataset also imposes some limitations. Key financial data — income, assets and liabilities — is recorded in bands, such as ‘$0.01–$4999.99’, rather than in precise figures. Banded data tends to obscure true distributions and thus reduce the accuracy of statistical calculations such as means and medians. Moreover, the dataset does not include secured liabilities, such as mortgages, as AFSA is unable to guarantee the reliability of such data. Nonetheless, even considering these limitations, the dataset provides valuable insights into the circumstances of Australian debtors at the time of their bankruptcies.

An important question to consider at the outset is what age groups should be included within the definition of ‘older Australians’. The AFSA dataset is grouped into age bands, which include the following older groups: 55–59 years, 60–64 years, 65–69 years and over 70 years. Generally, in this article we define older Australians as being aged 65 years and older, 65 being the original qualifying age for the age pension in Australia. However we also make observations in relation to both the ‘younger’ and ‘older’ cohorts of older Australians (those aged between 65 and 69, and those aged 70 and over), to provide a more nuanced picture of older Australians in bankruptcy at different points in their lifetime. For example, we observe differences between bankrupts around the time of eligibility for the age pension, and those who likely have been eligible for the age pension for some years.

It was noted that 87.4 per cent of coupled respondents to the Consumer Bankruptcy Project (‘CBP’) survey reported being ‘very stressed’ over their finances immediately before bankruptcy, while another 10.2 per cent were ‘somewhat stressed’.

AFSA advised that many debtors are unaware of the extent of their mortgages, or the market value of their homes, at the time of their bankruptcies. While AFSA does not report on secured liabilities, it does include one category of unsecured liability which it calls ‘house mortgage’. This category refers to debts where the amount owing exceeds the value of the security (ie only the amounts ‘owing above the estimated value of the security’ are included in the dataset): see, eg, Insolvency and Trustee Service Australia (‘ITSA’), ‘Profiles of Debtors 2011’ (Report, 2011) 19 <https://www.afsa.gov.au/statistics/profiles-debtors> (‘Profiles of Debtors 2011 Report’).

For many statistical purposes, the older cohort is taken to be comprised of those aged 65 and above: see, eg, AIHW, ‘Australia’s Health 2016’ (Report, 2016) 349 <https://www.aihw.gov.au/reports/australias-health/australias-health-2016/contents/summary>

During the period of the study the qualifying age for the age pension was 65 years. However, the qualifying age will gradually increase to 67 years by June 2023. The Federal Government has also announced a policy to continue increasing the qualifying age until it is 70 years by 1 July 2035, although these subsequent increases are yet to be legislated: Department of Human Services, Increase the Age Pension Qualifying Age to 70 Years — Budget 2014–15 (5 July 2018) <https://www.humanservices.gov.au/organisations/about-us/budget/budget-2014-15/budget-measures/older-australians/increase-age-pension-qualifying-age-70-years>.
B An Overview of Bankruptcy and Personal Insolvency in Australia

In order to provide context for our study of older Australians in bankruptcy, we first provide a brief overview of the prevalence of bankruptcy and personal insolvency in Australia, and how this has changed over time.

In 2015–16, 17 202 people declared bankruptcy in Australia, while the total number of personal insolvencies was 29 527. As illustrated in Figure 1, personal insolvencies (comprised of bankruptcies, debt agreements and a much smaller number of Part X agreements) had become more frequent between 1986–87 and 2009–10. The change in the total number of insolvencies over that period constitutes a fourfold increase, but since 2009–10 the number of personal insolvencies has been declining.

Figure 1: Changes in the number of personal insolvencies in Australia since 1986–87

Based on current filing rates, around 2.6 per cent of Australians could expect to become bankrupt during their working lifetime. Although bankruptcy and personal insolvency still affect a small proportion of the population, the incidence of

Source: AFSA.33


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bankruptcy and personal insolvency has increased since the 1980s. Between 1986 and 2016, the incidence of bankruptcy (in any given year) increased from around 0.05 per cent to 0.07 percent, while the increase in personal insolvency has been more significant (from 0.05 per cent to 0.12 per cent, annually).34

As shown in Figure 1, the number of bankruptcies has declined in almost every year since 2009–10. Over this period, there has been a corresponding increase in the number of debt agreements. Indeed, the number of debt agreements had increased significantly from less than 400 in 1997–98 to over 12 000 in 2015–16. While in 1997 around 96.6 per cent of insolvent debtors applied for bankruptcy, in 2015–16 the proportion of insolvent debtors opting for bankruptcy was around 58.3 per cent.

C Trends in Bankruptcies Involving Older Australians

The trends in the number of personal insolvencies and bankruptcies discussed in the previous section have not affected all age cohorts uniformly. In this section, we describe the key characteristics and trends in the age demographics of the bankruptcy population in Australia.

1 Changing Age Profiles of Bankrupts

The age profile of bankrupts has been changing in Australia in recent years. As we have seen, the total number of bankruptcies has declined between 2008 and 2014. Some of the largest declines involved the younger cohorts, which has the result of raising the average age of the bankruptcy population.

The 2008 report on personal insolvency trends by Ramsay and Sim observed steady increases in the age of bankrupts in Australia since 1997.35 As shown in Figure 2, the proportion of older bankrupts has continued to increase since 2008, albeit at a slower rate. The bankruptcy population has been ageing, with the proportion of bankrupts in the three oldest age cohorts (40–49 years, 50–59 years, and 60 years and older) increasing over the period. Further, the proportion of bankrupts aged 60 and over has doubled from around 7 per cent to around 14 per cent of all bankrupts between 2002 and 2014.

34 Incidence calculated using ABS population statistics and forecasts for those aged 18 and older: see ABS, Population Projections, Australia, 2012 (base) to 2101 (ABS Catalogue No 3222.0, 2013); ABS, Australian Demographic Statistics (ABS Catalogue No 3101.0, 2018) table 59; ABS, Australian Historical Population Statistics 2014 (ABS Catalogue No 3105.0.65.001, 2014) table 19.

35 Ramsay and Sim found that the proportion of bankrupts aged 54 or older had increased from 10 per cent of all bankrupts in 1997 to 22 per cent in 2008: Ramsay and Sim, ‘Trends in Personal Insolvency in Australia’, above n 9, 76–7.
Figure 2: Bankruptcy population broken down by age cohorts

One reason for the increase in the proportion of older bankrupts is the ageing of the overall population in Australia (the proportion of the older Australians has increased from 11.9 per cent to 15 per cent in the two decades preceding 2015). However, a more significant reason is the rising popularity of debt agreements as an alternative to bankruptcy, among all age cohorts. They have been particularly popular with younger and middle-aged people. For example, an analysis of AFSA statistics reveals that in 2014, nearly two thirds of people aged 24 years or under who became insolvent entered into debt agreements. In contrast, the increase in the proportion of debt agreements entered into by older Australians remained at less than 20 per cent in 2014. This is illustrated by Table 1.

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Table 1: Number of debt agreements as a proportion of all personal insolvencies for each age cohort (%)

<table>
<thead>
<tr>
<th>Age Cohort</th>
<th>2008 (%)</th>
<th>2014 (%)</th>
<th>2008–2014 Increase (percentage points)</th>
</tr>
</thead>
<tbody>
<tr>
<td>17–24</td>
<td>37.1</td>
<td>61.7</td>
<td>24.6</td>
</tr>
<tr>
<td>25–29</td>
<td>38.5</td>
<td>58.4</td>
<td>19.8</td>
</tr>
<tr>
<td>30–34</td>
<td>28.7</td>
<td>48.3</td>
<td>19.6</td>
</tr>
<tr>
<td>35–39</td>
<td>22.3</td>
<td>39.9</td>
<td>17.6</td>
</tr>
<tr>
<td>40–44</td>
<td>18.7</td>
<td>34.2</td>
<td>15.5</td>
</tr>
<tr>
<td>45–49</td>
<td>17.4</td>
<td>32.1</td>
<td>14.7</td>
</tr>
<tr>
<td>50–54</td>
<td>15.4</td>
<td>29.8</td>
<td>14.4</td>
</tr>
<tr>
<td>55–59</td>
<td>11.3</td>
<td>24.6</td>
<td>13.2</td>
</tr>
<tr>
<td>60–64</td>
<td>6.0</td>
<td>19.6</td>
<td>13.6</td>
</tr>
<tr>
<td>65–69</td>
<td>4.5</td>
<td>14.1</td>
<td>9.6</td>
</tr>
<tr>
<td>70 or more</td>
<td>5.5</td>
<td>18.9</td>
<td>13.4</td>
</tr>
<tr>
<td>Total</td>
<td>22.0</td>
<td>38.2</td>
<td>16.2</td>
</tr>
</tbody>
</table>

Source: derived from AFSA datasets.39

2 Incidence of Bankruptcy Categorised by Age and Gender

This section presents the differences in the incidence of bankruptcy among the age cohorts. The incidence of bankruptcy is calculated by dividing the total number of bankrupts in each age category by the total number of Australians within that age category. We present this data for both males and females.

Figures for the incidence of bankruptcy per 100 000 individuals are set out in Table 2 and Figure 3 for the major age groups for both males and females. While we have seen that the bankruptcy population is ageing, older Australians remain less likely to face bankruptcy compared to other age groups. The incidence of bankruptcy among older Australians is considerably lower than for those under 65 years of age. As shown in Table 2, the incidence of bankruptcy among males aged 65 years and older is just 77.3 per 100 000, as compared to 174.5 per 100 000 for males aged under 65 years. The difference in incidence between older and younger females is also stark: the incidence of bankruptcy among females aged 65 years and older is 46.2 per 100 000, as compared to 127.4 per 100 000 for females aged under 65 years. This means that older Australians are less than half as likely to become bankrupt than the remainder of the population.

39 AFSA, above n 37.
Table 2: Incidence of bankruptcy per 100,000 people aged 18 years and over during the period of the study

<table>
<thead>
<tr>
<th></th>
<th>Males</th>
<th>Females</th>
</tr>
</thead>
<tbody>
<tr>
<td>Incidence of bankruptcy (all ages)</td>
<td>160.6</td>
<td>115.3</td>
</tr>
<tr>
<td>Age under 65 years</td>
<td>174.5</td>
<td>127.4</td>
</tr>
<tr>
<td>Age 65 years and over</td>
<td>77.3</td>
<td>46.2</td>
</tr>
</tbody>
</table>

Sources: AFSA and ABS.40

Figure 3: Incidence of bankruptcy – male and female comparison, per 100,000 people aged 18 years and over during the period of the study

Figure 3 illustrates how the incidence, or the likelihood of bankruptcy, changes over a person’s lifetime. Overall, the trend for both males and females shows an increase in the risk of bankruptcy between the 20s and 40s, after which it declines again. The Figure shows that the incidence of bankruptcy is higher for males in each age cohort except for those aged under 25 years. However, the difference in bankruptcy incidence between the genders is relatively small for those aged under 30 years. The difference in bankruptcy incidence between the genders is most pronounced for those aged 60 years and over. The incidence of bankruptcy among males is nearly twice as high as among females for those aged 60–64 years and 65–69 years. As noted in the next section, a significant reason for these differences — particularly among

41 Ibid.
older people — is the small number of business-related bankruptcies involving older females.

D Causes of Bankruptcy Involving Older Australians

A key objective of our study of older Australians in bankruptcy is to identify the reasons why older people file for bankruptcy. Bankruptcies are categorised by AFSA as either business-related or personal. A business-related bankruptcy is defined by AFSA as being one in which a person’s bankruptcy is ‘directly related to his or her proprietary interest in a business’. This group is likely comprised of bankrupt sole traders, members of business partnerships, and shareholders who have provided a personal guarantee to a company’s creditors.

The primary causes of bankruptcy, as identified by the debtor, differ depending on whether the bankruptcy is business-related or personal. We focus the remainder of our article on personal bankruptcies involving older Australians. We have taken this approach because of the relatively small sample size of older business-related bankrupts, and particularly older female bankrupts. For example, the total number of female business-related bankrupts above the age of 70 years in the dataset is 14 (and there are only 56 female business-related bankrupts aged 65–69 years). It is possible that undertaking finer analysis of older business-related bankrupts may thus yield unreliable conclusions.

Table 3 provides the percentages of personal bankruptcies categorised by the primary cause of bankruptcy. We can see that the primary causes of bankruptcy differ between the age cohorts.

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42 For ease of reference we also use this term to refer to non-business-related bankruptcies.

43 This categorisation is sourced from the responses by the bankrupt in their SOA form, which is submitted to AFSA. AFSA also notes that it ‘does not provide guidance, including the definition of business,’ which means that this data may be ‘affected by differences in debtors’ interpretations of what constitutes a business’: ITSA, above n 30, 15. More than three quarters (79 per cent) of the bankruptcies in the dataset are classified as personal bankruptcies. The proportion of business-related bankruptcies differed between age groups. The youngest and oldest cohorts are least likely to become bankrupt for business-related reasons.

44 A number of logistic regressions including specific (dummy) age variables as well as other demographic and financial characteristics were carried out to determine which age variables were statistically significant in relation to causes of bankruptcy. We find few statistically significant variables for business-related bankruptcies. There are no statistically significant variables involving the older Australian cohort. This implies that age may not be an important determinant of business-related bankruptcy, but rather that the characteristics correlated with age (such as financial circumstances) may be more influential.
Table 3: Primary causes of personal bankruptcy for different age groups (%)

<table>
<thead>
<tr>
<th>Primary Cause of Bankruptcy: Personal Bankruptcy</th>
<th>Under 25 years</th>
<th>25–34 years</th>
<th>35–44 years</th>
<th>45–54 years</th>
<th>55–64 years</th>
<th>65 years and older</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adverse legal action</td>
<td>3.1</td>
<td>3.3</td>
<td>3.3</td>
<td>4.2</td>
<td>4.9</td>
<td>3.7</td>
</tr>
<tr>
<td>Domestic discord</td>
<td>10.2</td>
<td>15.7</td>
<td>17.9</td>
<td>11.8</td>
<td>5.6</td>
<td>3.0</td>
</tr>
<tr>
<td>Excessive credit</td>
<td>22.9</td>
<td>25.3</td>
<td>22.4</td>
<td>21.7</td>
<td>23.1</td>
<td>36.5</td>
</tr>
<tr>
<td>Gambling, speculation, and extravagance in living</td>
<td>2.8</td>
<td>4.0</td>
<td>3.3</td>
<td>3.8</td>
<td>4.0</td>
<td>3.9</td>
</tr>
<tr>
<td>Ill health</td>
<td>4.6</td>
<td>6.6</td>
<td>9.0</td>
<td>12.8</td>
<td>16.8</td>
<td>16.5</td>
</tr>
<tr>
<td>Liabilities due to guarantees</td>
<td>0.6</td>
<td>1.2</td>
<td>2.5</td>
<td>3.1</td>
<td>2.9</td>
<td>2.3</td>
</tr>
<tr>
<td>Other causes</td>
<td>2.4</td>
<td>5.6</td>
<td>9.4</td>
<td>10.2</td>
<td>11.1</td>
<td>11.6</td>
</tr>
<tr>
<td>Unemployment</td>
<td>53.3</td>
<td>38.3</td>
<td>32.2</td>
<td>32.4</td>
<td>31.7</td>
<td>22.4</td>
</tr>
</tbody>
</table>

Source: AFSA and ABS.45

The most significant primary causes of bankruptcy associated with older age are ‘excessive credit’, ‘ill health’ and ‘unemployment’. These primary causes, discussed in more detail below, comprise more than three quarters of all personal bankruptcies involving older Australians. The four remaining specific causes of bankruptcy, which are ‘adverse legal action’, ‘domestic discord’, ‘gambling, speculation and extravagance in living’, and ‘liabilities due to guarantees’ each comprise between two and four per cent of personal bankruptcies involving older Australians.46 It is worth noting that, of these other causes, domestic discord is much more prevalent among younger and middle-aged bankrupts. It is cited by only 3 per cent of older Australians as the primary reason for their bankruptcy, compared to, for example, the cohort aged 35–44 years (17.9 per cent).

It is possible that the likelihood of bankruptcy among older Australians can be explained by factors that are normally characteristic of the aged, rather than age per se. Key characteristics of older Australians include that they are more likely to be asset-rich, income-poor, more dependent upon government welfare transfers, and far less likely to be supporting young children.

To account for these factors, we conducted a series of logistic regressions for the primary causes of bankruptcy to identify the salient characteristics which are directly associated with (and therefore potentially causally related to) bankruptcy and isolate the age characteristic itself.47 This analysis is important because it could be the case

45 ABS, above n 40.
46 The catch-all category of ‘other causes’ is reported as the primary cause of 11.6 per cent of personal bankruptcies involving older Australians.
47 In the logistic regressions that follow, we test whether age — in particular older age — is a risk factor for three key causes of bankruptcy: excessive credit issues, ill-health, and unemployment. Age, however, is clearly correlated with a number of other characteristics such as income level (older age bankrupts will have a lower
that advancing age has no impact upon bankruptcy at all. For example, it could be true that older Australians tend to become bankrupt simply because their income levels are lower than other age cohorts. However, in the case of the three major causes of bankruptcy affecting older Australians, we find that being older is itself a factor in the bankruptcy, independent of factors normally characteristic of older age, such as low income.48

1 Excessive Credit

Our findings show that credit problems are by far the single highest cause of bankruptcy among older Australians. ‘Excessive credit’ is cited as the primary cause of personal bankruptcy by a significant proportion of younger and middle-aged Australians. However, the proportion of older Australians citing ‘excessive credit’ as the primary cause of bankruptcy is considerably higher than for each of the other age cohorts (36.5 per cent of older Australians cite excessive credit as the primary cause of bankruptcy, compared to 21.7–25.3 per cent among the other cohorts).49

2 Ill Health

Another key aspect which differentiates the older cohort from the younger cohorts is the proportion of bankrupts citing ‘ill health’ as a primary cause of bankruptcy. The proportion of younger debtors citing ill health as the primary cause is significantly lower. This trend is positively correlated with age. However, the increase in the proportion of debtors citing ill health as the key reason for their bankruptcy occurs earlier in the debtor’s lifecycle than ‘excessive credit’. Indeed, the percentage

income, particularly if they have retired or transitioned to part-time work), sources of income (older age bankrupts are more likely to be receiving government benefits as the primary source of income), and asset levels (older age bankrupts would be expected to be more asset-rich than younger bankrupts). Other factors might also confound an otherwise straightforward analysis (see Appendix A). Logistic regression allows us to test hypotheses about the impact of older age by factoring out the unique impact of these confounding characteristics. Typically, regression analysis measures the impact of a characteristic of interest (such as particular age groups) by comparing them to a base (or control) group. In this case, the control group is comprised of bankrupts aged between 30 and 54 years. We therefore measure whether a suite of individual groups (characterised by both age ranges and gender) impact bankruptcy causes independently. This is done by creating ‘dummy variables’ for the following groups: both male and female respondents aged under 30 years; 55–60 years; 60–65 years; 65–70 years; and 70 years and over.

48 See below nn 49–52.

49 The impact of ‘excessive credit’ as a cause of bankruptcy in the older age group was confirmed in the logistic regression. Some characteristics, such as receiving government benefits as a primary income source and high overall income levels, increase the likelihood of bankruptcy caused by excessive credit. Other characteristics, such as having substantial asset levels, reduce this likelihood. After factoring out these characteristics, the logistic regression identifies older age (more specifically, males aged 60 years and over and females aged 55 years and over) as a significant risk factor for those who cited excessive credit as the cause of bankruptcy.
of individuals citing ill health as the predominant reason for their bankruptcy is similar between bankrupts aged 55–64 years and 64 years and over (16.8 per cent and 16.5 per cent respectively).50

3 Unemployment

Unemployment as a cause of bankruptcy is inversely related to age. It is the key cause of bankruptcy for the youngest cohort (those younger than 25 years), more than half of whom cite unemployment as the primary cause of bankruptcy. Among other age cohorts this proportion declines to around one third of bankruptcies, although it is still the most significant factor for all age groups except the oldest cohort.

The proportion of older Australians citing unemployment as the primary reason for their bankruptcy (22.4 per cent) is lower than the other age groups. However, this figure — comprising the second highest cause of bankruptcy among older Australians — remains highly significant. A finer analysis of the older age bankruptcy cohort shows that around 31 per cent of males aged 65–69 years cite unemployment as the key reason for their bankruptcy. This proportion is significantly lower for females aged 65–69 years (22.1 per cent), which may reflect the fact that females tend to retire around nine years earlier than males.51 There is no substantial difference in the proportion of males and females aged 70 years and over citing unemployment as the key reason for their bankruptcy (16.7 and 16.8 per cent respectively), presumably as by this age most people would have retired regardless of gender.52

50 The impact of ill health as a cause of bankruptcy in the older age group was confirmed in the logistic regression. Some characteristics, such as earning a wage or funding one’s primary income through self-employment, decrease the likelihood of bankruptcy caused by ill health. Other characteristics, such as high incomes, higher unsecured liabilities and more substantial asset holdings, reduce this likelihood. After accounting for these characteristics, the logistic regression identifies the demographic of older age brackets as significant: this is especially noticeable in relation to males aged 60–64 years, and females aged 55–65 years.

51 The average age of retirement for people aged 45 years and over was 53.8 years in 2012–13 (50.0 years for females and 58.5 years for males): ABS, Retirement and Retirement Intentions, Australia, July 2012 to June 2013 (ABS Catalogue No 6238.0, 2013) (‘Retirement Intentions’).

52 The impact of unemployment as a cause of bankruptcy — inversely related to age — was confirmed in the logistic regression. Some characteristics, such as receiving government benefits as a primary income source, increase the probability of bankruptcy due to unemployment. Others, such as higher income levels and higher unsecured liability levels (generally correlated with high assets), reduce this probability. Further, bankrupts from certain occupational groups (eg machinery operators, community and personal workers, labourers and technicians) were more likely than others to cite unemployment as the cause of bankruptcy. After accounting for these characteristics, the logistic regression still substantiated the inverse relationship between age and unemployment as a reason for bankruptcy. Those in the older age demographic are far less likely to cite unemployment being primarily responsible for their bankruptcy (more specifically, males aged 60 years and over; and females aged 55 years and over).
E  Financial Circumstances of Older Bankrupts

In this section, we examine the financial circumstances — incomes, assets, unsecured liabilities, and net worth — of older bankrupts, and compare these with younger cohorts of bankrupts and other older Australians.

1  Incomes

(a)  Primary Income Source

As shown in Figure 4, the primary income sources for nearly all bankrupts of all ages are ‘wages and salaries’, and ‘government benefits and pensions’. Other primary income sources — such as business earnings and superannuation — are less common.

Figure 4: Primary income sources for different age groups (percentage of personal bankrupts citing income source as primary)

Source: AFSA and ABS.53

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The primary income source of bankrupts varies depending on the bankrupts’ age profiles. However, the biggest changes in bankrupts’ primary income sources occur between the cohort aged 45–54 years and 65 years and older. More than half of the cohort aged 45–54 years receives most of their income from wages and salaries, while “government benefits and pensions” is the primary income source of around a third of bankrupts from that age group. However, for the cohort aged 55–64 years these proportions are reversed, with more than half of bankrupts citing ‘government benefits and pensions’ as their primary income source. A large proportion of bankrupts in the 55–64 years age bracket are either unemployed or on other forms of government benefits or pensions. The proportion of bankrupts aged 65 years and over that cite government benefits and pensions as their primary income source is even higher, at 87.1 per cent, with less than 9 per cent obtaining their primary income from wages and salaries.

The low proportion of bankrupts citing wages and salaries as the primary income source is broadly in line with other older Australians — only around 12.0 per cent of older Australian households list wages and salaries as their primary income source. However, there is a substantial difference between the proportion of older bankrupts citing government benefits or pensions as the primary income source and the broader population of older Australians (around 61.8 per cent of older Australians cite this as their primary income source, compared to 87.1 per cent of older bankrupts). The difference is due to the reliance on other sources of income (such as superannuation), which are cited as the primary income sources of around 24.8 per cent of older Australians. Superannuation is the primary source of income of only around one per cent of bankrupts, and less than one per cent described their primary income source as ‘other’.

(b) Gross Income

Overall, bankrupts’ incomes (at both the individual and household level), which are provided in Table 4, are lower than average incomes in Australia. Analysis of bankrupts’ incomes also shows a relationship between bankrupts’ ages and incomes — incomes for both male and female bankrupts start declining from around the age of 40–49 years. Older bankrupts’ incomes are thus relatively low compared to other age cohorts of bankrupts — for example, they are only around half that of bankrupts in their 40s.


55 Bankrupts aged 45–49 years have mean gross income of $38 420.50 and median income of $32 500.
As shown in Table 4, older bankrupts’ gross household incomes are considerably lower than the mean and median gross household incomes of bankrupts of all ages. However, gross household income is an imperfect indicator of economic wellbeing, because it does not reflect the size of the household. Unlike the younger cohorts, older Australians usually reside in a single-person household or as part of a couple with no dependent children. This factor makes it difficult to compare an older person’s individual or household income with other age cohorts.69

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59 Around 41 per cent of older Australians are living in a ‘lone person’ household, which is higher than any other age category. Around 83 per cent of older Australians are living in either a ‘lone person’ household, or as part of a couple with no dependent children. The ABS also publishes an ‘equivalised disposable household income’ measure which accounts for the size of the household. The difference between equivalised disposable incomes of older Australians and the broader population is significantly smaller than the difference between the respective gross incomes: see ABS, *Household Income and Wealth, Australia: Summary of Results, 2015–16*, above n 54, Age of Reference Person — table 12.3, 12.4.
As such, we also compare gross personal incomes of older bankrupts with the other
cohorts. Again, these are much lower for older bankrupts than other age cohorts.\textsuperscript{60} For example, the median gross personal income of older Australian bankrupts is only
$17 500, compared to the median income of all bankrupts, $27 500. We also find that
only 5.8 per cent of bankrupts aged 65–69 and 3.2 per cent of those aged 70 years
and over have a gross personal income over $50 000.

We find that the relatively low household incomes of older bankrupts are broadly
consistent with household incomes of other older Australians.\textsuperscript{61} Older Austra-
lions make up around 14 per cent of the population but comprise nearly one third
(1.2 million) of people living in low income households.\textsuperscript{62}

Similarly to older bankrupts’ household incomes, older Australians’ personal incomes
are low. In 2011, more than half of all older Australians had personal annual incomes
between $10 400 and $20 800.\textsuperscript{63} This equates to $200–$400 per week, substantially
less than Australians’ median weekly personal incomes of $577 at the time.\textsuperscript{64} It is
also significantly lower than the current minimum wage, $589.30 per week, for a
person working full-time.\textsuperscript{65}

\textsuperscript{60} Unsurprisingly, there is a clear relationship between government benefits and pensions
as a primary income source, and a lower income.

\textsuperscript{61} We compared the household gross incomes of older bankrupts with those of other
older Australians. We find that this difference is relatively small (median gross
household income: $35 000 among older bankrupts, compared with $39 416 among
other older Australians; mean: $41 942 among older bankrupts’ households, compared
with $47 060 among other older Australians’ households). This difference likely
reflects inflation, which results in increases to the age pension rates. The effect of
inflation on pensions is significant — over the period of the study, the age pension
rate increased from around $13 000 to over $20 000. As AFSA does not adjust income
or debt levels to derive real measures, we arrive at relatively lower incomes over the
period of the study compared with 2015–16 ABS statistics, which were used for the
above comparison. See ABS, \textit{Household Income and Wealth, Australia: Summary of
Results, 2015–16}, above n 54, Age of Reference Person — table 12.1.

\textsuperscript{62} ABS, \textit{Household Income and Wealth, Australia, 2013–14 — Feature Article: Wealth of
Low Income Households} (ABS Catalogue 6523.0, 2016). See also Australian Council
of Social Service (‘ACOSS’), ‘Inequality in Australia’ (Report, 2015) 43: this report
found that 45 per cent of older Australians are in households in the bottom 20 per cent
of the income distribution.

\textsuperscript{63} ARC Centre of Excellence in Population Ageing Research (‘CEPAR’), ‘Older
Australian Fact Sheet’ (Fact Sheet, September 2014) 3 <http://cepar.edu.au/sites/
default/files/A_Statistical_Portrait_of_the_Older_Australian.pdf>.

services/getproduct/census/2011/quickstat/0>.

\textsuperscript{65} Fair Work Australia, ‘Annual Wage Review 2010–11’ (PR 062011, 20 June 2011) 2
docx>.
2 Assets

Our analysis identifies significant differences between the types and values of assets held by older Australians and those in bankruptcy. The first difference relates to real estate ownership. The proportion of older bankrupts owning real estate is very low, being less than 10 per cent. The data shows that the rates of home ownership among bankrupts are highest for those bankrupts in their 30s and 40s — albeit the proportion is still quite low (less than 15 per cent).

This suggests that personal bankruptcy tends to involve renters, who actually comprise less than a third of Australians, and an even smaller proportion of older Australians. In Australia, home ownership rates among households of older people have been consistently high. In 2010, over 80 per cent of older Australian households owned their own home (either outright, or with a mortgage).

We also find that the vast majority of older bankrupts (and bankrupts of other ages) do not have significant levels of assets. Indeed, a high proportion of bankrupts of all ages report ‘$0’ realisable assets. However, older bankrupts tend to have even lower levels of assets than younger cohorts. As shown in Table 5, the median value of all assets held by older bankrupts is only $2500. The level of assets held by older bankrupts decreases with age — for example, high proportions of bankrupts from the oldest age cohort (those aged 70 and over) report ‘$0’ for the value of the following asset categories:

- jewellery: 98.2 per cent of bankrupts report ‘$0’;
- tax refund: 96.1 per cent;
- other items of value: 87.9 per cent;
- shares: 96.5 per cent;
- tools of trade: 94.2 per cent; and
- superannuation and life insurance policies: 90.0 per cent.

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67 Yates, Ong and Bradbury, above n 66.
68 While mean assets are slightly higher for older bankrupts than for bankrupts under the age of 65 years, means are more likely to be influenced by extreme cases. Median assets of older bankrupts are considerably lower than younger bankrupts.
Table 5 Bankrupts’ assets: selected characteristics

<table>
<thead>
<tr>
<th></th>
<th>Personal bankruptcies (age under 65 years)</th>
<th>Personal bankruptcies (age over 65 years)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total assets (mean)</td>
<td>$154,176</td>
<td>$162,336</td>
</tr>
<tr>
<td>Total assets (median)</td>
<td>$17,500</td>
<td>$25,000</td>
</tr>
<tr>
<td>Total assets grouped (%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Proportion of bankrupts with assets valued under $20,000</td>
<td>54.5</td>
<td>77.4</td>
</tr>
<tr>
<td>$20,000 to $49,999</td>
<td>15.1</td>
<td>4.5</td>
</tr>
<tr>
<td>$50,000+</td>
<td>30.5</td>
<td>18.1</td>
</tr>
</tbody>
</table>

Source: AFSA and ABS.69

This general lack of assets clearly distinguishes older bankrupts from the broader population of older Australians. Older bankrupts also have very low levels of liquid assets, such as cash, shares or funds in bank accounts. Only a very small proportion of older bankrupts own shares, while only around two per cent of older bankrupts have over $5000 in their bank accounts, or in cash.

Other older Australians are generally ‘asset-rich’. A significant proportion of older Australians’ assets is comprised of real estate assets. In 2015–16, households with a reference person aged 65–74 years on average held $1.4 million in assets, which includes around $555,000 in financial assets (such as bank accounts, shares, trusts and superannuation) while the remainder is comprised primarily of real estate assets. Households with a reference person aged 75 years and older on average held $1.08 million in assets, which includes $285,000 in financial assets.70 As discussed below, many older Australians own real estate unencumbered (or have only small mortgages remaining), which means that they also have high levels of wealth (‘net worth’).

3 **Indebtedness**

In respect of liabilities, only unsecured debts (debts that are not secured by a mortgage or security interest over property) are included in the dataset. However, this omission only has the effect of understating the level of indebtedness of bankrupts. Further, as we have shown above, it appears that very few older bankrupts actually own real estate, so the existence of home loans is unlikely to materially impact our observations relating to bankrupts’ typical financial circumstances.71

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69 ABS, above n 40.
71 Less than one per cent of all older bankrupts report the unsecured liability ‘house mortgage’. This comprises 1 in 10 older bankrupts who have real estate. For discussion of AFSA’s treatment of mortgages and secured liabilities, see ITSA, above n 30 and accompanying text.
The main area of debt which affects all bankrupts, including older cohorts, is credit-card liabilities. The size of bankrupts’ credit-card debt generally increases with age, and plateaus for the 60s age cohort. As shown in Table 6, older bankrupts have higher credit-card debts compared to those younger than 65 years. While the magnitude of the credit-card debt is slightly lower for older bankrupts compared to those in their 50s, it is still considerably higher than the average for all age cohorts. It is also notable that older bankrupts are more likely to have credit-card debt compared to other cohorts (over 80 per cent of older bankrupts have credit-card debt), and that many of these debts are large (over 40 per cent of older bankrupts have credit-card debt of over $20 000).

Table 6: Bankrupts’ liabilities: selected characteristics

<table>
<thead>
<tr>
<th></th>
<th>Aged under 65 years</th>
<th>Aged over 65 years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean of credit-card debt ($)</td>
<td>18 764</td>
<td>28 021</td>
</tr>
<tr>
<td>Mean of credit-card debt (excluding those bankrupts with ‘0’ debt) ($)</td>
<td>26 155</td>
<td>33 439</td>
</tr>
<tr>
<td>Median of credit-card debt ($)</td>
<td>7500</td>
<td>17 500</td>
</tr>
<tr>
<td>Median of credit-card debt (excluding those bankrupts with ‘0’ debt) ($)</td>
<td>17 500</td>
<td>22 500</td>
</tr>
<tr>
<td>Mean unsecured liabilities ($)</td>
<td>144 350</td>
<td>197 663</td>
</tr>
<tr>
<td>Median unsecured liabilities ($)</td>
<td>37 500</td>
<td>27 500</td>
</tr>
<tr>
<td>Proportion of those with unsecured liabilities $50 000 and over (%)</td>
<td>38.5</td>
<td>32.0</td>
</tr>
<tr>
<td>Average proportion of credit-card debt as % of total unsecured liabilities (%)</td>
<td>34.0</td>
<td>64.0</td>
</tr>
</tbody>
</table>

Source: AFSA and ABS.72

The overall magnitude of unsecured liabilities held by bankrupts follows a similar trajectory to credit card debt — bankrupts’ levels of debt increase with age, plateau when individuals are aged 40–65 years, and decline after the age of 65 years. The average size of credit card debt as a percentage of their total liabilities also increases with age, even among older bankrupts. For example, on average, credit card debt comprises 55.0 per cent of total liabilities for bankrupts aged 60–64 years, 60.2 per cent for those aged 65–69, and 68.3 per cent for those aged 70 years and over.

A substantial proportion of older bankrupts (35.6 per cent) also report having debt categorised by AFSA as ‘other’. The proportion of older bankrupts who report having ‘other’ debts is significantly lower than other age cohorts (53.7 per cent of other bankrupts report having ‘other’ debt). The remaining types of unsecured debt — such as overdrafts, rates, store card debts,73 legal liabilities, medical debts,

72 ABS, above n 40.
73 The prevalence of store card debts is higher among older bankrupts than among other cohorts, however, this may simply reflect that older people are more likely to use store cards for shopping compared to younger bankrupts. The percentage of older
and personal loans — are held by smaller proportions of older bankrupts, and they comprise a much smaller component of their unsecured liabilities. The magnitude of these liabilities either declines with age (for example, overdrafts, utility liabilities, rates liabilities, and taxation liabilities) or is generally very low for all personal bankruptcies (for example, trade liabilities and legal liabilities).

The high levels of credit card debts among older bankrupts vastly differ from the general older population in Australia. Older bankrupts have mean credit card debt of $28,021. However, mean credit card liabilities for older households are around $1,200,74 which comprises less than 5 per cent of the mean credit card debt of an older bankrupt. Excluding home loans and loans on other real estate, mean liabilities for older Australians are also very low (around $5,200) compared to older bankrupts.75

4 Net Worth

Net worth, which is a measure of wealth, is defined as the excess of assets over liabilities. Wealth tends to be accumulated during people’s working lives and tends to be reduced during retirement to support consumption. As such, older Australians are generally income-poor but have a high level of net worth, due to their relatively higher levels of assets and lower levels of liabilities. In 2015–16, households with a reference person aged 65–74 years had median net worth of $802,800, while households aged 75 years and over had net worth of $642,500 (compared to a median Australian household net worth of $527,000).76

In contrast, the net worth of bankrupts is very low. Indeed, even without factoring in secured liabilities, most bankrupts have an excess of liabilities over assets. The proportion of older bankrupts with liabilities in excess of assets is particularly high — 83.3 per cent, compared to 68.2 per cent of those aged under 65 years. The proportion of bankrupts whose unsecured liabilities exceed assets is illustrated in Figure 5. The percentage of bankrupts that have liabilities exceeding assets decreases with age until individuals enter their 40s and early 50s, after which the proportion of bankrupts with excess liabilities increases again.

74 ABS, Household Income and Wealth, Australia: Summary of Results, 2015–16, above n 54, Age of Reference Person — table 12.2. This amount comprises less than half of the amount owing on credit-cards across all Australian households ($26,000).

75 ABS, Household Income and Wealth, Australia: Summary of Results, 2015–16, above n 54, Age of Reference Person — table 12.2. This amount comprises less than one third of all households’ mean liabilities excluding home loans and loans on other real estate ($18,200). It comprises around 2.6 per cent of mean, or 18.9 per cent of median, unsecured liabilities held by older bankrupts. Note that these two estimates ($5,200 and $18,200) have a relative standard error of 25 per cent to 50 per cent.

76 ABS, Household Income and Wealth, Australia: Summary of Results, 2015–16, above n 54, Age of Reference Person — table 12.2. Mean net worth for the respective household cohorts was significantly higher: $1.33 million and $1.04 million.
Figure 5: Percentage of bankrupts whose liabilities exceed assets, categorised by age

![Percentage of bankrupts whose liabilities exceed assets, categorised by age](image)

Source: AFSA and ABS.\(^{77}\)

Figure 6: Bankrupts’ median assets, liabilities and net liabilities, categorised by age

![Bankrupts’ median assets, liabilities and net liabilities, categorised by age](image)

Source: AFSA and ABS.\(^{78}\)

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77 ABS, above n 40.
78 Ibid.
A broadly similar pattern emerges in relation to the level of wealth of the older bankrupts compared to the younger cohorts. Indeed, Figures 5 and 6 show that the wealth of the oldest two cohorts largely mirrors the youngest two cohorts. These cohorts are most likely to have liabilities in excess of assets — for example, only one in eight bankrupts from the oldest and youngest cohorts has higher assets than liabilities. They also tend to have the lowest levels of assets (median level of assets is only $2500). The consequences of financial trouble for the youngest and oldest cohorts will of course differ, as older people have fewer years left during which they can recover from bankruptcy, particularly given their reliance on government pensions and benefits.

IV Analysis

In this part of the article we discuss the implications of our empirical results for our understanding of older Australians in bankruptcy.

A Causes of Bankruptcy Among Older Australians

We have seen that the three most common causes of bankruptcy among older Australians are excessive credit, ill health and unemployment. It is likely that, while debtors are required to select a ‘primary’ cause for their bankruptcies, many personal bankruptcies result from multiple interrelated causes, rather than a single cause. For example, it is possible that when a debtor selects ‘ill health’ as the primary cause, other factors such as unemployment and excessive credit may have contributed to the bankruptcy (and vice versa).

1 Excessive Credit

That more than a third of bankruptcies involving older Australians are caused by excessive credit is perhaps surprising as it is accepted that in general, older people do not suffer from credit problems to the same extent as younger people. This may still be the case, but recent research has shown that credit problems are increasingly affecting some older people, and particularly those on low incomes.

Indeed, research undertaken in the US found that in most cases bankruptcies involving elderly Americans involved multiple crises. Thorne's study found that multiple crises were responsible for 71 per cent of bankruptcies involving elderly Americans. Thorne notes that '[t]aken together, the qualitative and quantitative data make a strong case for the interconnectedness of the reasons for elder bankruptcy. No single event is to blame. Instead, there is a chorus of reasons, but the end result is still the same': Thorne, ‘Interconnected Reasons’, above n 5, 200–1.

Our findings raise questions about lending practices to vulnerable groups such as pensioners, who have low incomes and many of whom have no liquid assets, and those on the cusp of retirement who are likely to experience a decline in income. It has been observed that vulnerable older people are increasingly ‘using credit to make essential purchases that they cannot otherwise afford’ 81 People with lower levels of financial literacy are more likely to also have lower income and wealth, which has implications for retirement planning and income management post-retirement. 82 Studies have also shown that older people have lower levels of financial literacy and may be less likely to understand credit than the younger cohorts. 83 The combination of low incomes, limited assets and older age may make some people particularly vulnerable. As older people on low incomes may find it difficult to obtain small loans, they may fall prey to predatory lenders, such as those that charge excessively high interest rates. 84

‘Excessive credit’ is a very broad category that involves an element of subjectivity. In other words, what constitutes ‘excessive’ credit is subjective to the debtor and requires a degree of hindsight and attribution of responsibility. 85 Given the likelihood that most bankruptcies are caused by multiple interrelated causes, it is likely that excessive, or dangerous, credit is a more significant cause of bankruptcy than what our results indicate. For example, offering high credit card limits to financially vulnerable people, such as pensioners with no assets, or lending large amounts to people nearing retirement, likely contributes to their financial demise even if some other event (such as illness or unemployment) subsequently made repayment of the debts untenable.

81 Ibid 26–7.
83 The ANZ financial literacy survey found that participants aged 70 and over had the lowest levels of financial literacy of all age groups: ANZ, above n 82, 4. See also Council of the Ageing (Victoria), ‘Report to Consumer Credit Fund for Credit Preferences and Credit Traps for Older People’ (Report, September 2007) <https://www.consumer.vic.gov.au/resources-and-tools/research-studies>. For discussion of consumer credit issues among older people see generally Frances Gibson and Francine Rochford, ‘Emerging Consumer Credit Issues for Older Australians’ (2008) 12 University of Western Sydney Law Review 73; Radwan and Morgan, above n 5, 12.
84 Gibson, above n 80, 30.
85 The findings of another recent Australian study, which included surveys of current and former bankrupts, illustrates this attribution of responsibility. The study found that respondents attributing their problems at least in part to excessive use of credit ‘were much more likely to attribute their bankruptcies to their own financial mismanagement, rather than misfortunes such as physical or mental health problems’: Paul Ali, Lucinda O’Brien and Ian Ramsay, ‘Bankruptcy and Debtor Rehabilitation: An Australian Empirical Study’ (2017) 40 Melbourne University Law Review 688, 717.
2 Ill Health

The fact that older people are more likely to cite ill health as a reason for their bankruptcy is not surprising as the risks of health problems increase with age. Indeed, most older Australians (87 per cent) suffer from at least one chronic disease, while 60 per cent suffer from more than one.86 Furthermore, many people who enter retirement in good health are likely to face significant health-related costs later in their life.87

In some respects, the relatively low proportion88 of older bankrupts citing ill health as the primary reason for their bankruptcy — compared to unemployment

86 AIHW, ‘Australia’s Health 2016’, above n 31, 73, 76.
87 Indeed, a US study found that retirees who are healthy will face higher lifetime health care costs than those with chronic diseases — because the former will likely live longer which will increase their overall health-related costs and increase the probability that they will require a longer period of home care: Wei Sun, Anthony Webb and Natalia Zhivan, ‘Does Staying Healthy Reduce Your Lifetime Health Care Costs?’ (Brief No 10–8, Centre for Retirement Research, Boston College, May 2010) 1–3 <http://crr.bc.edu/wp-content/uploads/2010/05/IB_10-8.pdf>.
88 As a point of comparison, in the US, a study undertaken as part of the CBP found that ‘illness and injury’ (65 per cent) was cited by older American bankrupts almost as often as ‘credit-card interest and fees’ (67 per cent) as a cause of bankruptcy: Thorne, ‘Interconnected Reasons’, above n 5, 194. The US studies allowed respondents to select more than one cause of bankruptcy, rather than just the primary cause. There have been other studies showing that medical reasons contributed to most bankruptcies in the US: see, eg, David U Himmelstein et al, ‘Medical Bankruptcy in the United States, 2007: Results of a National Study’ (2009) 122 American Journal of Medicine 741, 743.

The difference between medical bankruptcy levels in Australia and the US may reflect specific characteristics that relate to the US. Americans pay significant healthcare costs. Indeed, it was found that in 2010 older Americans on average spent $US18 424 on personal health care: see David Lassman et al, ‘US Health Spending Trends by Age and Gender: Selected Years 2002-10’ (2014) 33 Health Affairs 815, 815. A major study found that the US has a health system which is the most expensive system in the world but which also underperforms all countries in the Organisation for Economic Cooperation and Development (‘OECD’), particularly in the key indicators of affordability and equity. It is particularly relevant in relation to medical bankruptcy that the US health system was ranked last in terms of access, equity and health care outcomes. In the US, 20 per cent of respondents to the study reported having serious problems paying, or were unable to pay, medical bills — compared to 5 per cent in Australia. A third of US respondents to the study reported cost-related access problems relating to medical care in 2016–17, compared to 14 per cent of those in Australia. The difference between individuals on high and low incomes reporting serious problems paying or being unable to pay medical bills was 18 per cent in the US, compared to only 6 per cent in Australia: see Eric Schneider et al, ‘Mirror, Mirror 2017: International Comparison Reflects Flaws and Opportunities
(22.4 per cent) and excessive credit (36.5 per cent) — may be a reflection on Australia’s universal health system, which is of high quality by international standards.\(^8^9\)

In Australia, a significant proportion of older people’s healthcare costs are borne by governments, which helps keep their out-of-pocket healthcare costs manageable.\(^9^0\) Recent modelling suggests that much of the increase in Australian healthcare spending by governments relates to providing new, improved and more frequent health services rather than spending causally related to the ageing population or population growth.\(^9^1\)

While the universal health system in Australia can reduce the financial hardship, and thus potentially prevent bankruptcy of vulnerable people, the costs of out-of-pocket healthcare may be a cause of bankruptcy for some older Australians. Even government concessions such as healthcare cards do not entirely protect older people from financial hardship as a result of out-of-pocket healthcare costs — such as those involved in long-term treatment and care, and supportive care in the community.\(^9^2\)

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\(^8^9\) According to the survey of health care systems by The Commonwealth Fund which included 10 other countries, Australia was ranked second in 2017 behind the United Kingdom (Australia was ranked fourth in terms of access, seventh in terms of equity, and first in terms of health care outcomes): Schneider et al, above n 88, 5. See also Emil Jeyaratnam and Fron Jackson-Webb, ‘Infographic: Comparing International Health Systems’ The Conversation, September 1 2014 <https://theconversation.com/infographic-comparing-international-health-systems-30784>.


Out-of-pocket costs and co-payments are significant when considered relative to older Australians’ total expenditure, and their relatively lower incomes. Out-of-pocket costs particularly affect older Australians with multiple chronic conditions, because these people have a tendency to have lower incomes (and higher health costs due to multiple chronic conditions). A recent study found that older Australians who are unable to afford these expenses are likely to have to draw on savings, sell assets or take out credit. As such, there will be many older Australians who will face financial hardship due to healthcare costs, which may in turn lead to other crises and possibly even bankruptcy.

In Australia, research has shown that ill health is a significant factor that leads to people having shorter working lives. This means that for many older people, ill

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93 Farhat Yusuf and Stephen R Leeder, ‘Can’t Escape It: The Out-of-Pocket Cost of Health Care in Australia’ (2013) 199 Medical Journal of Australia 475, 477. The study found that while the costs borne by older Australians were only slightly higher than for younger people, these costs comprised a higher proportion of older people’s total expenditure. It has been observed that an increase in pharmaceutical costs results in a more significant impact — as measured by a decrease in dispensing of government-subsidised medicines — on social beneficiaries (generally comprised of low income earners and the elderly): see Anna Hynd et al, ‘The Impact of Co-Payment Increases on Dispensings of Government-Subsidised Medicines in Australia’, (2008) 17 Pharmacoepidemiology and Drug Safety 1091, 1097–8. See also Yun-Hee Jeon et al, ‘Economic Hardship Associated with Managing Chronic Illness: A Qualitative Inquiry’ (2009) 9 BMC Health Services Research 182, 187–90.


95 Carpenter et al, above n 94, 910–11.

96 Essue and Jan, above n 92.

health and unemployment are inextricably linked and can together result in financial hardship and, potentially, bankruptcy.98 We examine unemployment as the third major cause of bankruptcy among older Australians in the following section.

3 Unemployment

The high proportion of older bankrupts citing unemployment as the primary cause of bankruptcy is perhaps surprising, especially when one considers that the clear majority of older Australians are already retired from the workforce, and that unemployment among older Australians is low.99 Among older Australians, only around 13 per cent (17 per cent of males, and 9 per cent of females) are considered by the ABS to be participating in the workforce.100 A decade ago the proportion of older Australians in the workforce was even lower (8 per cent), which suggests that Australians are increasingly retiring later.101

One possible explanation for the high proportion of older bankrupts citing unemployment as the primary cause of bankruptcy relates to the ABS definition of unemployment. The ABS definition requires the person to be actively seeking work and to be currently available for work.102 Thus, the ABS unemployment rate for older Australians is very low, because many older Australians are not classified as being in the workforce.103 The ABS definition of unemployment would exclude a significant proportion of older people, such as those who are retrenched or dismissed, or those

98 A US study carried out as part of the CBP found that ‘the loss of income and employment [because of sickness or injury] is even more devastating financially than the direct cost of medical care’: Teresa A Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, *The Fragile Middle Class: Americans in Debt* (Yale University Press, 2000) 142.

99 The ABS publishes quarterly unemployment rates for those aged 65 years and over. These have ranged between 0.2 per cent and 2.8 per cent over the last 10 years: see ABS, *Labour Force, Australia, Detailed — Electronic Delivery July 2018* (ABS Catalogue No 6291.0.55.001, 2018). However, the ABS notes that many of the lower quarterly estimates are ‘subject to sampling variability too high for practical purposes’.


101 Ibid.


who face an early exit from the workforce due to factors such as ill health and discrimination.  

AFSA, however, does not provide a definition of unemployment, which means that many older bankrupts who consider themselves unemployed may cite this as the primary cause of their bankruptcy, even if they do not meet the more narrow, technical ABS classification.

Another possible explanation relates to the fact that older Australians are increasingly delaying their retirement, largely due to concerns about financial security. A lack of financial security for older Australians may of course make them more vulnerable to bankruptcy, particularly in the event of job loss, which may affect older people due to reasons such as ill health, retrenchment or redundancy. Job loss can be an unexpected event, and indeed many Australians who find themselves forced into early retirement due to job loss would not expect this to occur. With this in mind, our findings may reflect that those older Australians who are unemployed or forced into early retirement due to job loss are more likely to become bankrupt compared to those older Australians who have already retired voluntarily and those who remain employed in positions with high levels of job security. Perhaps this reflects that some of these older people are already highly vulnerable prior to losing their job, or that the unexpected crisis of unemployment prompted the bankruptcy. It is also possible that the relatively long periods of time that older people remain unemployed further increases their risk of bankruptcy. The AFSA data shows that many bankrupts have been out of work for a very short period of time prior to their bankruptcy (consistent with bankruptcy being caused by a crisis, or series of crises), but that around one third of all unemployed bankrupts have been out of work for an extended period of at least two years. Long-term unemployment is frequent among older Australians actively looking for work, and indeed it has been suggested that official long-term unemployment figures underestimate the true extent of the problem because, as noted above, many older may stop looking for work due to reasons such as age

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105 ITSA, above n 30, 17.

106 ABS statistics show that the most significant factor influencing Australians’ decisions on when to retire is financial security (35 per cent of females and 40 per cent of males), followed by health and physical abilities (around 23 per cent): see ABS, Retirement and Retirement Intentions, above n 97.

107 An ABS survey covering the 20 year period to 2007 found that less than one per cent of workers intending to retire expected being retrenched or made redundant to be the main factor influencing their retirement decision. However, a far greater proportion of people, eight per cent, said that this was in fact the main reason they had retired: see ABS, Australian Social Trends (ABS Catalogue No 4102.0, 2009) 27.

108 ITSA, above n 30, 18.

109 It has been found that ‘the likelihood of a long search for employment increases significantly with age’: Damian Oliver and Serena Yu, ‘The Australian Labour Market in 2016’ (2017) 59 Journal of Industrial Relations 254, 257.
discrimination, or ill health and disability and this is not captured by official unemployment statistics.\textsuperscript{110}

\textbf{B Financial Circumstances of Older Australians in Bankruptcy}

1 \textit{Incomes}

As discussed, our logistic regressions suggest that age, government pensions as a primary income source, and gross incomes are important factors in explaining bankruptcy caused by excessive credit and unemployment. The first two of these factors are also important in explaining bankruptcy caused by ill health.\textsuperscript{111}

While older bankrupts have incomes that are much lower than the broader Australian population, they are largely consistent with incomes of other older Australians. This is principally due to their primary source of income being the age pension. As discussed below, the rate of income poverty among older people in Australia is one of the highest in the OECD.\textsuperscript{112}

2 \textit{Assets}

Generally, older Australians tend to be asset-rich but income-poor due to having accumulated assets over their working life and subsequently relying on the age pension for income.\textsuperscript{113} However, we have seen that most older bankrupts have very low levels of realisable assets, or none at all.

We also know that one third of older low-income households have few liquid assets.\textsuperscript{114} Research demonstrates that a significant proportion of older Australians, including those on low incomes, are experiencing financial stress, resulting in them being unable to pay their utility bills on time.\textsuperscript{115} One would expect that this vulnerable group of Australians — with low incomes and few liquid assets — would be at higher risk of bankruptcy compared to other older Australians.

Assets that are required to be reported to AFSA are divisible/realisable assets at the time of the bankruptcy. Since this data is collected at the commencement of the

\begin{thebibliography}
\item \textsuperscript{110} Baum and Mitchell, above n 104, 238, Dubé, above n 103.
\item \textsuperscript{111} See above Part III (D) of this article.
\item \textsuperscript{112} Below n 145 and accompanying text.
\item \textsuperscript{114} ABS, ‘Many Older Australian Households Asset-Rich, Income-Poor’ (Media Release, ABS Catalogue No 6523.0, 30 March 2016).
\end{thebibliography}
bankruptcies, it is likely to show the person’s financial affairs in their worst state because assets may have been owned and sold prior to filing. Some bankrupts may have already sold assets to pay debts, or had secured property repossessed, prior to filing for bankruptcy. This may partially explain the high proportion of bankrupts that report ‘$0’ realisable assets. Thus, while these figures are a good indicator of the state of the bankrupt population’s financial affairs at the time of bankruptcy, they may not be as reliable an indicator of the person’s state of affairs in the years prior to their most severe financial distress. A lack of assets held by bankrupts, and older bankrupts in particular, may also at first glance indicate that assets have had to be disposed of as an attempt to prevent the assets from becoming divisible among creditors. However, the latter is in breach of the *Bankruptcy Act* and there are serious consequences for the debtor. For this reason, AFSA also requires bankrupts to detail sales, transfers or gifts of assets in the five years prior to the bankruptcy. Less than 10 per cent of bankrupts aged 70 years and over, and less than 15 per cent of bankrupts aged 65–69 years note that they sold, transferred or gifted assets during the five years prior to bankruptcy. From this, we can infer that the vast majority of older bankrupts had already held very low levels of assets in the years preceding the crisis (or crises) which eventually led to their bankruptcy.

3 *Superannuation*

Our findings suggest that older Australians in bankruptcy are far less likely to be in a position to draw on superannuation assets (and other alternative income sources, such as incomes from investments), compared to older Australians from middle and higher income households. For example, 9 out of 10 bankrupts aged 70 years and over report having no superannuation assets to draw on. The low incomes and lack of realisable assets likely necessitates the borrowing which culminates in bankruptcy. This may indicate that bankruptcy is more likely to affect those older Australians with low incomes, as they are less likely to be able to draw on superannuation balances (recall that older bankrupts are reliant on government benefits and pensions). These findings illustrate that middle and higher income older households with superannuation assets, are less vulnerable and thus less likely to face bankruptcy.

Insufficient understanding of superannuation due to the complexity of the system may contribute to a lack of retirement income adequacy for many older Australians,

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116 *Bankruptcy Act* s 121. Additionally, under s 120 of the *Bankruptcy Act*, transactions for less than the market value of the property are voidable if they occurred within five years before the commencement of the bankruptcy (with certain exceptions).

117 ABS data shows that high and middle-income retiree households are highly likely to derive their income from ‘other income’, including superannuation. Seventy-six per cent of higher income and 53 per cent of middle income households drew their income primarily from ‘other income’, while 92 per cent of lowest income households drew their incomes from government pensions and allowances: see ABS, *Household Income and Wealth, Australia, 2015–16 — Characteristics of Low, Middle and High Income Households* (ABS Catalogue No 6523.0, 2017).
culminating in bankruptcy.\textsuperscript{118} While this may be an area to consider reform, it is a key feature of the superannuation system that the level of compulsory employer contribution is determined by the employee’s income — which effectively means that superannuation balances on retirement correlate with pre-retirement wealth.\textsuperscript{119} Thus, people who have been working part-time or receive low incomes during their working life (or have been forced into early retirement or experience lengthy work interruptions) will tend to have limited assets and low superannuation balances upon retirement, which will necessitate reliance on government pensions. This issue particularly affects women, who tend to retire with far lower superannuation balances as a result.\textsuperscript{120}

While superannuation is a key pillar of Australia’s retirement system, people on low incomes will only receive limited (if any) benefits of superannuation reforms.\textsuperscript{121} Possible reforms that would reduce poverty for older Australians include targeted changes to government benefits, such as the increase to the Commonwealth Rent Assistance supplement discussed in the next section.

4 Bankrupts’ Home Ownership

We also observe that only a very small proportion of older Australians in bankruptcy own real estate, such as their own home. This finding is significant because home ownership is often considered to be a fourth pillar of Australia’s retirement income system (in addition to the three traditional pillars being the age pension, superannuation, and voluntary savings).\textsuperscript{122} Our findings offer further evidence that home

\textsuperscript{118} Australia’s superannuation system is particularly complex, and research has found that low incomes, wealth and older age are associated with lower levels of financial literacy. Bateman et al suggest that ‘[a]s even choices as fundamental as contribution rates require the navigation of complex tax provisions, and fund and investment choices require some understanding of risk, return and diversification, it is likely that the financial capability of Australian retirement savers plays a key role in enabling retirement income adequacy’: Bateman et al, above n 82, 42.

\textsuperscript{119} Indeed, it has been observed that occupational pensions (such as superannuation) can actually \textit{increase} inequality among pensioners. They do this because they ‘amplify and extend labour market inequalities’: Kendra Strauss, ‘Accessing Pension Resources: The Right to Equality Inside and Out of the Labour Market’ (2014) 10 \textit{International Journal of Law in Context} 522, 522.


\textsuperscript{121} Ibid 25.

ownership provides protection against financial hardship and poverty, allowing many Australians to manage serious financial crises which could have otherwise led to bankruptcy. The low rates of home ownership among bankrupts may reflect the fact that home owners are less financially vulnerable than renters. They are less vulnerable by virtue of their home ownership (their home being a valuable asset during a period of rising property values, which can be either sold or the equity used to obtain loans). Equally importantly, people who are more financially vulnerable are simply less likely to own real estate in the first place. That is, they are less likely to attempt to take on a mortgage, and even if they did, they are unlikely to be able to afford a deposit or be offered finance. The low rate of home ownership among bankrupts (and older bankrupts in particular) may also reflect a reluctance by some homeowners to file for bankruptcy due to the risk of having their home sold by the trustee.

Our findings also provide further evidence of the vulnerability of those older Australians who are renting. Home ownership (or rather lack thereof) is the most significant factor contributing to financial hardship among pensioners, and it has been found that the cost of accommodation may be the key reason that determines whether an older person lives in poverty. Since most older Australians (around 75 per cent) own their own home outright — compared to around 21 per cent of those younger than 65 years — they also typically have lower housing costs. However, older Australians in private rental accommodation face a more severe housing cost burden than any other age cohort. Those particularly vulnerable are older Australians who are renting in a metropolitan area and living by themselves. This situation may deteriorate further due to a predicted shortage of affordable private rental and social housing, which may further increase bankruptcy rates among older Australians.

Given that our results suggest that many older Australians in bankruptcy reside in private rental accommodation, an increase in the Commonwealth Rent Assistance supplement could reduce the risk of bankruptcy among this group. It has been found that this supplement (currently capped at $67 per week for people with no dependent children, and currently indexed to the Consumer Price Index) covers only a small

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126 CEPAR, above n 63; Yates, Ong and Bradbury, above n 66, 2.
127 Yates, Ong and Bradbury, above n 66, 3; Eslake, above n 122, 16.
128 Morris, above n 125, 373.
129 Yates, Ong and Bradbury, above n 66, 12.
proportion of housing costs for older private renters. Coates, in making the case for an increase in this supplement as a measure to help alleviate poverty of older Australians and reduce the gender gap in retirement incomes, suggests that it would be more effective than a number of recently proposed changes to superannuation.

5 Indebtedness

We have seen that like many older Australians, older bankrupts have low incomes. However, many older Australians tend to have no debt, and those that do are extremely unlikely to be over-indebted. Older Australians tend to be more conservative borrowers, and even those on low incomes may be more likely to cut back on basics such as food and medicines rather than take out credit they would be unable to repay.

In contrast to other older Australians, who generally have relatively high levels of wealth and few debts, older bankrupts’ financial situations are characterised by high levels of indebtedness combined with very low assets. As the AFSA data on liabilities is limited to unsecured liabilities, some older bankrupts’ financial circumstances are likely to be even more precarious than our findings indicate.

Older bankrupts’ high levels of indebtedness are mostly due to their credit card liabilities, which are significant both in absolute terms, and relative to their incomes.

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131 Coates, above n 120.
132 Over-indebtedness is defined by the ABS as occurring when a household’s debt is three or more times the household’s annual income, or when debt is equal to three-quarters or more of the value of the household’s assets. In 2015–16 older households were significantly less likely to be over-indebted compared to other age cohorts (only around 5 per cent of these households were over-indebted): see ABS, Household Income and Wealth, Australia, 2015–16 — Feature Article: Household Debt and Over-Indebtedness in Australia (ABS Catalogue No 6523.0, 2017).
134 While older people are less likely to have a mortgage than other demographics, there are many reasons why some people retire while still carrying a mortgage. For example, they may have purchased property later in life, or taken out a reverse mortgage to help pay for expenses. For discussion and other examples, see Radwan and Morgan, above n 5, 9.
and assets. Again, this finding is somewhat surprising given that it has been observed that older people tend to rely less on credit-cards compared to other age cohorts.\textsuperscript{135}

Our results raise the question of how pensioners with limited assets are accumulating such high credit card debts, which may warrant further investigation. Evidence is emerging that credit card debts — and inappropriate credit limits — are increasingly becoming the major cause of personal bankruptcy, including for pensioners and others on government benefits.\textsuperscript{136} Further, interest rates on credit cards are regressive in the sense that they have a more profound impact on poorer and vulnerable people, as these demographics are more likely to incur high interest rates and additional fees and charges on their balances.\textsuperscript{137} Further, as their levels of debt (and fees) comprise a large proportion of their income, they are more likely to have a severe impact.\textsuperscript{138}

Recent empirical research has found that bankruptcy in Australia is increasingly becoming a middle-class phenomenon, displacing traditional assumptions that bankruptcy is either the domain of the chronically poor or the profligate rich who are seeking to avoid meeting their financial obligations.\textsuperscript{139} While our results indicate that older bankrupts tend to have low incomes and assets, some of the bankruptcies may have been the result of severe credit problems for older Australians who are not poor. These bankruptcies may again be in large part due to certain lending practices by financial institutions. For example, it has been observed that some financial institutions do not consider a person’s age when lending and do not design a repayment

\begin{itemize}
\item \textsuperscript{135} Anil Mathur and George P Moschis, ‘Use of Credit-Cards by Older Americans’ (1994) 8 Journal of Services Marketing 27, 35. The results of this US study suggest that the relatively low use of credit-cards by older people is not due to age \textit{per se} but rather due to other circumstances associated with age (such as income and employment or retirement status).
\item \textsuperscript{138} Ibid.
\end{itemize}
strategy which considers that when most people retire, their income decreases.\textsuperscript{140} This would commonly occur because the age pension is significantly lower than people’s previous wages or salary. Store cards, which are popular with older people, may also be contributing to older people’s credit problems. These cards often involve much higher interest rates than credit cards, and particularly when combined with interest-free deals can encourage people to make additional purchases on credit which they may be unable to afford.\textsuperscript{141}

C Why are Older Australians Less Likely to File for Bankruptcy?

The age profile of people going bankrupt in Australia is changing and the bankruptcy population is getting older. However, as we have shown, this change can largely be explained by the fact that younger and middle-aged insolvent debtors are increasingly turning to debt agreements instead of bankruptcy. A secondary factor explaining the increase in the proportion of older bankrupts in Australia is the ageing of the overall population in Australia.

Our results illustrate that bankruptcy is increasingly affecting people of all ages, including the elderly. However, older Australians remain less than half as likely to become bankrupt than the remainder of the population. We have also seen that those older Australians who do become bankrupt are more likely than any other age cohort of bankrupts to be on low incomes and highly reliant on government benefits or pensions.

The relative lack of indebtedness of older Australians is likely to be the most significant reason for their lower likelihood of facing bankruptcy compared to other age groups.\textsuperscript{142} However, there are other possible explanations for why older Australians are less likely to become bankrupt. Recent Australian research suggests that a persistent correlation between bankruptcy and entrenched poverty remains,\textsuperscript{143} and older Australians are more likely than any other age group (other than children) to experience poverty.\textsuperscript{144} Indeed, income poverty among older people is more common in Australia than in each of the other countries in the OECD, except Korea and Latvia.\textsuperscript{145}

\textsuperscript{140} Gibson, above n 80, 28, 31.


\textsuperscript{142} Above nn 74–5 and accompanying text.


\textsuperscript{144} ACOSS and SPRC, above n 123, 21, 33.

\textsuperscript{145} OECD, ‘Pensions at a Glance’ (Report, 2017) 135 <http://www.oecd.org/pensions/oecd-pensions-at-a-glance-19991363.htm>. However, there are limitations in such measures which only consider income, as opposed to wealth (such as superannuation
This suggests that there are many low-income older Australians in severe financial stress who do not file for bankruptcy due to its negative consequences. Indeed, it is possible that the consequences of bankruptcy are particularly serious for older Australians. Older people may feel particularly vulnerable in filing for bankruptcy, because their earning capacities are limited, as most derive their incomes from government benefits and pensions. Further, many older people will feel that bankruptcy will not provide a fresh start for them, as they typically have fewer years left to recover from any credit troubles compared to younger people. Indeed, studies have shown that one of the key factors allowing a person to succeed financially after bankruptcy, is the ability to secure future employment at a sufficient salary — which of course would not be feasible, or desirable, for many older people in bankruptcy. For those older Australians who are employed prior to their bankruptcy, the effects of bankruptcy can be a barrier to future employment and even result in involuntary retirement.

For example, these people may have been deregistered from professional or trades associations as a result of their bankruptcy, or may have had restrictive conditions placed on their ability to continue working. It is likely that many older people will not re-register even after being discharged from their bankruptcy. There may also be other obstacles to the financial recovery of older bankrupts — such as individuals and creditors who exacerbate older bankrupts’ financial troubles through predatory actions.

Savings and home ownership). The report by ACOSS and SPRC which found that older Australians are more likely to experience poverty than the rest of the population, other than children, also takes into account housing costs: ACOSS and SPRC, above n 123.


It has been found that bankruptcy is a factor that can push males aged 45 years and over into early retirement. The relationship between major financial difficulties, such as bankruptcy, and retirement was not statistically significant for females. See Roger Wilkins, ‘The Household, Income and Labour Dynamics in Australia (HILDA) Survey: Selected Findings from Waves 1 to 15’ (Report, Melbourne Institute, The University of Melbourne, 2017) 70. See generally Nicola Howell and Rosalind Mason, ‘Reinforcing Stigma or Delivering a Fresh Start: Bankruptcy and Future Engagement in the Workforce’ (2015) 38 University of New South Wales Law Journal 1529.


Hanna notes that these individuals, or ‘vultures’, ‘come in many shapes and sizes — as telemarketers, credit-card company solicitors, mortgage company loan officers, and even family members’: Meelad Hanna, ‘For the Bankrupt Elder, There is No “Fresh Start”: Resisting the Vulture Effect’ (2015) 14 Seattle Journal of Social Justice 781, 782.
It is also possible that older Australians are more reluctant than other age groups to file for bankruptcy, for reasons such as the stigma associated with bankruptcy and the fear of long-term consequences — such as having their home sold by the trustee. Older bankrupts may also resist filing for bankruptcy due to the potential for future difficulties with obtaining insurance and entering essential contracts (such as telecommunications and rental contracts). Moreover, bankruptcy would likely further impact older Australians’ ability to obtain credit, which they may need to make essential purchases that they cannot otherwise afford, such as medicines. They may therefore be more likely to forego essential purchases instead of filing for bankruptcy.

V Conclusion

While older Australians remain less likely to face bankruptcy compared to other age groups, they comprise an increasing proportion of Australians in bankruptcy. We expect that the ageing population, the forecasted increases in the numbers of older Australians renting or with mortgages, and the increasing popularity of debt agreements as an alternative to bankruptcy among younger Australians, means that this trend will likely continue.

In this article, we examined a large representative sample of bankruptcy data provided by AFSA to examine the key causes of bankruptcy of older Australians, and some potential reasons for the vulnerability of this demographic. The reasons for older Australians filing for bankruptcy may be complex and in many cases intertwined — for example, older people are more likely to have lower incomes due to their reliance on government pensions, are more likely to suffer from health problems, and those that hope to remain in the workforce are more likely to face obstacles, such as age discrimination, leading to difficulties finding and maintaining employment. Our analysis provides important insights into the causes of bankruptcy among older Australians and some possible explanations for their financial vulnerability, enhancing our understanding of how personal bankruptcy laws operate in practice.

Our results illustrate the contrasting financial fortunes of older Australians. While many older Australians are ‘asset-rich’ and carry little or no debt, this is by no means universal. Many older Australians have little or no liquid assets, and older people represent the age cohort most likely to experience poverty, other than children.

Our findings also provide an important insight into the financial challenges faced by many older Australians. The most significant causes of personal bankruptcy

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152 Hynd et al, above n 93; Kemp et al, above n 133.
involving older Australians are excessive credit, unemployment, and ill health. It is likely that — like other Australians their age — many Australians in bankruptcy had been forced into involuntary retirement due to difficulties in finding and maintaining employment, and health problems. Again, like many others their age, older Australians in bankruptcy had low incomes because they were reliant on the age pension. However, in contrast to other older Australians, who generally have relatively high levels of wealth — such as real estate and financial assets — accumulated during their working years, older bankrupts had carried high levels of debt. Only a very small proportion of older bankrupts owned their own home. Indeed, a high proportion of bankrupts of all ages reported no realisable assets at all. These vulnerable individuals were unlikely to be able to repay their debts due to the combination of their low incomes and lack of assets, leading to bankruptcy.

Considering older bankrupts’ severe financial crises, it appears unsurprising that the highest proportion of older Australians cite excessive credit as the primary reason for their bankruptcy. On the other hand, that more than a third of bankruptcies involving older Australians are caused by excessive credit is notable in the context of the widely-held belief that older people do not suffer from credit problems to the same extent as younger people, a belief that may be becoming increasingly misplaced.

Our findings provide an insight into the characteristics of only those older Australians who have been driven by severe financial crises to file for bankruptcy. Older Australians in bankruptcy represent only a small proportion of older people facing financial difficulties and struggling under a serious debt burden in a society where many people must access credit even to obtain basic necessities. Many would be reluctant to file for bankruptcy due to its disadvantages, such as the risk of having their home sold by the trustee, or the prospects of being unable to obtain further credit for essential purchases. Others will simply cut back on basics such as medicines rather than taking out credit in the first place. Thus, bankruptcy filings allow us to see only ‘the tip of the iceberg’ of the financial difficulties faced by older people.

**Appendix A: Logistic Regression Explanation**

A logistic regression is used when the variable being modelled or ‘predicted’ (called the ‘dependent variable’) — on the basis of one or more ‘predictor’ or ‘explanatory’ variables — takes the form of either a ‘one’ or ‘zero’. In the first logistic regression below, we model the probability that a bankrupt will nominate excessive credit as the primary cause of their bankruptcy. So, the dependent variable takes the value of one if they did, and zero if they did not cite excessive credit. The second logistic regression models the probability that ill-health was the primary cause of bankruptcy; the third regression, whether unemployment as the primary cause of bankruptcy is cited.

While such modelling to determine explanations is the norm in logistic regression, our concern is more narrow. Our interest is to determine if age — and particularly older age — has an effect on the probability of selecting a particular cause of bankruptcy. Since age is correlated, to some extent, with a variety of other characteristics (for example, older people tend to be income poor and asset-rich), the risk
is that an ‘older age bracket’ variable will be shown to be a significant influence, when in fact the actual reason is, for example, lower income, or higher assets. In other words, income, asset level, sources of income, whether there is a spouse with an income source, and so on, might confound the unique contribution of age. Our purpose in the three regressions below is to include these possible confounding variables — together with the age bracket variables — so we can determine the unique effect (if any) of age alone. We also include a suite of non-confounding variables to determine if age still has a noticeable effect once these other effects are accounted for, or ‘factored out’.

As in ‘ordinary least squares’ (OLS) linear (or multiple) regression, each explanatory variable is tested to see if it has a ‘slope’. If a series trends upwards (eg the likelihood of a bankrupt citing excessive credit rises with increasing age) or downwards, then there is evidence for a linear relationship between the two. Since we are working with samples to try and predict populations, there will be a margin of error involved in the slope. So, we normally test (statistically) the probability that the slope will be different from that postulated in the ‘null hypothesis’: the null hypothesis simply postulates there will be no slope at all (and therefore no relationship between the dependent variable and the explanatory variable).

In logistic regression, the determination and testing of this ‘slope’ is complicated by the fact that the relationship between the two variables is not linear. By taking the logarithm of the odds of the dependent variable, an appropriate form can be derived whereby the relationship can be tested statistically. The ‘p-value’ which is normally derived for each explanatory variable presents the probability that the slope is zero. As a rule of thumb, if there is equal to or less than a 1 in 20 chance of the slope being zero (that is, a p-value of equal to, or less than, 0.05) we judge that there is a statistically significant probability that a relationship exists. That is, the slope is highly unlikely to be zero. In other words: the explanatory variable does affect the dependent variable.

Logistic regression packages (such as SPSS — used for the analysis in this paper) also provide broad tests to see if the derived or ‘likelihood’ model fits the raw observations. One test is the Model Chi-square test which is equivalent to the ‘F-test model’ used in OLS multiple regression. It tests whether all of the coefficients are equal to zero, and therefore a good model is one where this (null) hypothesis is rejected (that is, returns a p-value equal to, or less than, 0.05). It effectively tests the extent to which any of the explanatory variables predict the dependent variable.

Another test used for the logistic regression model, however, is the extent to which the derived model ‘fits’ the raw data. The raw observations are first used to derive a likelihood model — an equation which likely fits the data. It tests the proposition that the sample (the observations in the data) could reasonably be drawn from a hypothesized population that is modelled ‘perfectly’ by the logistic regression likelihood model. If it fitted perfectly, the likelihood of such a perfect fit would be 1 — at worst, signifying no reasonable fit, the likelihood would be zero. The relationship between the observed values and the ‘best-fit’ likelihood model follows a chi-square distribution. The null hypothesis in this case is that the probability of the data fitting such
a perfect model is 1. In this case, we would wish to fail to reject the null hypothesis (that is, the p-value should be greater than 0.05). If the null hypothesis were to be rejected, we would conclude that the likelihood model does not at all explain the data. This test is the –2 LL (Log Likelihood) model indicated in the output below.

Finally, it is possible to ask if each of the individual data in the dependent variable is ‘guessed’ correctly by the model. A classification table is usually produced by logistic regression software that gives the percentage of the ‘1’ that are correctly estimated (the 1 in this case being, for example, bankrupts who cited excessive credit as the primary cause of their bankruptcy); and the percentage of ‘0’ that were correctly estimated (that is, those who did not cite excessive credit). These percentages are given below, together with the overall percentage of correctly estimated cases.

### Logistic Regression Dependent Variable: The Impact of Excessive Credit as the Primary Cause of Bankruptcy

<table>
<thead>
<tr>
<th>Total number of cases:</th>
<th>22517 (Unweighted)</th>
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II LOGISTIC REGRESSION DEPENDENT VARIABLE: THE IMPACT OF ILL-HEALTH AS THE PRIMARY CAUSE OF BANKRUPTCY

Number of selected cases: 22517

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III LOGISTIC REGRESSION DEPENDENT VARIABLE: THE IMPACT OF UNEMPLOYMENT AS THE PRIMARY CAUSE OF BANKRUPTCY

Number of selected cases: 22517

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DUAL CITIZENSHIP AND AUSTRALIAN PARLIAMENTARY ELIGIBILITY: A TIME FOR REFLECTION OR REFERENDUM?

I Introduction

Recent events in Australia have laid bare a curious state of affairs in which, under the accepted interpretation of the Australian Constitution, foreign law is (in most cases) directly determinative of a given individual’s eligibility to be elected and sit as a member of the Federal Parliament. Specifically, where the law of a foreign power dictates that an individual is a citizen of that foreign power, s 44(i) of the Australian Constitution is engaged to disqualify that individual from being elected or sitting as a member of the Federal Parliament. Lack of knowledge is no defence against this disqualification. However, an individual will not be disqualified where they have taken all reasonable steps to renounce their foreign citizenship.

Much debate has erupted in the wake of these events. Perhaps most notably, the Joint Standing Committee on Electoral Matters (‘JSCEM’) conducted an inquiry into s 44, and published a corresponding report titled ‘Excluded: The Impact of Section 44 on Australian Democracy’ (‘JSCEM Report’) — proposing radical, but necessary, constitutional reform.

* James Morgan (formerly James Goh) LLB (Hons), BCom, is a Barrister and Solicitor in the Supreme Court of South Australia, and recent graduate of the University of Adelaide.

1 Re Canavan; Re Ludlam; Re Waters; Re Roberts (No 2); Re Joyce; Re Nash; Re Xenophon (2017) 349 ALR 534, 539–40 [13]–[19], 546–49 [47]–[60], 551 [71] (‘Re Canavan’).

2 Ibid 549–51 [61]–[69], 551 [72]; see also Re Gallagher (2018) 355 ALR 1.


II Section 44(I) of the Australian Constitution

Section 44 of the *Australian Constitution* provides several express restrictions on eligibility to sit as a member of the Federal Parliament — engaging to immediately and automatically disqualify any individual who breaches one of these restrictions. One such restriction is that of s 44(i), which provides that

> [a]ny person who:

> is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power;

> ...

> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.6

III The High Court’s Interpretation of s 44(i)

Until recently, s 44(i) and the other s 44 disqualification provisions largely sat dormant over the post-Federation history of Australia. While there had been only fairly limited direct judicial consideration of the interpretation of s 44(i),8 the High Court of Australia notably held in *Sykes v Cleary*9 that an individual holding dual citizenship is ineligible for election to the Federal Parliament, save where they have taken all reasonable steps to renounce that citizenship. Despite this development, s 44(i) had, until recently, only very rarely been raised to question the eligibility of any candidate or parliamentarian. The last s 44(i) disqualification was contested in 1999 in *Sue v Hill*,10 in which Heather Hill, a One Nation Senate candidate, was held to be ineligible for election as a dual citizen of both the United Kingdom and Australia.

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5 The practical reality of a federal parliamentarian being disqualified by s 44 may not be fully realised until the Court of Disputed Returns declares that individual to have been disqualified as at a given point in time. However, while it may remain unrecognised until a later date, a given person is disqualified both immediately and automatically by the operation of s 44 where they breach one of the restrictions therein.  
6 *Australian Constitution* s 44(i).  
7 For a comprehensive table of all matters before the High Court which have involved s 44(i) of the *Australian Constitution*, see generally Harry Hobbs, Sangeetha Pillai and George Williams, ‘The Disqualification of Dual Citizens from Parliament: Three Problems and a Solution’ (2018) 43 *Alternative Law Journal* 73, 77.  
9 (1992) 176 CLR 77 (‘*Sykes*’).  
That remained until 2017, when a considerable number of Commonwealth parliamentarians had their eligibility for election called into question under s 44(i), on the basis that they appeared to be dual citizens.\(^{11}\) As a result, questions regarding the validity of the election of seven Commonwealth parliamentarians\(^{12}\) were referred to the High Court.\(^{13}\)

\begin{center}
A Re Canavan (2017) 349 ALR 534
\end{center}

On 27 October 2017, the High Court, sitting as the Court of Disputed Returns, delivered judgment in the matter of these seven Commonwealth parliamentarians — Re Canavan; Re Ludlam; Re Waters; Re Roberts (No 2); Re Joyce; Re Nash; Re Xenophon.\(^{14}\) The Court unanimously held that five of the seven — specifically, Barnaby Joyce, Scott Ludlam, Fiona Nash, Larissa Waters and Malcolm Roberts — were disqualified from being elected or sitting in Parliament by s 44(i) as a result of their dual citizenship.\(^{15}\) Matt Canavan and Nick Xenophon were held to have not been disqualified by s 44(i).\(^{16}\)

This is a remarkable case in many respects. It is a unanimous judgment of the High Court on a matter of constitutional interpretation, and immediately resulted in the simultaneous disqualification of an unprecedented number of Federal Parliament members (including the Deputy Prime Minister). In the wake of this judgment, many more members have resigned or been disqualified by the Court. Yet perhaps more importantly, Re Canavan has significant implications for representative government in Australia.

The judgment in Re Canavan is examined in significantly greater detail later in this volume by Kyriaco Nikias. For present purposes, it is sufficient to note that the Court’s judgment in Re Canavan followed the majority’s reasoning in Sykes and clarified the accepted interpretation of s 44(i). The Court in Re Canavan expressly rejected the approach of reading a mental element into s 44(i),\(^{17}\) which would have required that an individual must know of their foreign citizenship to be disqualified.\(^{18}\) It is now

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\(^{12}\) The seven Commonwealth parliamentarians in question were: Matthew Canavan, Scott Ludlam, Larissa Waters, Malcolm Roberts, Barnaby Joyce (then the Deputy Prime Minister of Australia), Fiona Nash, and Nick Xenophon. Notably, Mr Ludlam and Ms Waters resigned immediately upon the issue of their foreign citizenship being raised (prior to any High Court determination).

\(^{13}\) See generally Commonwealth Electoral Act 1918 (Cth) s 376.

\(^{14}\) (2017) 349 ALR 534.

\(^{15}\) Ibid 564–5 [141]–[145].

\(^{16}\) Ibid 564 [140], 565 [146].

\(^{17}\) Ibid 546–9 [47]–[60], 551 [70]–[71].

\(^{18}\) Notably, this rejected approach echoed the dissenting view of Deane J in Sykes, in which his Honour considered that s 44(i) should be read as incorporating a mental element such that it only applies ‘where the relevant status, rights or privileges have
clear that s 44(i) will operate to disqualify citizens of a foreign power, *regardless of their knowledge of that citizenship*.\(^\text{19}\) Such individuals are only saved from disqualification where they have taken all reasonable steps to renounce that citizenship.\(^\text{20}\)

B *Re Gallagher (2018) 355 ALR 1*

In the wake of the 2017 judgment in *Re Canavan*, and the subsequent resignation of many more Commonwealth parliamentarians, questions regarding the validity of the election of Katy Gallagher were referred to the High Court.

On 9 May 2018, the High Court delivered judgment on these questions in *Re Gallagher*.\(^\text{21}\) The Court unanimously held that Ms Gallagher was, at the time of her election to the Senate, disqualified from being elected by s 44(i) due to her British citizenship.\(^\text{22}\)

The Court in *Re Gallagher* examined the reasonable steps exception to disqualification under s 44(i). The Court indicated that what constitutes reasonable steps to renounce foreign citizenship will necessarily depend on the requirements of the law of the foreign power,\(^\text{23}\) and accepted the submission of the Commonwealth Attorney-General that

> it is not enough for a candidate merely to have taken steps to renounce his or her foreign citizenship. Unless the relevant foreign law imposes an *irremediable impediment to an effective renunciation*, it is necessary that a candidate actually have divested himself or herself of his or her status as a foreign citizen before the commencement of the process of being chosen to which s 44(i) applies.\(^\text{24}\)

The Court’s decisions in *Re Canavan* and later in *Re Gallagher* have made clear that this reasonable steps exception in fact has very limited scope, and defers primarily to the requirements of foreign citizenship law unless those requirements are untenably unreasonable.\(^\text{25}\) In submissions to the JSCEM, Professor Tony Blackshield observed that

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\(^\text{19}\) *Re Canavan* (2017) 349 ALR 534, 539–40 [13]–[19], 546–9 [47]–[60], 551 [71].

\(^\text{20}\) Ibid 545–6 [44]–[46], 549–51 [61]–[69], 551 [72].


\(^\text{22}\) Ibid 11 [40] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 11 [41] (Gageler J), 18 [69] (Edelman J).

\(^\text{23}\) See, eg, ibid 5 [9] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

\(^\text{24}\) Ibid 7 [21] (emphasis added). See also ibid 7–10 [22]–[34] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 11–12 [41]–[45] (Gageler J), 15–16 [58]–[60] (Edelman J).

the Court will not defer absolutely to the foreign law; it will do so only if the operation of the foreign law is compatible with the reasonable expectations of our Constitution. So the point is not whether the actions of an individual member of Parliament have been reasonable, but whether the requirements of the foreign law are unreasonable. The old example was what would happen if a foreign country conferred its citizenship on all members of our federal Parliament, so as to clear it out entirely: we would simply take no notice. A newer example is what would happen if a foreign country required that renunciation of its citizenship must be carried out within its own territory: an Australian citizen might be entitled to ignore that requirement if travel to that territory was dangerous.

It’s only in this sort of context that the question of ‘reasonable steps’ can arise. If the foreign country makes it impossible to renounce its citizenship, or imposes such onerous requirements or conditions that we find them unreasonable, then a person who has done everything within their power to effect a renunciation will be thought to have done enough. But ‘everything within their power’ may still be a much more onerous test than talk about ‘reasonable steps’ might suggest.26

It is now clear that, with limited exceptions, a prospective federal parliamentarian must have fully and successfully renounced all foreign citizenships (under the laws of the respective foreign powers) prior to nomination, or else be immediately and automatically disqualified by s 44(i).

IV How Does s 44(i) Compare Internationally?

By comparison to many similar democratic nations around the world, Australia’s approach to dual citizens in the legislature is rather harsh. Whereas s 44(i) imposes a near total prohibition on dual citizens in the Federal Parliament, dual citizens are in fact quite welcome in the legislatures of many other common law countries. Amongst other countries, the United Kingdom, United States, Canada, and New Zealand do not prohibit dual citizens from election to their respective legislatures.

For example, a dual citizen of both Australia and the United Kingdom is free to be elected as a member of the Parliament of the United Kingdom,27 yet is constitutionally barred from election to the Australian Federal Parliament. Indeed, many Australian dual citizens would find themselves in this situation — prohibited from taking on federal parliamentary duty in Australia, but legitimately able to do so in the country of their foreign citizenship.


Foreign elected representatives have sometimes chosen to renounce their other foreign citizenships, during or in advance of their time in office. For example, Ted Cruz, a Senator for Texas in the United States, renounced his Canadian citizenship in 2014.28 However, Mr Cruz’s decision to renounce his foreign citizenship, and similar decisions of others, merely reflect the personal ideology of individuals, and are not a result of express restrictions against dual citizens in their domestic legislatures.

Some countries do impose a degree of restriction on dual citizens in their legislature, but fall short of a total prohibition analogous to that in s 44(i). For example, in New Zealand, a member of the New Zealand Parliament loses their seat where they become a foreign citizen after being elected.29 Nevertheless, dual citizens are still entitled to be elected to New Zealand Parliament.

In fact, this comparatively minor limitation on foreign citizens in the New Zealand Parliament has only been enlivened once — in 2003, when Harry Duynhoven, then a member of the New Zealand Parliament, took up Dutch citizenship by virtue of his Dutch-born father,30 with the effect that his seat in Parliament became vacant.31 This event was largely not regarded with the same severity as have been comparable events in Australia,32 with some going as far as to consider it simply ‘a gaff’.33 Retrospective legislation34 was subsequently passed which allowed Mr Duynhoven to keep his seat in Parliament35 — a far more lenient approach to obtaining foreign citizenship than that seen in Australia.

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29 Electoral Act 1993 (NZ) s 55(1)(c).
31 Ibid 8–10, 13.
32 The extent to which the people of New Zealand were unconcerned by Mr Duynhoven’s foreign citizenship is perhaps best illustrated by the submissions made to the New Zealand Privileges Committee by Sir Geoffrey Palmer (constitutional lawyer and former New Zealand Prime Minister) on behalf of Mr Duynhoven. Sir Geoffrey attempted (albeit unsuccessfully) to invoke the principle of de minimis non curat lex — the law does not concern itself with trifling matters. Notably, the Privileges Committee declined to accept this submission on the basis that it was not open to the Speaker to disregard a statutory disqualification on the ground of it being ‘of too trifling a nature to justify declaring a vacancy.’ However, the Privileges Committee passed no express comment as to the extent to which a foreign citizenship based disqualification might be regarded as ‘trifling’: ibid 8, 10.
35 See, eg, O’Flynn, above n 33.
Very few democratic nations impose a restriction as severe as that in s 44(i) of the *Australian Constitution*. One of the only similar foreign examples is that of Israel, which prohibits dual citizens from being members of the Knesset (the unicameral legislature of Israel).\(^{36}\) A dual citizen must renounce all foreign citizenships before they will be permitted to serve in the Knesset.

Even within Australia itself, this harsh approach to dual citizens is not applied to parliamentarians at the state and territory level. Nothing in the Australian state constitutions or statutory frameworks prohibit the election of dual citizens to the respective state level parliaments.\(^{37}\) Whereas a citizen of Australia also holding foreign citizenship is constitutionally barred from election to the Federal Parliament, that same citizen is entirely free to take on parliamentary duty at the state and territory level with limited restriction.

Few democratic nations around the world treat dual citizenship with the level of concern, in respect of membership of the domestic legislature, as does Australia at the federal level. We should question then, is it necessary or desirable that Australia take such a severe approach to dual citizens’ service in the legislature? Do dual citizens pose such a challenge in Australia that it is necessary to impose this unusual total restriction on their election to Federal Parliament (yet impose no restriction on their election to Australia’s state and territory legislatures)?

### V Is Disqualifying Dual Citizens Desirable?

#### A The Desirability of Disqualification Under s 44(i)

In examining the desirability of the disqualification of dual citizens from parliamentary eligibility, it is important to note the central purpose behind s 44(i). In *Sykes*, the plurality remarked that the purpose of s 44(i) is to ensure ‘that members of Parliament did not have a split allegiance and were not, as far as possible, subject to any improper influence from foreign governments.’\(^{38}\) Certainly, there is merit in

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\(^{36}\) Basic Law: The Knesset (Israel) 1958, art 16A.

\(^{37}\) However, similarly to New Zealand Parliament, a member of the Parliament of New South Wales, Queensland, South Australia, or Tasmania will lose their seat where they become a foreign citizen *after* being elected (or otherwise commit an act by which they acknowledge allegiance to a foreign power): Constitution Act 1902 (NSW) s 13A(1)(b); Parliament of Queensland Act 2001 (Qld) ss 72(1)(d), 72(2); Constitution Act 1934 (SA) ss 17(1)(b)–(c), 31(1)(b)–(c); Constitution Act 1934 (Tas) s 34(b)–(c). See generally Lorraine Finlay, ‘Think the Dual Citizenship Saga Does Not Affect State Parliamentarians? It Might Be Time to Think Again’, (17 July 2018) *The Conversation* <http://theconversation.com/think-the-dual-citizenship-saga-does-not-affect-state-parliamentarians-it-might-be-time-to-think-again-100020>.

a constitutional guarantee to this effect — the elected representatives of Australia should not be torn between their duty to the people of Australia and allegiance to a foreign power.

On this point, giving evidence to the JSCEM, Simon Cowan, Research Fellow with the Centre for Independent Studies, remarked that

>[f]or democracy to function as intended, the public must believe that politicians are acting in the public’s best interest … The appearance of a conflict of interest, even if it does not actually influence the behaviour of an individual, undermines that trust and confidence. The theme of s 44 is to disqualify persons in certain circumstances where conflicts of interest can be identified.\(^{39}\)

Yet it would seem an inherently odd proposition that the eligibility of an Australian citizen for parliamentary duty should be dependent on the law of a foreign power. In determining whether s 44(i) has disqualified a given individual, the law of foreign powers must be interpreted and applied to determine that person’s foreign citizenship status.\(^{40}\) The laws of foreign powers can therefore significantly limit which citizens of Australia are entitled to be elected and sit in the Federal Parliament.\(^{41}\)

This is an issue exacerbated by such disqualification being possible without an individual having any knowledge of their foreign citizenship. It is difficult to contend that an Australian parliamentarian could be swayed from the proper discharge of their duties by allegiance to a foreign power, if they are themselves wholly unaware of that allegiance. Nor is it likely that the Australian people would lack confidence in such a parliamentarian’s fidelity to Australia on the basis of their dual citizenship, if knowledge of their dual citizenship were not public.

The burden presently rests on any prospective federal parliamentarian to conduct all necessary enquiries of their citizenship status under the laws of any foreign power, and take all reasonable steps to renounce any foreign citizenships, prior to nominating for election. On this note, the Court in \textit{Re Canavan} stated that

\begin{quote}
Specifically, Brennan J noted that the purpose of s 44(i) ‘is to ensure that no candidate, senator or member of the House of Representatives owes allegiance or obedience to a foreign power or adheres to a foreign power.’ Justice Deane further considered that ‘[s]ection 44(i)’s whole purpose is to prevent persons with foreign loyalties or obligations from being members of the Australian Parliament’: \textit{Sykes} (1992) 176 CLR 77, 109 (Brennan J), 127 (Deane J).
\end{quote}

\(^{39}\) Evidence to Joint Standing Committee on Electoral Matters, Parliament of Australia, Sydney, 2 February 2018, 4 (Simon Cowan).


\(^{41}\) However, foreign law cannot \textit{irremediably} prevent an Australian citizen from election to Australian Federal Parliament: \textit{Re Canavan} (2017) 349 ALR 534, 551 [72]; \textit{Re Gallagher} (2018) 355 ALR 1, 7–10 [22]–[34] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 11–12 [41]–[45] (Gageler J), 15–16 [58]–[60] (Edelman J).
while it may be said that it is harsh to apply s 44(i) to disqualify a candidate born in Australia who has never had occasion to consider himself or herself as other than an Australian citizen and exclusively an Australian citizen, nomination for election is manifestly an occasion for serious reflection on this question; the nomination form for candidates for both the Senate and the House of Representatives requires candidates to declare that they are not rendered ineligible by s 44.42

It could be said to be appropriate that the disqualification of dual citizens should operate in such a harsh manner. Certainly, one should expect a prospective parliamentary candidate to reflect very seriously on their suitability for a role as an elected representative of the Australian people — which must necessarily include turning their mind to the question of any potential allegiance to foreign powers.

Yet conducting enquiries to conclusively ascertain foreign citizenship status is not always a realistic expectation, particularly in circumstances where an individual lacks information about their parental background. The injustice of disqualifying Australians who are unknowingly dual citizens from service in the Federal Parliament, is perhaps best illustrated by an example set out in the JSCEM Report (said to be based on a real situation):

Liz has no records of her father’s birth or childhood. Her father himself told various, contradictory stories about where he came from, including a suggestion that he changed his name as a teenager. Her father died over a decade ago and, despite searching, Liz has not been able to find any further records. She is having second thoughts about running for Parliament, knowing that she would be under constant threat of someone uncovering information about her father that might lead to her disqualification under s 44.43

Furthermore, Australia is often regarded as an immigrant nation which is multicultural in nature.44 Almost half of the Australian population were either born overseas or have at least one parent who was born overseas,45 which can often be sufficient for citizenship under the laws of foreign powers.46

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42 Re Canavan (2017) 349 ALR 534, 549 [60] (emphasis added).
43 Joint Standing Committee on Electoral Matters, above n 4, xxii.
46 For example, an individual who was born outside of the United Kingdom is a British citizen where their father or mother was, at the time of the individual’s birth, a British citizen otherwise than by descent: British Nationality Act 1981 (UK) c 61, s 2(1)(a).
statistics as to what proportion of the Australian population possess dual citizenship do not exist. However, currently available estimates indicate that the proportion is substantial — in the range of almost one half of the population, if not more.47

That such a large (and unclear) proportion of the Australian people is disqualified from federal parliamentary service is itself cause for significant concern. But more than that, it is perhaps a disservice to both the Commonwealth of Australia and its multicultural history to disqualify so much of its population on the basis of foreign citizenship. The Federal Parliament can hardly be said to be a fair cross-section of the different people of Australia unless its membership includes dual citizens.

Indeed, reflecting on this topic extrajudicially, former Justice of the High Court, the Hon Michael Kirby, remarked that

[un]less there is some other interpretive way to solve the problem then I think it should be changed, because Australia really has been successful as a multicultural society and that is challenged by this approach to disentitle a very large number of members of the Australian community being elected to the national parliament. That's not a good thing.48

Preventing conflicts of interests of Australian parliamentarians, and the perception of such conflicts of interest, is a purpose of considerable importance to the integrity of the Australian democratic process. Nevertheless, to disqualify so large a proportion of the Australian people on the basis of the perceived conflict inherent in possessing foreign citizenship — many of whom have no knowledge of their foreign citizenship — is perhaps an overzealous pursuit of this purpose.

B The Conclusions of the Joint Standing Committee on Electoral Matters

In its report, the JSCEM stopped short of passing judgment on the question of whether, as a matter of principle, foreign citizens should be prohibited from election to the Federal Parliament.49 As Senator Linda Reynolds, Chair of the JSCEM remarked, the appropriate qualifications and disqualifications for Australian parliamentarians are ‘for Australians to determine as part of a wider debate in what qualities we want in our candidates standing for election and for those who are elected to serve in Parliament’.50

49 Joint Standing Committee on Electoral Matters, above n 4, xxvi, 97 [5.13].
50 Ibid x.
However, the JSCEM went on to observe that s 44 of the *Australian Constitution* — as it now stands under the High Court’s interpretation — leaves no scope for the Australian people to debate the appropriateness of existing parliamentary disqualifications. The disqualifications provided for by s 44 are strict and inflexible, and leave no scope for alteration in accordance with any possible changing expectations of the Australian people over time.

In particular, the JSCEM concluded — notwithstanding whether dual citizens should in principle be prohibited from election to the Federal Parliament — that the operation of s 44(i), in its current form, creates an untenable circumscription on Australian democracy. The JSCEM remarked that

> [w]hat is clear is that the operation of s 44(i) allows the laws of other countries to create dual citizenships without the knowledge or consent of Australian citizens, or any active steps being taken by Australian citizens to accept that conferral of citizenship. Section 44 creates an ongoing cloud of uncertainty over those who have parents, grandparents or spouses born overseas. This cloud also covers those who do not have documentation about their family, including Indigenous Australians.

Because foreign citizenship laws can and do change, the evidence before the Committee suggests that only those with documented generations of wholly Australian forebears can be completely assured of their citizenship status for the duration of their parliamentary term. This creates two classes of Australian citizens for the purposes of engaging in representative democracy. The Committee considers that this is an unacceptable situation for Australian democracy.

VI  **THE WAY FORWARD**

Provided that the accepted interpretation of s 44(i) remains valid, there is only one way in which this restriction on dual citizens sitting in the Federal Parliament may be lifted or altered — a referendum under s 128 of the *Australian Constitution*. This

51 Ibid xxvi.
52 Ibid 97 [5.12]–[5.16].
53 Ibid 97 [5.14]–[5.15].
54 It is highly unlikely that the High Court’s interpretation of s 44(i) will be reversed (certainly at any point in the foreseeable future), particularly in light of its unanimous position. As Professor Helen Irving remarked in submission to the JSCEM: ‘the reality is that the Court has spoken — and spoken unanimously — and, although the Court sometimes (very rarely) overrules earlier judgments, it is highly unlikely to do so anytime soon on this matter’: Helen Irving, Submission No 33 to Joint Standing Committee on Electoral Matters, Inquiry into Matters Relating to Section 44 of the Constitution, 7 February 2018, 1.
requires a double majority, meaning a majority of the states of Australia in addition to the majority of the Australian population, to approve an amendment to s 44.\textsuperscript{55}

Indeed, the JSCEM concluded, with respect to addressing the untenable issues with s 44(i), ‘that there is no viable alternative other than amending the Constitution.’\textsuperscript{56} Specifically, it concluded that a referendum should be held to either repeal s 44 altogether, or else to insert the words ‘[u]ntil the Parliament otherwise provides’ into s 44.\textsuperscript{57} This phrase is utilised elsewhere in the \textit{Australian Constitution} — such as in s 34, which provides for the qualifications required for members of the House of Representatives — allowing for these requisite qualifications to be altered over time following informed debate by the Australian people.

The JSCEM envisions that, following such a referendum, properly drafted legislation can ensure Australian federal parliamentarians’ allegiance to Australia — regardless of whether, after comprehensive public debate, it is determined that restrictions on foreign citizens are necessary for this purpose.\textsuperscript{58} In the event that it is thought appropriate that some level of restriction on dual citizens should remain, this legislation can specifically account for any difficult or unusual situations, which presently fall within the scope of the blanket disqualification under s 44(i).\textsuperscript{59}

However, getting to this stage first requires a referendum, which have historically rarely been successful in Australia. Of the 44 Australian referenda which have been held, all but eight have failed.\textsuperscript{60} History tends to indicate that a successful referendum being held on the issue of the parliamentary eligibility of dual citizens is unlikely, although not necessarily impossible. This is, after all, an issue which strikes at the heart of representative government in Australia, with s 44(i) potentially prohibiting approximately half of the Australian population from representing their fellows in the federal democratic process.\textsuperscript{61}

It is worth noting that while s 44(i) has rarely been the subject of direct High Court consideration, by no means are the contemporary issues arising from its operation unanticipated. To the contrary, the potential dangers to Australian democracy posed by s 44(i) have been a matter of public debate since well before the more recent

\begin{itemize}
\item \textit{Australian Constitution} s 128.
\item \textsuperscript{56} Joint Standing Committee on Electoral Matters, above n 4, 98 [5.23].
\item \textsuperscript{57} Ibid 98 [5.23], 102 [5.45]; see also ibid 84–9 [4.110]–[4.127].
\item \textsuperscript{58} Ibid 97 [5.16].
\item \textsuperscript{59} Ibid.
\item \textsuperscript{61} See, eg, Transcript of Proceedings, \textit{Re Canavan, Re Ludlam, Re Waters, Re Roberts (No 2), Re Nash, Re Xenophon} [2017] HCATrans 200 (11 October 2017) 4108–4117 (D M J Bennett QC).
\end{itemize}
disqualifications. For example, in 1997, the House of Representatives Standing Committee on Legal and Constitutional Affairs concluded that, in respect of s 44(i) the potential exists for challenges to the eligibility of a significant number of parliamentarians especially in view of the fact that a large number of Australian citizens possess dual citizenship. This represents a risk to the integrity and stability of the parliamentary system and to the government of the nation.62

In fact, even as early as 16 years prior to this, in 1981, the Senate Standing Committee on Constitutional and Legal Affairs concluded that s 44(i) should be deleted from the Australian Constitution, contingent upon the implementation of formal safeguards,63 remarking that

[i]t is highly desirable that Australian citizens with unsought dual nationality should be free to participate in the highest levels of political life in the Australian democratic system. To deny them this right of citizenship on the basis of a determination by a foreign system of law, which for every other purpose has no application in the municipal of Australia, would be most invidious.64

Despite having only recently been thrust into the forefront of public consciousness, s 44(i) has long sat as a conspicuous and entirely unhidden ‘time bomb’. The corresponding fallout risks considerable damage to the integrity of the Australian democratic process. As the JSCEM cautioned,

[s]ection 44 has been the subject of many inquiries and much debate over the past 20 years. The problems identified in the report have been long foreseen but remain unaddressed. They are not going away. These issues have to be fixed some time. The Committee considers that time is now.65

Any proposed referendum to the Australian Constitution is, by its very nature, a radical prospect requiring nothing less than the utmost mature and careful consideration. Yet the contemporary issues arising from s 44(i) are palpable, and perhaps even stifling, to the Australian democratic process. While s 44(i) is intended to ensure the fidelity of federal parliamentarians to their Australian democratic duties, in its current draconian form, it is itself a threat to that very same democratic integrity.

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62 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Aspects of Section 44 of the Constitution — Subsections 44(i) and (iv) (1997) 37.
64 Ibid 11 [2.18].
65 Joint Standing Committee on Electoral Matters, above n 4, 102 [5.43].
I Introduction and Orientation

It is easy to overlook the law when you can watch a rocket launch before your eyes. There is a significant quantity of international and domestic law applicable to outer space and a number of texts have emerged over the years that attempt to clarify the various obligations that follow these laws. Literature in the field is dominated by the initial works of reputable international law scholars such as Bin Cheng,1 Stephen Gorove,2 and Carl Q Christol.3 These texts are complemented by the early works of renowned experts such as Manfred Lachs4 that provide wide-ranging, early stage commentary on the status and content of space law, the implications for states, and the intentions of state parties as to how the law was to be formed.

More recently, the modern ‘space lawyer’ has emerged, a professional who splits their time between considering not only international space law, but the impact that law can have on up-and-coming commercial space operations. Academics such as Frans von der Dunk have edited hefty volumes focusing on selected issues in outer space, with von der Dunk’s most recognised work, *The Handbook of Space Law*, spanning almost 1200 pages.5 Similarly, large groups of academics have collaboratively developed hugely popular resources in the public international law realm. Series such as the *Cologne Commentaries on Space Law* stand out for their thorough article-by-article commentary on the major treaties and ‘soft law’ instruments in the

* Adelaide Law School, University of Adelaide.
field, delving into the historical development, foundational contexts, and the current prevailing academic interpretations. This is contrasted against books that cover niche aspects of the applicable law. The ‘popular culture’ associated with outer space and the limited cache of reputable literature in the field makes it an interesting area to publish in. Despite this, many works merely pass as restatements of previous literature; analysis and new ideas run thin when authors and editors aim for publication volume over quality.

In this context, the second edition of Professor Francis Lyall and Professor Paul B Larsen’s flagship ‘Space Law: A Treatise’ is warmly welcomed. Published at the beginning of 2018, it is the second iteration of their book initially released in 2009. The volume seeks to act as a guide for students studying the field, practitioners venturing into the depths of space law, and to provide an accessible resource for interested persons. The book considers a broad variety of issues including the foundational concepts of international space law and its domestic counterparts, telecommunications law, extra-terrestrials, and many of the issues that face the present-day actor in the space domain.

The first edition of this book was presented as an introductory text to outer space, a position retained in the second edition. It stays well clear of the popular ‘selected issues’ approach of the edited collections that the field seems to elicit, while still dealing with many of the more specialist areas of commercial and practical relevance for law in outer space. With a title as simple as ‘Space Law’ it is likely to be the first port of call for many people, just as attractive as the other major texts in the area such as The Handbook of Space Law. Lyall and Larsen state that they have attempted to produce a ‘fresco’ of space law and that an ‘etching’, focused on intricate detail, would be ‘impossible to achieve in a mural of c. 330,000 words’, especially in an area so diverse and broad (in both the literal unending expanse and law applicable to the domain sense). Furthermore, it is an attempt at exploring space law in a comprehensive manner while recognising that

\[ \text{the literature of space law, both national and international, is considerable, if of variable quality. Books are appearing, many being collections of chapters by various hands that usefully focus on particular areas. … Some writers, vociferous in their conclusions, appear to lack knowledge of legal principle or existing law.} \]

\[ \text{Stephan Hobe, Bernhard Schmidt-Tedd and Kai-Uwe Schrogl, Cologne Commentary on Space Law (Carl Heymanns Verlag, 2009–15) vols 1–3.} \]

\[ \text{See, eg, Patricia McCormick and Maury Mechanick (eds), The Transformation of Intergovernmental Satellite Organisations: Policy and Legal Perspectives (Martinus Nijhoff, 2013); Ray Purdy and Denise Leung (eds), Evidence from Earth Observation Satellites (Martinus Nijhoff, 2013).} \]

\[ \text{Francis Lyall and Paul B Larsen, Space Law: A Treatise (Ashgate Publishing, 2009).} \]

\[ \text{von der Dunk, above n 5.} \]

\[ \text{Francis Lyall and Paul B Larsen, Space Law: A Treatise (Routledge, 2nd ed, 2018), xi.} \]
Some contributions are simple propaganda and amount to ‘result-orientated jurisprudence’.11

It is from this position that the authors attempt to provide a quality and academically robust assessment of space law whilst trying to go beyond a restatement of rights and duties at law to provide a detailed analysis of the issues at hand. The authors achieve this in nearly every instance, adding colour and depth to an area of law that is characterised by its environment: dark and empty.

The contents of the book can be grouped into three main themes which clearly demonstrate a focus on the practicalities of the law. The first considers the general international and domestic sources of law applicable to outer space, fora, and the basic legal principles applicable in outer space. This first part of the text orients the reader, introducing the context and content for the chapters that follow.

Second, the authors clearly reach their areas of expertise in the thrust of the book, driving through the more complicated commercial and practical legal implications of outer space — the use of telecommunications, broadcasting, environmental law, and activities more broadly — all while ensuring relevance to the fundamental principles that underpin the boundless domain.

Finally, the authors draw our attention to the future and carefully consider the major driver of modern outer space to be exploration for advantage. They practically draw on financing, trade restrictions, commercial law, and military perspectives while also considering extraterrestrial intelligence, and address the legal questions for the future.

This review will consider the efforts of the authors to provide a basic introduction to the law of outer space while comparing it to other interpretations, practice and broader literature. This approach confirms that the authors have developed a highly robust and academically rigorous text, one which sits in the enviable position of being a go-to book for a range of audiences, from the law student right through to the experienced international lawyer looking for further information on a booming discipline.

II PART 1 — INTRODUCTION AND FOUNDING CONCEPTS

This book does well to orientate the reader and ensure they are aware of the immense volume of law applicable to outer space. The first seven chapters acquaint us with the major players in outer space, the basic law, and the elements of the outer space domain.

Lyall and Larsen clearly recognise the significance of humans moving into the outer space domain, especially from a legal perspective. They state that the jumping into

11 Ibid 28.
space ‘has involved law, and appropriate law has had to be developed,’ an explicit recognition of the applicability of law to space even before humans reached into its depths. Now that the human species is relatively active in outer space, a comprehensive and relatively useful range of legal principles governing the basic activities of the actors in the domain has been developed.

A The Actors

In their first chapter, Lyall and Larsen introduce the major players in the space domain and outline the international obligations that have shaped practice. This is a realistic and pragmatic introduction of the major actors, although it may be open to the criticism that the authors have placed excessive significance on traditional interest groups and academic pursuits at the expense of the modern commercial players who are likely to be the key drivers of space activity in the decades to come.

The authors make the useful and often overlooked point that although space law is thought by many to have sprung into existence the moment the Union of Soviet Socialist Republics (‘USSR’) successfully launched Sputnik 1 into orbit (4 October 1957), its ‘origins lay much further back.’ What Sputnik 1 did do (in addition to creating customary international law regarding the right of overflight in outer space), was trigger a movement to expand and clarify the applicable law and develop appropriate institutions to regulate outer space. It was the pressure of the Second World War that truly sparked the development of the space age, and even now ‘there is nothing like war for producing progress in technology’ which will inevitably need to be matched with new law.

It is from the post-WWII position that the authors begin to explore the primary institutions they believe have developed space law; the reader is provided with overarching and broad introductions to the International Astronautical Federation, the International Academy of Astronautics, and the International Institute of Space Law (‘IISL’). As has been presented in the text, it is clear that each of these groups has impacted the development of the law to varying degrees. However, these bodies have supported space law in a primarily academic sense. Even today, these international institutions are primarily associated with their large annual conferences. In recent years, the International Astronautical Federation has gained increased exposure as the organiser of the International Astronautical Congress which entered its 69th year in 2018. The recent emphasis has been bolstered by presentations by notable figures

12 Ibid 2.
13 Ibid 3.
15 Lyall and Larsen, above n 10, 6.
in the space industry such as Elon Musk. The organisation most suited to space law, the IISL, is a collection of lawyers who hold an academic or, in limited circumstances, practical interest in outer space. Although an academic institution, the IISL continues to promote international space law and attempts to shape its development. In the modern era these institutions mainly sit on the periphery, providing opinion as they deem necessary. Alongside these institutions, the authors also recognise the input of universities in both teaching space law and fostering the development of it more broadly.

The United Nations is where the majority of space law has been developed. The Committee on the Peaceful Uses of Outer Space (‘UNCOPUOS’) is the primary international committee supported by the Office for Outer Space Affairs. These bodies are recognised by the authors as ‘[t]he most obvious forum for developing space law within the operational structures of the United Nations itself’. This has been the primary venue for the development of international space law over the last century, facilitating the introduction of the five outer space treaties, numerous General Assembly Resolutions and the more recent principle-based documents

17 Lyall and Larsen, above n 10, 13.
on different elements of the outer space domain. Of significance is the authors’
criticism of UNCOPUOS’s present and modern role; that diplomatic processes are
significantly hampered when some states ‘want precise language, while others seek
to fudge’ and the frequent use of representatives ‘for whom space questions are not
a priority.’ This is a position that was recognised by the Greek Representative in
2000 when they asked

[i]f the Legal Subcommittee is not the appropriate global forum for discussion
of the thorny question[s] … then my delegation wonders where it is that these
questions should be discussed? In the corridors, at the coffee counter, or in
Vienna restaurants?

They followed by suggesting that

[t]o avoid there being any hidden agendas on the part of certain States to see the
role of the [Legal] Subcommittee deteriorate so that they could take action at the
international level without legal commitments, in a totally deregulated environ-
ment, then we all must work together so that … tax payers the world over should
not be forced to pay taxes so that representatives of some countries spend that
money on spring holidays in Vienna.

This demonstrates a clear degree of discontent from at least one member state with
the status and progress of UNCOPUOS, a point recognised by the authors.

Of course, the text continues to explore the other actors in the space domain, the
role of national space agencies and major international organisations such as the
European Space Agency. Although these agencies do not make international law,
they shape domestic law, contribute to the international policy setting and act as the
agent of the state in outer space.

A/RES/62/101 (10 January 2008, adopted 17 December 2007); Principles Relating to
Remote Sensing of the Earth From Outer Space, GA Res 41/65, UN GAOR, 41st sess,
95th plen mtg, UN Doc A/RES/41/65 annex.

Including: Principles Relating to Remote Sensing of the Earth From Outer Space,
GA Res 41/65, UN GAOR, 41st sess, 95th plen mtg, UN Doc A/RES/41/65 annex;
Principles Relevant to the Use of Nuclear Power Sources in Outer Space, GA Res
47/68, UN GAOR, 47th sess, 85th plen mtg, UN Doc A/RES/47/68 (14 December
1992); Space Debris Mitigation Guidelines of the Committee on the Peaceful
Uses of Outer Space, UN GAOR, 62nd sess, Supp No 20, UN Doc A/62/20 annex
(22 December 2007).

Lyall and Larsen, above n 10, 17.

Ibid 18.

Committee on the Peaceful Uses of Outer Space, Legal Subcommittee, ‘Unedited
Transcript 633rd Meeting’ (3 April 2000) UN Doc COPUOS/LEGAL/T.633, 3.

Ibid.
B The Law

While the actors in the space domain are essential to understanding the overarching policy context of the law of outer space, they tell us very little about the relevant legal regimes. The law applicable to outer space comes from two quite distinct sources — international law and domestic law — a point the text conveys well. Interestingly, unlike many other books, there is no distinct separation of the two sources into different chapters. For example, the Handbook of Space Law dedicates three chapters to reciting the relevant law; the first on international space law, the second on national space law and the third on European space law (due to the complexities of the European legal system and framework surrounding the European Space Agency). Lyall and Larsen divide their focus differently. First, they address the sources of law in a general fashion in one chapter, ‘Sources of Space Law’, while leaving specific detail to chapters that deal with the subject matter. Domestic space laws are relegated to the end of the book and considered after reviewing commercial activities in outer space. This approach is intuitive and ensures the practical relevance of any legal principle raised is fully understood in the context of the law that precedes it. Despite this, the authors broadly demonstrate how space law can be found in diverse sources including domestic law, contracts and agreements, public international law, international customary law, United Nations documents, and a range of other soft law instruments.

C An Outer Space Treaty?

The most significant and well adopted of the five space law treaties is the 1967 Outer Space Treaty,26 a text the authors rightly dedicate an entire chapter to considering, unlike the other treaties which are discussed in the relevant topical sub-sections. Lyall and Larsen successfully encapsulate the broad background of the Outer Space Treaty and provide the relevant context to the reader, whomever they are.

There is an intriguing analogy used to describe the creation and context of international space law. The authors suggest that while the ‘maritime law of today was largely the creation of the English merchant fleet’, the United States has played a ‘similar role in the development of general world space law’.28 Although in many regards this might be true, especially when considering the development of the commercial space industry, the United States is in no way the inventor of space law, a point clearly exemplified in the development of the Outer Space Treaty which required significant compromise between all parties (mostly the United States and the USSR). To some extent this remark reflects the bias of the authors’ overall focus

25 von der Dunk, above n 5.
27 Lyall and Larsen, above n 10, 50–1.
28 Ibid 29.
which sees a tendency to address American space policy in more detail than that of other major space-faring nations. This should not be faulted too highly though; many books in this field frustratingly only repeat the law as it stands, without colour or analysis, resulting in a dry restatement of the law. It should also be noted that space law as it stands today is definitely, in part, a result of the influence of the United States as one of the most active states in the outer space domain. Despite these points, it is misleading to suggest that the United States created space law, with a well-documented history of compromise during treaty negotiations between what is now Russia and the United States, as well as a vast number of other stakeholder nations.29

What must be commended is the authors’ use of extensive referencing, with citation of United Nations documents, travaux préparatoires, UN COPUOS documents, and all manner of other background documents, all adding to the quality and presentation of the text; one which commands authority throughout its substantive components.

D A Question of Custom

Where the authors enter into rocky ground is their discussion of the Outer Space Treaty existing as customary international law. They assert that, ‘as a minimum’ articles I, II, III, VI and VII have all entered into customary international law and ‘cannot be evaded’.30 These are incredibly general articles and, in most instances, are unlikely to be controversial in their application. What should be questioned, though, is the blanket application that the authors refer to.

Article III imports international law to outer space. As a consequence, and with very little evidence to counter this assertion, it is unlikely to be questioned by any rational actor and has likely become customary international law without much fuss. Similarly, the principle codified in article I — that space is to be free for all to explore — would have entered into customary international law the moment the United States and USSR space race begun.

Claims of sovereignty over parts of space are prohibited by Article II. To claim that this article is customary is precarious. On one level, any state that claims an entire planet, or substantial part of one will likely be condemned. On another, mining of space resources is being proposed as a valid use of outer space, an action that would require an entity to exercise possession and control of material found in space, arguably amounting to a claim of sovereignty.31 With viable off-planet settlement plans afoot that would require sovereignty or claims over space in some form or another, it would be sensible to recognise that the overarching concept as codified in article II is customary. It is the exact scope and application that remains in question.

29 Ibid 69.
30 Ibid 64.
When looking to arts VI and VII, the assertion of customary international law falters. The articles consider the responsibility and liability of states in the space domain and each are unique to the outer space context.

Article VI presents a regime of law that is incompatible with general international law as it stands, essentially removing the well-established concept of ‘attribution’ that is required for any act contrary to international law. The International Law Commission spent a significant period of time, nearly 40 years, developing what is in essence a codification of the customary international law position of state responsibility: the Articles on the Responsibility of States for Internationally Wrongful Acts. If the status of article III as customary law is to be accepted, it would import the terrestrial concept of state responsibility into the outer space domain to cause a conflict of laws with the text of article VI not explicitly displacing the well understood concept of state responsibility. This is where many invoke the principles of *lex specialis* (that specific laws will displace the more general rules), a logical conclusion based on more traditional concepts of law. With this conflict in mind, it would be expected that any claim of custom be comprehensively supported due to the conflicting international obligations. It is here that the authors fail. Events have also transpired since the book’s publication that question this interpretation, with the first ever publicly known incidence of an unauthorised payload entering orbit in early 2018. There was no outcry, no statements that even though the payloads were rejected under the relevant United States law they would be attributed to the United States.

Article VII of the *Outer Space Treaty* presents nations with the ability to claim damages from another in the event of an accident. Although claiming damages for the consequences of internationally wrongful acts is well established, invoking a claim for damages under article VII does not require a wrongful act. The authors do not go into detail trying to support this article as customary, they merely state that

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33 *Outer Space Treaty* art VI:

> States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty …


it is.\textsuperscript{36} As a distinct legal concept that only applies to state parties and with incredibly limited state practice it is difficult to support an assertion without justification.\textsuperscript{37}

Noting that all space-faring states are party to the \textit{Outer Space Treaty} and have not overtly acted in contravention of its terms should not be considered sufficient to establish a rule of customary international law. The essential components of state practice and \textit{opinio juris} should always be highly valued. Although the authors attempt to justify their position, it is only done in generalities. The authors refer to the principle enshrined in the \textit{North Sea Continental Shelf Case}; that the actions of those states that have a particular interest in a situation or circumstance have a more significant role in the development of the relevant customary international law.\textsuperscript{38} The primary argument presented for all articles being customary is to suggest that, as no state has acted contrary to the foundational principles of the \textit{Outer Space Treaty} (arts I–III, VI, VII), the content becomes customary; this argument should only be cautiously accepted at most. There is no significant consideration of the state practice or \textit{opinio juris} of non-space-faring states. While focusing on the interests of those nations already in space aligns with the principle presented in the \textit{North Sea Continental Shelf Case}, customary law does not form merely because five to ten states have not overtly acted contrary to their treaty obligations. The interests of current space-faring nations are relevant but should not be considered determinative, especially when it is recognised that space activities require a certain financial and technical capability; a capability that most states do not possess. It is unlikely that many poorer states would accept the imposition of customary law created almost exclusively by wealthy Western states as they reached space first. Furthermore, this goes against article I of the treaty, which clearly articulates that space is to be used in the ‘interests of all countries’ and remain ‘the province of all mankind’.

Although there is little evidence to support all five introductory articles of the \textit{Outer Space Treaty}, article I through III are the main candidates to be classified as custom, they are broad and generally compatible with terrestrial international law as it stands. Overall, it does need to be recognised that the status of these articles as customary international law is tempered by the authors later in the text where they assert that only articles I through IV sit as custom despite article IV not being raised in the earlier discussion.\textsuperscript{39}

\textsuperscript{36} Lyall and Larsen, above n 10, 64.

\textsuperscript{37} There has only been one claim for damages cause by a space object. This claim was settled by diplomatic negotiation rather than by the terms of the \textit{Liability Convention}; see ‘The Canadian Statement of Claim’ (1979) 18 International Legal Materials 899; \textit{Protocol and Settlement of Canada’s Claim for Damages Caused by Cosmos 954, Canada–Union of Soviet Socialist Republics}, entered into force 2 April 1981, 20 ILM 689.

\textsuperscript{38} \textit{North Sea Continental Shelf, (Federal Republic of Germany v Denmark) (Judgment)} [1969] ICJ Rep 3, 43.

\textsuperscript{39} Article IV of the \textit{Outer Space Treaty} stands as a prohibition on the use on use of weapons of mass destruction in space and establishment of military bases and installations; Lyall and Larsen, above n 10, 167.
The remaining chapters of what can be called Part I of the book deal with a number of other significant and essential components of space law. The authors contemplate ‘space objects’, a legal construct clouded in ambiguity and uncertainty, especially when different laws apply to different space objects based on nationality, treaty ratification patterns, and where they may have been launched from. Despite this, the complicated *Rescue Agreement*, *Liability Convention* and *Registration Convention* are navigated in a way that clearly articulates the status of the law and the obligations of states.\(^{40}\)

A similar sentiment can be expressed when the authors deal with the position of ‘astronauts’ at law, especially when every relevant international instrument conveniently neglects to define what an ‘astronaut’ is. When looking to the *Outer Space Treaty*, it is clear that ‘astronauts’ are to be accorded some significance as ‘envoys of mankind’, although this term has been given little to no legal significance.\(^{41}\) With very few humans reaching outer space over time, the authors review the domestic policies of states to conclude that there is no certain definition.\(^{42}\) At the same time, academia appears relatively settled on the matter, with a person needing a degree of professional purpose, training and responsibility to the space craft to be classified as an ‘astronaut’.\(^{43}\)

Reviewing the practices of many states this conclusion is tenuous, but understandable, due to the ambiguity caused by potential space tourism. The United States has been using a number of different classifications for humans travelling into space for quite some time; even the *Space Transportation System Handbook* — the book used to train NASA personnel who would be travelling on the Space Shuttle — acknowledges the presence of different classes of crew, with the commander and pilot described as ‘crew’ and the remaining classified as mission specialists (engineers, scientists, etc). It further recognises the potential for ‘noncareer crewmembers’ who undergo the ‘minimum STS training considered necessary’ to travel into outer space.\(^{44}\)


\(^{41}\) Frans G von der Dunk and Gerardine Goh, ‘Article V’ in Stephan Hobe, Bernhard Schmidt-Tedd and Kai-Uwe Schrogl (eds), *Cologne Commentary on Space Law* (Carl Heymanns Verlag, 2009) vol 1, 94, 98 [17].

\(^{42}\) Lyall and Larsen, above n 10, 119.

\(^{43}\) von der Dunk and Goh, above n 41, 94, 98 [15].

\(^{44}\) National Aeronautics and Space Administration, *Space Transportation System User Handbook* (June 1977) 4-22.
Furthermore, the rules in place to guide the selection of crew for the International Space Station notes that there are crew, ‘professional astronauts’, and spaceflight participants, the latter of which is not to be termed an astronaut.\textsuperscript{45} With significant uncertainty in the state practice, the prevailing academic view, as referenced by Lyall and Larsen, should generally be favoured and accepted until overt and contradictory state practice indicates otherwise.

\textbf{F Celestial Bodies}

The final chapter of ‘Part 1’ of the book moves us to one of the more interesting areas of outer space; the law applicable to planets, moons, and other ‘bodies’ present in space. As is very clearly and accurately set out in the first few lines of this chapter, ‘[t]he legal regime of the Moon, asteroids and other celestial bodies is not finally settled and will require adaption’ especially in a time where ‘[c]ommercial exploitation of the Moon and of asteroids is under active discussion.’\textsuperscript{46} The essence of this chapter is a reminder that the law, especially the \textit{Outer Space Treaty}, ‘goes well beyond Earth-orientated matters’,\textsuperscript{47} and it is not the law of the sea that applies (as was erroneously stated by Matt Damon’s character, Mark Watney, in the 2015 movie \textit{The Martian}). This is a fact that is easily overlooked, especially with the majority of human activity outside of low earth orbit ending in 1972; the exceptions being purely scientific endeavours.\textsuperscript{48}

In recent times, as has been well captured by the authors, there is an enthusiastic drive to push humanity further into our solar system, be it for the scientific cause or to exploit space for commercial gain. In an interesting and well-positioned discussion, the authors raise a definitional question: what is a planet? This is not really an ‘every day’ question, but one that has been left to scientific experts in the first instance. It was these experts who famously demoted Pluto to a ‘dwarf planet’ in 2006 and continue to review and reclassify the natural objects within our solar system.\textsuperscript{49} Of course, lawyers have ignored the technical question in its entirety and opted for ‘celestial bodies’ as a blanket term for the naturally occurring objects in outer space — be they planets, asteroids, or comets — a classification that is undefined but features in the full title of the \textit{Outer Space Treaty} and \textit{Moon Agreement}.

The Moon is the only non-earthly body that humans have physically reached and, depending on the policy of any particular government or company (mainly the

\begin{footnotes}
\item Lyall and Larsen, above n 10, 163.
\item Ibid 166.
\item The final Apollo mission, Apollo 17, was completed with successful splashdown into the Pacific Ocean on 19 December 1972.
\item Lyall and Larsen, above n 10, 163.
\end{footnotes}
With much of the law of outer space explained in the context of orbital activities, it is important to recognise that the concepts of non-appropriation, peaceful purposes, and general international law all apply to the Moon. The authors raise the influence of United States President Eisenhower in the development of the Outer Space Treaty, recognising that there was an overt attempt to prevent claims of sovereignty in a manner analogous to the Antarctic, which is governed by a treaty that entered into force in 1961. The use of the Antarctic sovereignty analogy is intentionally and wisely restrained, primarily due to the fact that seven nations maintain claims to Antarctic territories despite the treaties in place.

It is from here that the authors recognise the Moon Agreement — officially the ‘Agreement Governing the Activities of States on the Moon and Other Celestial Bodies’ — which aims to clarify the legal obligations of states not only on the Moon, but on any other celestial body. After the first draft was presented to UNCOPUOS in 1970, drafting of a new treaty was severely hamstrung by a focus on the Rescue Agreement, Liability Convention and Registration Convention. The Moon Agreement opened for signature in 1979 and, unlike the other treaties, faced an uphill battle to enter into force in 1984. As is recognised throughout the space law community, the treaty sits well outside the main body of law, with no major space-faring state parties. The authors acknowledge the advantages of the treaty, recognising the ‘useful aspects’ and that it ‘may yet prove to be the Sleeping Beauty of the five UN space treaties’.

In the modern context, as is reinforced in numerous parts of this book, profit is a significant motivator and the viability of space mining and resource exploitation operations has become a fascination for many. The authors assert that the ‘Moon and any other celestial bodies are res extra commercium’. An unfortunate quirk of this book is the extensive use of Latin without clarification or explanation, requiring those without an intricate understanding of historic legal maxims to rely on online searches

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52 Nations with a claim over parts of Antarctica are: Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom.

53 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, opened for signature 18 December 1979, 1363 UNTS 3 (entered into force 11 July 1984) (‘Moon Agreement’).

54 With the exceptions of France and India as signing but not ratifying parties.

55 Lyall and Larsen, above n 10, 169.

56 Ibid 170.
or dictionaries to fully understand some assertions.\textsuperscript{57} The \textit{res extra commercium} concepts closely link with the terms of article II of the \textit{Outer Space Treaty}, but also the basic provisions of the \textit{Moon Agreement}.\textsuperscript{58}

It is here that the authors begin to discuss the interface between the principles of law and practice. Although it is relegated to a footnote, their inclusion of the case of \textit{Nemitz v National Aeronautics and Space Administration}\textsuperscript{59} is an interesting one. In that case, Nemitz sought to register an interest over Eros, an asteroid. When NASA landed their NEAR Shoemaker probe on the asteroid in 2001, Nemitz sent a bill to NASA for ‘parking and storage’. Of course, they refused to pay and Nemitz sued. The US Court of Appeals for the Ninth Circuit dismissed Nemitz’s appeal after the trial judge found against the Nemitz.\textsuperscript{60} This proves an interesting point of state practice and treaty interpretation, one that is not discussed in any particular detail by the authors.

The \textit{Moon Agreement} does actually provide for the ability to exploit the resources on the Moon (and other celestial bodies), although it is relatively ineffective in its current form. Despite this, the authors begin to describe the actions of states towards resource exploitation without the backing of the \textit{Moon Agreement}. The most obvious of these is the provisions of the United States Code that allow American companies to apply for authorisation to exploit resources from celestial bodies.\textsuperscript{61} There has been significant resistance to this though, with the United States Congress quoted as saying that ‘the United States does not … assert sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any celestial body’, a line that concords with the concept presented in the \textit{Nemitz} case above.\textsuperscript{62} The authors raise the main contradictory argument that

\begin{quote}
by granting to US citizens engaged in asteroid mining entitlement to any resource so [obtained], including rights of possession, ownership, transportation, use and sale, the new USC § 51303 is a sovereign act recognising rights of property, and would therefore appear to be an act of national appropriation.\textsuperscript{63}
\end{quote}

To further clarify this statement — and in what can only be regarded as an attempt at humour — the authors footnote the ‘Duck Test’ in respect of the above quote, that

\begin{quote}
\end{quote}

\begin{quote}
\textit{Moon Agreement} art 11.
\end{quote}

\begin{quote}
\textit{Nemitz v National Aeronautics and Space Administration} (9th Cir, No CV-03-00599, 10 February 2005).
\end{quote}

\begin{quote}
Lyall and Larsen, above n 10, 171.
\end{quote}

\begin{quote}
\end{quote}

\begin{quote}
Lyall and Larsen, above n 10, 184.
\end{quote}

\begin{quote}
Ibid 185.
\end{quote}
‘[i]f it looks like a duck, walks like a duck, and quacks like a duck, it is a duck.’\textsuperscript{64} This is a line that can only be interpreted as an opinion that the position of the United States will likely be in breach of their international obligations in the future.

Although there is potential for article II of the Outer Space Treaty to be breached as a consequence of the American legislation, the authors rightly recognise that there is no international opposition to this policy, with countries such as Luxembourg following suit and the IISL sitting on the fence on the matter, relying on the potential for subsequent state practice to inform the future of space law.\textsuperscript{65} This chapter is a representative encapsulation of one of the most controversial issues in international space law. The authors recognise that there is no answer and no real reason to reach one yet: it will be dealt with ‘when celestial mining becomes feasible.’\textsuperscript{66}

\section*{III Part 2 — Commercial and Practical Law}

Moving on from the basic principles that underpin outer space, as was foreshadowed in the introduction, the centre of the book is where the authors hit their stride, writing on the legal principles related to the more commercial and practical uses of outer space. This includes the regulation of radio communications and the International Telecommunications Unit (‘ITU’),\textsuperscript{67} unusual or developing uses of outer space,\textsuperscript{68} environmental regulations,\textsuperscript{69} navigation and communication,\textsuperscript{70} remote sensing,\textsuperscript{71} and the more delicate areas of finance and trade for space activities.\textsuperscript{72}

\subsection*{A The ITU Cannot Be That Complicated?}

It is interesting to see the development of organisations to meet the needs of evolving industries. One of the most prominent international organisations that has shaped itself to meet the needs of outer space operators is the ITU. The authors demonstrate their comprehensive knowledge of this area of law in what is one of the longer chapters of the book.

As is outlined in the first paragraph of the chapter, ‘radio is integral to almost all uses of space’, as without communication there would be no real use to infrastructure in

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{64} Ibid 186, n 126.
\item \textsuperscript{66} Lyall and Larsen, above n 10, 186.
\item \textsuperscript{67} Ibid ch 8.
\item \textsuperscript{68} Ibid ch 9.
\item \textsuperscript{69} Ibid ch 10.
\item \textsuperscript{70} Ibid chs 11, 12.
\item \textsuperscript{71} Ibid ch 13.
\item \textsuperscript{72} Ibid ch 14.
\end{itemize}
\end{footnotesize}
the domain.\textsuperscript{73} The majority of present day regulation over radio communications is
governed by the ITU. What is interesting, and noted by the authors, is the develop-
ment of the ITU and how it fell into the role of regulating radio communications in
outer space, a role that also sees it essentially regulate geostationary orbit.

In this book there is little reference to the activities of humans before the early 1900s,
especially because there was no genuine capability to exploit space prior to this
period. However, the authors begin their exploration of the ITU in the late 1800s,
beginning with the inception of the telephone and telegrams as a method of intern-
national communications. On this background, to say that the authors skim over the
ITU would be manifestly incorrect.

Delving into the detail of this chapter here is unlikely to do it justice. The authors
should be commended for the way they explore the intricate detail of the three major
instruments (Constitution, Convention\textsuperscript{74} and Administrative Regulations\textsuperscript{75}) that
constitute the ITU and govern the activities of not only states, but private activities in
the outer space domain. They also acknowledge the major limitations and challenges
that face the organisation moving forward. It is here that we see the true applica-
tion of the constitutive documents applied to practical and real-world situations. The
commercialisation of outer space is seen as a great threat to many different aspects
of outer space; primarily, the lack of overall control that comes with more actors
and the privatisation of operations. When governments are the only parties acting in
a domain, there is less risk of overt actions that blatantly contradict founding legal
principles. This is not so with commercialisation due to international law’s limit of
only applying to states, not the citizens within them (subject to certain exceptions).
As acknowledged by the authors, the ultimate power to control spectrum allocation
(radio signals) is ‘a matter for the sovereign power of a state’\textsuperscript{76} and they recognise that
the existing protocols in place that protect spectrum allocation could be ignored.\textsuperscript{77}

From here the authors acknowledge that the ITU is heavily reliant on ‘the practices
of compromise and mutual accommodation’ and that they fear that ‘privatised
commercial providers of space telecommunications may press their governments to
engage in dispute for commercial rather than proper or procedural reasons’ recognis-
ing the influence of ‘free market’ principles.\textsuperscript{78} This very closely relates to the issue
of spectrum congestion in the future, that with increasing commercial activities, the

\textsuperscript{73} Ibid 189.
\textsuperscript{74} The Constitution and Convention of the ITU are grouped into a single document: ITU,
‘Collection of the Basic Texts of the International telecommunication Union Adopted
by the Plenipotentiary Conference’ (2015) <http://search.itu.int/history/HistoryDigi-
talCollectionDocLibrary/5.21.61.en.100.pdf>.
\textsuperscript{75} The Administrative Regulations are split over a significant number of different,
area specific, volumes. These can be viewed at: ITU, Administrative Regulations
Collection <http://handle.itu.int/11.1004/020.1000/1>.
\textsuperscript{76} Lyall and Larsen, above n 10, 220.
\textsuperscript{77} Ibid.
\textsuperscript{78} Ibid.
existing spectrums that are ideal for orbital operations will become congested and ultimately lead to disputes between private actors and nations. With internet and other ‘radio reliant’ services becoming viable operations in orbit, there is little that could be argued to rebuff the concerns of the authors in this context.

B Space and Unusual Problems?

‘Unusual problems’ is never expected to be a title in a textbook, but in the context of outer space it is not particularly surprising. This chapter contemplates three ‘issues’: space tourism, planetary defence, and small satellites in large constellations. These are not, per se, unusual, but scenarios that will arise with increasing frequency in the future. Space tourism and small satellite constellations are commercial issues that require a number of different points of law to be drawn together. Of the three, planetary defence is most likely the unusual one as it is something that is not frequently contemplated, unless you are a fan of the ‘asteroid destroys the earth’ genre of films. The most valuable component of this chapter is the traditional approach of applying law to fact in a clear and comprehensive way.

1 Tourism

Space tourism has begun to pick up momentum in the market. In most instances, it is a precarious balance between sub-orbital flight and actual space flight, but the main concept is to sell flights into space. The authors raise a number of significant legal questions and correspondingly apply what is likely the most correct legal conclusions. Their methodology in approaching the legal questions is almost flawless, breaking the business into its practical parts beginning by clarifying that ‘space tourism is a lawful use of space in terms of’ the Outer Space Treaty. Drawing on the principles from the Outer Space Treaty, Rescue Agreement, Liability Convention, radio regulations, and the importance of domestic space law, the concise summary of space tourism is well conceived. One thing that must be questioned is the pessimism of the authors when they assert, quite plainly, that ‘[s]pace tourism will involve disaster.’ Back to the positive, the use of foreshadowing the content of the book and considering the broader impacts of activities is effectively used, with recognition that the outer space environment is ‘fragile because, unlike the Earth, outer space is not able to heal itself from the effects of human activities.’

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79 Ibid 223.
80 For a relatively up to date collection of news and features about the increasing references to tourism in the space domain, see Space Tourism: The Latest News, Features and Photos, Space.com <https://www.space.com/topics/space-tourism>.
81 Lyall and Larsen, above n 10, 228.
82 Ibid 231.
83 Ibid 233.
2 Planetary Defence

As mentioned above, planetary defence is not something that comes to mind when thinking about outer space. The authors acknowledge that the majority of interest in this area comes from creatively named films such as Meteor (1979), Asteroid (1997), Armageddon and Deep Impact (both 1998). As would be likely expected from Hollywood movies, the law does not play a major role in the storyline of each. What is most interesting about this analysis is that ‘defending the planet’ does not present any prima facie legal issues and the authors do not overtly consider any of the legal barriers to protecting the planet, focusing more on the administrative and political processes in place that recognise a threat to humanity.

Although Hollywood has a fascination with nuclear weapons and stopping asteroids, scientists have suggested it would be unlikely that Bruce Willis’ character in Armageddon would have been successful in his approach. This would have been an opportunity to discuss the prohibition on ‘nuclear weapons or any other kind of weapons of mass destruction’ space and if any exceptions for the purposes of planetary protection could be reasonably sustained.

3 Small Satellites and Large Constellations

Many companies have already begun exploring the viability of large constellations of satellites to provide basic communications-based services. This is presenting one of the more pressing and contemporary issues facing the space sector moving forward. For example, SpaceX have received preliminary regulatory approval to launch 4425 small satellites to provide global internet services. This is in addition to a number of other companies that have sought approval for large constellations (albeit not as large as those of SpaceX). Despite these types of constellations being given regulatory approval, the authors raise a number of legal questions and concerns, some which would clearly fall into the ‘policy’ category but should not be ignored merely because they are not ‘legal’. It is well-acknowledged that this style of satellite deployment, alongside many of the advances in space technology, has been driven by the miniaturisation of technology and the corresponding decreases in initial costs.

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84 Ibid 235.
87 Outer Space Treaty art IV.
89 Lyall and Larsen, above n 10, 240.
Small satellites, many of which fall into the ‘CubeSat’ category, are designed to carry out a wide range of tasks, generally with a shortened expected life.91

As with tourism, the authors divide the issues and apply the relevant law accordingly, moving between treaties in a swift, accurate and concise manner. Of great significance is the references to debris and end-of-mission disposal, an issue that is of incredible importance when looking at small satellites, especially if they have short life spans.92

An extreme limitation of this chapter is its positioning. Right in the centre of the book, this chapter is not informed by the significant volume of commercial law that follows later in the book, making the analysis seem superficial and light. The chapter ticks the boxes when it comes to the relevant international law but seems to skim what will be the true limiting factors of any commercial venture: domestic law.

C The Space Environment

Many would not consider the space environment as a major factor that could influence how people operate in the domain. Environmental protection has increased in importance in recent decades, with it accurately recognised that ‘[i]t would be wrong to consider the law of the space environment as something separate, distinct and different from the concepts of terrestrial environmental law.’93 Of course the outer space environment faces different threats when compared to Earth, but nonetheless they have the ability to impact on the long-term viability of space activities and access to the domain for all who wish to use it. Unsurprisingly for an instrument drafted in the mid-1900s, there is no overt consideration of the space environment in the Outer Space Treaty. There are a number of more terrestrial concepts that the authors attempt to import into orbit and beyond through the article III mechanisms under the Outer Space Treaty.94 Of course, due to the nature of international law only binding parties if in treaty form unless a rule is custom,95 the majority of the discussion in this chapter is related to customary international law, and unlike some previous suggestions by the authors, there is little that could be considered controversial in their discussion.

90 CubeSats (cube satellites) are small satellites that are comprised of 10cm³ units. See California Polytechnic State University, CubeSat Design Specification (CDS) Rev 13 (6 April 2015) <http://www.cubesat.org/s/cds_rev13_final2.pdf>.
91 Lyall and Larsen, above n 10, 240–1, n 82.
92 Ibid 244.
93 Ibid 245.
94 Ibid 246.
Drawing on concepts from the *Trail Smelter Arbitration*\(^{96}\) and *Corfu Channel Case*,\(^{97}\) the authors suggest that despite the lack of sovereignty in orbit, states and other actors in space must not cause detriment to another’s activities. This assertion is then supported by drawing on a number of other instances of laws that prohibit the causing of harm to another despite ‘such declarations and statements [being] largely chronicles of aspirations and intentions’.\(^{98}\) The strongest restatement of an obligation to consider the environment cited by the authors comes from the 1996 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* Advisory Opinion by the International Court of Justice, where the majority clearly stated that

> [t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of International Law relating to the environment.\(^{99}\)

It is from this well-substantiated base that the authors launch into the more detailed transfer of environmental protections into outer space and the obligation to prevent contamination, congestion, and destruction of the environment. The authors do not stop here though; they quickly expand into the implications of geoengineering,\(^{100}\) contamination of the earth by extraterritorial elements,\(^{101}\) and pollution of orbit by debris.\(^{102}\) It is orbital pollution and debris that have the most immediate implications for space activities and this is why the authors delve into the most detail about this, exploring the current space traffic management arrangements (as this generally includes the tracking of active satellites and debris/defunct orbital equipment), voluntary debris mitigation guidelines, and the implications of each.

The space environment is not an element of significant focus for many and historically it has been ignored. Reflecting on both the nuances of long-standing international law and the need to protect the space environment, the authors have truly embraced the importance of this developing area of law.

D *What Do We Use Space For?*

The bulk of the book is taken up by a discussion of what outer space is actually used for: service provision. In three chapters, the authors discuss satellite communication and direct broadcasting, navigation systems, and remote sensing, with each going

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96 *Trail Smelter (United States v Canada) (Awards)* (1941) 3 1905 RIAA.
98 Lyall and Larsen, above n 10, 247.
100 Lyall and Larsen, above n 10, 258.
101 Ibid 252.
102 Ibid 264.
into great detail about not only the law relevant to each of those areas, but the bodies that have shaped the law and industries as they stand.

Drawing on state practice, international law, domestic law, and other persuasive instruments that exist, these central chapters explore the policy, administrative, and legal complications related to the daily and ordinary uses of outer space, the uses that are mostly overlooked by the ordinary person and will not be considered here in great detail due to the significant depth the authors consider the issues in.

IV MODERN SPACE: EXPLOITATION FOR ADVANTAGE

A Commercialisation and Commercial Law

Launches of commercial payloads are almost a weekly occurrence now — companies such as American SpaceX and United Launch Alliance consistently aim for increased launch frequency from their North American bases, while the French-based Ariane-Space, Indian ISRO, and New Zealand-based Rocket Lab add to the consistency of the launch industry. Although it is easy to marvel at the technological capability behind these endeavours, it is important to remember the presence of significant legal barriers. Just as nations are faced with highly restrictive international obligations, these companies must navigate complex domestic regulatory regimes while trying to remain profitable. It is easy to forget that rockets are incredibly expensive, making it difficult to break into the space industry without significant financial backing. Lyall and Larsen explore the issues that face commercial operators in remarkable detail in chapters 14 and 15, touching on the little considered issues of commercial financing and trade restrictions, and domestic laws that contemplate space respectively.

1 Finance in Space?

Funding is the grand equaliser of the commercial space industry. No matter the company structure, technology involved or innovative approach to launching, there is a significant cost involved in reaching orbit, generally in the tens of millions of dollars for contracting a large payload launch and the hundreds of millions (if not billions) of dollars to be able to develop rocket technology. The authors recognise this, and in a chapter that could have been incredibly dry, they comprehensively


104 SpaceX, Capabilities and Services <http://www.spacex.com/about/capabilities>.

cover the restrictions and primary international instruments that regulate financing of space activities and objects.

The authors introduce this part by recognising the importance of domestic law, that the law of where a company is incorporated, where they operate, or where they contract will always be of paramount significance and influence their ability to raise funds and conduct space activities.\textsuperscript{106}

When considering finance, the authors tackle, in a relatively concise manner, two main approaches; registration of security interests in space objects (or a company’s holdings) and capital raises, with the majority of the chapter considering the former due to the more solidified private international law in the area. As foreshadowed above, domestic law is not to be ignored, with the authors recognising its importance and the capability to register interests in company property in a large number of jurisdictions. Although the authors focus mainly on the United States Uniform Commercial Code, while briefly stopping by the more convoluted approach in Europe, the approach to describing the regimes makes it easy for any informed reader to draw analogies with their own domestic law.\textsuperscript{107} For example, it is clear to see how the Australian \textit{Personal Property Securities Act 2009} (Cth) can be used to allow companies to leverage the technology they are developing to raise funds.\textsuperscript{108}

This is where the domestic analysis ceases and the authors move to private international law, specifically the \textit{Cape Town Convention}.\textsuperscript{109} This optional convention established a set of international rules and mechanisms as to how interests in rail, aviation, and space assets are to be registered so as to protect a debtor’s rights when assets are moved between jurisdictions (or in the case of aviation and space assets, moved into regions outside of the jurisdiction of any state). The text of the Space Protocol to the Convention was agreed to in 2012 with a significant amount of pushback from the industry it sought to regulate.\textsuperscript{110} From the outset, as the authors do, it is important to note that for the protocol to come into force it needs 10 ratifications but at the time of publication, the book recorded only four.\textsuperscript{111}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{106} Lyall and Larsen, above n 10, 388.
\item\textsuperscript{107} Ibid 388–9.
\item\textsuperscript{108} \textit{Personal Property Securities Act 2009} (Cth). For those unfamiliar with the Australian \textit{Personal Property Securities Act}, it allows the registration of interests against property for a broad variety of tangible ‘goods’, ‘including satellites and other space objects’: s 10 (definition of ‘goods’).
\item\textsuperscript{111} Lyall and Larsen, above n 10, 393.
\end{enumerate}
\end{footnotesize}
This Convention provides groundwork for the international equivalent of a domestic register of interests while attempting to overcome the complexities associated with international mobility. The book thoroughly engages with issues related to registration of interests in space objects, the administrative backing behind such a system, and the broader compatibility with public international law.

Despite this, the authors note the variability in the space industry by raising the concerns of nearly 100 concerned parties from across the world and the complaints they made in a joint letter to the administering body of the Convention in 2012.\textsuperscript{112} It is here that the authors recognise the diversity of approaches in a commercial setting, that some companies will be capable of raising funds through shares, venture capital, or other investments that do not require security interests in space objects. The authors only cautiously look to why the space industry has rejected the Convention, acknowledging complaints as to the burden that may be imposed. What they do not do is extend their analysis beyond the primary evidence. While it is likely that many companies merely hold disdain for the scheme as it may hold them liable, internationally, for their debts, it is not an assertion that is made by the authors. Considering the reluctance of the industry to accept the \textit{Cape Town Convention} the authors clearly, and accurately, assert that it is likely that not all who enter the space sector can do so without security and that this Convention, when entering a more mature phase, will no doubt become useful.

2 \textit{Domestic Space Law}

Held until quite late in the book, Chapter 15 is titled ‘Commercial activities and the implementation of space law’. On its face this is slightly misleading, with the chapter more dedicated to examples of domestic space law, very much in the vein of chapters in a multiplicity of other books in the market.\textsuperscript{113} Where the authors have tried to expand upon the work of others is by including an introduction to the major obligations that need to be included in domestic instruments, much of which is explained in significant and intricate detail early within the book. What must be commended is the way in which the authors have intertwined practical examples, such as the on-orbit transfer of satellites between INTELSAT and New Skies NV,\textsuperscript{114} in a way that draws on the much larger and more complex analysis and interpretation introduced earlier in the text.

Recognising this, the authors skilfully provide an overview of a topic that could easily span hundreds of pages; providing a basic overview and context for the domestic space law of Australia, China, India, Russia, the United Kingdom, and the United States. The approach is relatively simple, drawing on real world and practical examples from these jurisdictions and highlighting the unique points of policy and law that exist in each. This is a relatively concise approach when compared to volumes such as von der Dunk’s \textit{Handbook of Space Law} that discusses in excess of 15 nations’ domestic space laws and policy.\textsuperscript{115} When comparing the two though,

\begin{flushright}
\textsuperscript{112} Ibid 394.
\textsuperscript{113} See, eg, von der Dunk, above n 5, 127.
\textsuperscript{114} Lyall and Larsen, above n 10, 417.
\textsuperscript{115} von der Dunk, above n 5, 127.
\end{flushright}
the detail is much more refined in the Lyall and Larsen volume, to the benefit of the casual reader and the more experienced space lawyer who needs an accurate, yet succinct, summary of major space laws internationally.

B Militarisation

A fact that is frequently forgotten when looking to the development of space activities is the inherent military character of its development. Whilst it would be misleading to say that outer space is completely ‘militarised’, it would be naïve to claim that all uses of orbit are commercial and possess a non-military purpose, a point the authors clearly articulate by saying that ‘almost all space activities can have a military aspect’. In many circles, outer space is referred to as the ‘high ground’, a concept the authors link with Sun Tzu’s *The Art of War* and the strategic advantages of occupying geographically higher positions in conflict. The authors articulate the benefit of orbit strategically, stating that

[a] country in possession of unique advanced space technology and with the will and means to use it for military purposes might achieve dominance over non-space-faring countries and otherwise impose its will.

Recognising this, the military uses of outer space interact with all other uses. Reckless militarisation jeopardises not only the safety of humankind on earth, but also access to the space domain itself. It is from here that the authors turn their mind to the restrictions that exist in space law.

In an effective analysis, the authors draw on broader international law to inform the position of military activities in outer space. Many academics, when approaching the question of whether military activity in outer space is permitted, start with the principle articulated in article IV of the *Outer Space Treaty*, that space is only to be ‘exclusively for peaceful purposes’. Departing from this custom, the authors begin with their assessment of international law more broadly, providing the history and context of military activities in outer space, and space-specific international law restrictions before they reach the question of whether the use of ‘peaceful purposes’ prohibits any military activity in outer space. This is justified by the need to first appreciate ‘the context of the technologies and actual use of space’ before any decision as to the lawfulness of military activities in outer space is made. Restricting the emphasis on the significance of the phrase, the authors adopt a practical and

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116 Lyall and Larsen, above n 10, 448 (emphasis added).
118 Lyall and Larsen, above n 10, 447.
119 Ibid.
120 *Outer Space Treaty* art IV.
121 Lyall and Larsen, above n 10, 468.
realistic approach to restating the law as it is, not as many other academics may wishfully interpret it to be.

Militarisation and military activities in outer space are discussed in a practical manner, linking the content with that already presented, using a building block approach. This chapter truly recognises the issues going forward by looking to the past actions of nations. In the current context of the private actor reigning supreme, it is recognised that space will not eternally be free of conflict and that the ‘interdependence of military and commercial policies’ may result in conflicting ideologies and eventual military engagements in the domain.122

C SETI

What is likely the most unique analyses of Lyall and Larsen’s entire volume is their inclusion of the legal issues related to the search for extraterrestrial intelligence (‘SETI’). Capitalising on what is now a clearly established approach of compounding areas of law to explore the legal issues in more depth, the authors consider the background of the search for extraterrestrial life, current scientific programs, and the interaction with international telecommunications law, the basic principles in the space treaties and the broader international law. Finally, they move into considering the documents that contemplate detection and first contact with extraterrestrial intelligence. So as not to spoil the content of the unique and engaging chapter, this review will not delve into the intricate detail, but merely remark that it has been constructed in an intuitive manner that exemplifies the positives of this book and its ability to progressively increase the complexity of the law considered, while ensuring it is conveyed in an accessible manner.

V Conclusion

As has been discussed throughout this review, space law is complicated and it faces many issues moving into the future. The second edition of Space Law: A Treatise does well to present the vast content of space law in a generally accessible and accurate manner, a difficult task when one acknowledges the vagaries of many components and the inconclusive nature of many doctrines, especially in the modern context. It clearly identifies many of the frequent practical issues with the law of outer space, while providing incredibly deep and intricate background to how the said law has been developed, while also acknowledging that many who write in this field are ignorant of the broader international law and contextual significance of the law of outer space.123 In most instances, the law has been portrayed in a well-accepted manner, with conflicting views recognised. There are times where the authors falter, but this is insignificant when compared to the broader content of their book, one which achieves their aim of providing a ‘fresco’ of space law that is accessible by a broad range of individuals, no matter their background.

122 Ibid 476.
123 Ibid 510.
I IntroductIon

In mid-2017, it emerged that several Federal parliamentarians may have been ineligible to be elected on account of their dual citizenship status by operation of s 44(i) of the Constitution. In Re Canavan,2 the High Court, sitting as the Court of Disputed Returns, found five of them ineligible. This case note interrogates the Court’s interpretation of s 44(i), and analyses the judgment with reference to its political context and its constitutional significance. It is argued that the Court has left unclear the question of how it will treat foreign law in respect of s 44(i), and that the problems which this case has highlighted might only be resolved by constitutional reform.

II The Political Context

A Background

In July 2017, two Greens senators, Scott Ludlam and Larissa Waters, resigned from the Senate, upon announcing that they were, respectively, New Zealand and Canadian citizens. Politicians soon traded blows. The Prime Minister accused the Greens of ‘careless[ness]’ with respect to their eligibility for nomination.3 But soon

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2. Re Canavan, Re Ludlam, Re Waters, Re Roberts [No 2], Re Joyce, Re Nash, Re Xenophon (2017) 349 ALR 534 (‘Re Canavan’).
3. David Penberthy and Will Goodings, Interview with Malcolm Turnbull, Prime Minister (Radio Interview, 19 July 2017) <https://www.malcolmturnbull.com.au/media/interview-on-5aa-adelaide>. References to the positions of parliamentarians are based on the state of affairs at the time the case was heard by the High Court.
enough, parliamentarians in other parties — including the ruling Liberal–National coalition — faced accusations that they too were ineligible.

These included the Deputy Prime Minister Barnaby Joyce and two Government Ministers, Senators Matthew Canavan and Fiona Nash. Crossbench senators Malcolm Roberts and Nick Xenophon were also in doubt. All five were referred to the Court of Disputed Returns, in addition to the two Greens who had already resigned.

B The Facts

Each parliamentarian had been put in their position of jeopardy because of some connection to a foreign state. The facts of these relations can be stated briefly.

Canavan was the grandson of Italian migrants. He discovered in July 2017 that ‘he may have been registered as an Italian citizen’ by his mother, despite never having taken any steps to acquire citizenship himself.

Ludlam acquired New Zealand citizenship upon being born in that country, to New Zealander parents, before moving with his family to Australia three years later.

Waters was born to Australian parents in Canada, and consequently became a Canadian citizen.

Roberts was born in India to a British father and Australian mother, and was registered as a ‘citizen of the United Kingdom and Colonies’. He was naturalised as an Australian citizen years later.

Joyce was born in New South Wales to a New Zealander father, and acquired New Zealand citizenship by descent.

Nash was born in Sydney to a Scottish father, who was a ‘citizen of the United Kingdom and Colonies otherwise than by descent’. At birth, Nash acquired ‘citizenship of the United Kingdom and Colonies’, which became ‘British citizenship’ in 1983.

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4 Commonwealth Electoral Act 1918 (Cth) s 376.
5 Re Canavan (2017) 349 ALR 534, 551 [75].
6 Ibid 552 [78].
7 Ibid 552 [76].
8 Ibid 554 [90].
9 Ibid 555–6 [94], [96]–[97].
10 Ibid 556–7 [100]–[101].
11 Ibid 556 [100].
12 Ibid 557 [105], 558 [109].
13 Ibid 558 [113], 559–60 [116]–[118].
14 Ibid 559–60 [117]–[118].
Xenophon was born in South Australia to a Cypriot father and a Greek mother, neither of whom had been naturalised as Australians at the time. He had renounced any rights to Greek or Cypriot citizenship in 2007. But Cyprus was a British possession when his father was born there; Xenophon therefore had claim to the status of ‘British overseas citizenship’ by descent.

The fact of dual citizenship was disputed only in respect of Canavan, Roberts, and Xenophon. The disputed questions of fact concerning Roberts were determined in a separate hearing, concluding that there was a ‘real and substantial prospect’ that Roberts was a British citizen. The statuses of Canavan and Xenophon fell to an interpretation of foreign law, as will be shown.

### III The Constitutional Bar to Election

Section 44 of the Constitution prescribes five categories of persons who ‘shall be incapable of being chosen’ to sit in Parliament. Subsection (i) concerns persons who are

under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or [are] … subject[s] or … citizen[s] or entitled to the rights or privileges of a subject or a citizen of a foreign power.

In *Re Canavan*, the Court followed the approach of the majority in *Sykes v Cleary*, finding that the ‘incapab[ility] of being chosen’ under s 44(i) attaches to the process of election, ‘of which nomination is an essential part’ The question which fell to the Court was therefore the following: were the persons referred by the Parliament ineligible at the time of nomination?

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15 Ibid 560 [121].
16 Ibid 560 [122].
17 Ibid 560–2 [123]–[129].
18 *Re Roberts* (2017) 347 ALR 600, 618 [103], 620 [116] (Keane J).
19 *Constitution* s 44(i) (emphasis added).
20 *Re Canavan* (2017) 349 ALR 534, 537 [3], citing *Sykes v Cleary* (1992) 176 CLR 77, 100–1, 108, 130–2 (‘*Sykes*’). In *Sykes* at 120–1, Deane J disagreed on this construction. He preferred a ‘narrow construction’ which would adjudge eligibility at the time of the ‘final step in the procedure for choosing the particular member’, being the ‘declaration of the poll’.
IV Competing Interpretations

A Mental Element?

The Court accepted the approach of the amicus curiae,21 which treated s 44(i) as though it had two limbs, being two severable bases for ineligibility:22

1. acknowledgement of allegiance to a foreign power; and

2. citizenship, or entitlement to the rights of citizenship, of a foreign power.

Three separate submissions invited what was termed a ‘substantial[]’ departure from the text of the Constitution.23 Their common principle was to imply a mental element into the second limb,24 meaning that the status of having, or being entitled to, foreign citizenship would not alone constitute ineligibility.

The Attorney-General’s approach required that citizenship was voluntarily obtained or retained — requiring some level of knowledge.25 The point was to distinguish between persons who were Australians by birth, and those who were naturalised.26 ‘[N]atural-born’ Australians must take active steps to obtain foreign citizenship in order to be disqualified.27 But ‘naturalised Australian[s] who had not taken all reasonable steps to renounce a foreign citizenship would be deemed to have voluntarily obtained [it]’.28 This sought to disqualify naturalised citizens like Roberts and Ludlam, who mistakenly but ‘honestly believed that naturalisation had involved renouncing the[ir] foreign citizenship’.29

21 An amicus curiae was appointed ‘to act as contradictor on issues of law in the references concerning Senators Canavan, Nash and Xenophon’: Re Canavan (2017) 349 ALR 534, 538 [7]. Submissions as amicus were made by Geoffrey Kennett SC and Brendan Lim, instructed by the Australian Government Solicitor. See Amici Curiae, ‘Annotated Submissions of the Amici Curiae’, Submissions in Re Canavan, Re Nash, Re Xenophon, Nos C11, C17, C18/2017.

22 Re Canavan (2017) 349 ALR 534, 540–1 [20]–[23].

23 Ibid 539 [13].

24 Ibid 539–40 [14]–[19].

25 Ibid 539 [14]; Attorney-General (Cth), ‘Annotated Submissions of the Attorney-General of the Commonwealth’, Submission in Re Canavan, Re Ludlam, Re Waters, Re Roberts (No 2), Re Joyce, Re Nash, Re Xenophon, Nos C11, C12, C13, C14, C15, C17, C18/2017, 26 September 2018, 12 [32], 20–2 [52]–[59].

26 Re Canavan (2017) 349 ALR 534, 539 [15].

27 Ibid.

28 Ibid (emphasis added).

29 Ibid.
Submissions for Joyce and Nash,\(^{30}\) and Ludlam and Waters,\(^{31}\) also argued for a mental element, along similar lines.

But the Court, in a single unanimous judgment, rejected any such implication. The Court preferred the argument of the amicus curiae, which it described as a ‘textual’\(^{32}\) reading of the section ‘close[] to [its] ordinary and natural meaning’.\(^{33}\) The section contained no mental element, which would ‘open up conceptual and practical uncertainties’.\(^{34}\)

**B A Limited Exception: the Constitutional Imperative**

Nevertheless, the Court was prepared to accept one limited exception, being the ‘constitutional imperative … that an Australian citizen not be prevented by foreign law from participation in representative government where … the person has taken all steps that are reasonably required … to renounce his or her foreign citizenship.’\(^{35}\)

The ‘constitutional imperative’ seeks to avoid a case in which a person is ‘irremediably disqualified’ under s 44(i).\(^{36}\) This followed authority in *Sykes*, in which the plurality said it was important not to give ‘unqualified effect’ to foreign law so as to disqualify persons ‘on whom there was imposed involuntarily … a continuing foreign nationality, notwithstanding that they had taken reasonable steps to renounce [it]’.\(^{37}\) The exception anticipated ‘extreme examples of foreign … citizenship being foisted upon persons against their will’\(^{38}\)

**C The Reasonable Steps Test**

A majority in *Sykes* held that ineligibility under s 44(i) fell to whether the person had ‘taken all reasonable steps to divest himself or herself of any conflicting allegiance’.\(^{39}\) This was an interrogation of reasonableness into both the ‘circumstances of the particular case’ and the ‘requirements of the foreign law’.\(^{40}\)

The Court in *Re Canavan* rejected submissions by the Attorney-General which argued that, if a person did not know that they were a foreign citizen, then ‘[t]aking

\(^{30}\) Ibid 539 [16].
\(^{31}\) Ibid 539–40 [17].
\(^{32}\) Ibid 539 [13].
\(^{33}\) Ibid 540 [19].
\(^{34}\) Ibid 548 [54].
\(^{35}\) Ibid 539 [13].
\(^{36}\) Ibid 545 [43].
\(^{38}\) Ibid 131 (Dawson J).
\(^{39}\) Ibid 107 (Mason CJ, Toohey and McHugh JJ). See also Brennan J at 114, Deane J at 128, Dawson J at 131, Gaudron J at 139.
\(^{40}\) Ibid 108 (Mason CJ, Toohey and McHugh JJ), 128–130 (Deane J), 131 (Dawson J).
no steps [would be] reasonable’. It was cautioned that ‘[s]ection 44(i) is cast in peremptory terms’. Put simply, ignorance is not bliss under s 44(i).

D The Interpretation of Foreign Law

The Court’s strict reading suggested that foreign law alone would be determinative of eligibility under s 44(i). Questions of foreign law are conventionally treated in private international law as ‘question[s] of fact of a peculiar kind’. But the ‘constitutional imperative’ recognised that, in some ‘extreme’ cases, foreign law would have to be disregarded.

In Sykes, Brennan J suggested that ‘if a foreign power were mischievously to confer its nationality on members of the Parliament so as to disqualify them all, it would be absurd to recognize the foreign law conferring foreign nationality.’ A law of this kind would be ‘extreme’ because it would exceed what international law recognises as the limits on a state’s jurisdiction to legislate on the subject of nationality.

As for cases that are not extreme, a majority in Sykes held that unilateral declarations of renunciation were insufficient where foreign law availed a citizen of a way of renunciation that was reasonable. The foreign legal process of renunciation would have to be followed. But Deane and Gaudron JJ, both in dissent, took the view that an oath of allegiance to Australia upon naturalisation was enough.

The dissenting view in Sykes did not meet the support of the Court in Re Canavan: ‘The approach taken by Deane J draws no support from the text and structure of s 44(i)’. The Court was adamant that — provided the foreign laws were reasonable — renunciation would be determined by reference to the foreign law. But it was reflected...
that reasonable circumstances ‘may be contrasted, for example, with a requirement of a foreign law that the citizens of the foreign country may renounce their citizenship only … in the territory of the foreign power’. 51 Such a law would not operate to disqualify an Australian citizen under s 44(i) ‘if his or her presence within that territory could involve risks to person or property’.52

In Re Canavan, as in Sykes, the Court showed that foreign law was not to go unexamined in all cases. Both the ‘reasonable steps’ test and the ‘constitutional imperative’ required the Court to consider the reasonableness of the requirements of foreign citizenship law.

E The Judgment

Nevertheless, the eligibility of most respondents did not involve more than the simple application of foreign law.

Being citizens of New Zealand53 and Canada,54 respectively, Ludlam and Waters were ineligible to be elected. They had rightly resigned.

Roberts was ineligible too. He ‘knew that there was at least a real and substantial prospect that … he remained … a citizen of the United Kingdom’.55 His only attempt at renunciation was to send a unilateral declaration by email, to an inappropriate authority, three days after his nomination.56 This was ineffective under British law.57

Similarly, the declarations of renunciation by Joyce and Nash of their respective New Zealand58 and British59 citizenships came too late.60 They were both ineligible at the time of nomination.61

The cases of Canavan and Xenophon, however, demanded greater scrutiny of foreign law.

51 Ibid 551 [69].
52 Ibid.
53 Ibid 554 [90].
54 Ibid 555–6 [96]–[98].
55 Re Canavan (2017) 349 ALR 534, 557 [102]; Re Roberts (2017) 347 ALR 600, 613–4 [73]–[74].
56 Re Roberts (2017) 347 ALR 600, 621 [119].
57 Ibid 617 [98], 618 [103].
58 Re Canavan (2017) 349 ALR 534, 558 [109]–[110].
59 Ibid 560 [118]–[119].
60 Ibid 558 [108], 560 [119].
61 Ibid 557 [106].
As concerned Canavan, the Court accepted evidence that a ‘reasonable interpretation of Italian law’ meant he was not a citizen of Italy.62 Canavan’s mother registered him in Italy as an ‘Italian[] Resident Abroad’.63 But the Court decided that this could ‘not per se be considered a recognition of Italian citizenship’.64 To do so would allow ‘Italian citizenship by descent to extend indefinitely’ if successive generations could register their children as citizens without them having done a thing.65 Canavan retained his place in the Senate.

In respect of Xenophon, the Court accepted that he was a ‘British overseas citizen’ at nomination.66 The problem was that this carried few rights or obligations; the evidence termed it a ‘residuary’ of colonial British citizenship.67 The Court held that ‘British overseas citizenship’ did ‘not confer the rights or privileges of a citizen as that term is generally understood’.68 It declined to treat Xenophon as a foreign citizen. He was not ineligible.

The parliamentary places of the five respondents rendered ineligible — Nash, Roberts, Ludlam, Waters, and Joyce — were vacant by operation of s 45(i) of the Constitution.69 It was ordered that the Senate places be filled by a ‘special count’ of the ballots cast, and a by-election was to be held in Joyce’s vacated seat, New England,70 which Joyce himself won.71

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62 Ibid 553–4 [85]–[86].
63 Ibid 552 [78].
64 Ibid 553 [84].
65 Ibid 554 [86].
66 Ibid 558 [131].
67 Ibid 562 [131].
68 Ibid 563 [134].
69 Ibid 563–4 [136]–[139].
V Comment

Section 44(i) gave us what has been called ‘the world’s most ridiculous constitutional crisis’. The provision is to some ‘an ass’, to others ‘racist’, and to a more reserved commentator, a mere ‘foll[y]’. Whatever it is, it had from July 2017 until the time of writing thrown 17 members out of the Parliament. A second decision, Re Gallagher, followed Re Canavan in finding another ineligibility, which spurred further resignations.

The High Court sought to resolve a ‘dramatic’ political crisis. Instead, its judgment created a constitutional one.

A Subconscious Disloyalty?

It is normal in statutory interpretation to look to the purpose of a law in order to clarify its meaning. Section 44(i) is directed to the ‘split allegiance’ of members of Parliament. It seeks to ensure that elected representatives have a ‘single-mindedness for the welfare of the community’. This purpose provided the basis for submissions which urged an interpretation guided by some criterion of voluntariness or knowledge.

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74 Kate Galloway, ‘Reform Constitution to Give Voice to all’, Eureka Street, 19 November 2017, 44.


78 McKenzie-Murray, above n 75.

79 See, eg, Acts Interpretation Act 1901 (Cth) s 15AA.


But it was cautioned by the amicus curiae that the section’s purpose must be determined from *within* the text, not on the basis of ‘some *a priori* assumption’.83 They argued that a ‘second’ purpose was to ‘avoid[] the risk or appearance of divided allegiances’.84

The Court accepted this interpretation.85 It adopted what the Attorney-General called an ‘almost brutal literalism’.86 That it is not possible to have a *subconscious* allegiance to a foreign state was irrelevant. Section 44(i) was concerned not with ‘actual allegiance as a state of mind’, but with the ‘status of citizenship’,87 like a status offence in criminal law.88

The determination of this status, however, raises further questions about the Court’s interpretations of foreign law.

**B Foreign Law**

Both the ‘reasonable steps’ test and the ‘constitutional imperative’ show that there are some foreign laws that the Court will refuse to apply on account of their unreasonableness. But even when it was willing to apply and interpret foreign law, the Court did not strictly defer to the word of the law as it did with s 44(i).

In respect of Italian law, the Court made what Anne Twomey called a ‘particular interpretative choice’.89 It noted the ‘potential for Italian citizenship by descent to extend indefinitely’.90 It then decided that some more ‘positive step[]’ was required

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84 Ibid 3 [14] (emphasis added).

85 *Re Canavan* (2017) 349 ALR 534, 540 [19].


90 *Re Canavan* (2017) 349 ALR 534, 554 [86].
for Canavan to become an Italian citizen,\textsuperscript{91} beyond his mother having registered him on a municipal list.

The Court seems to have accepted the submission which described the Italian law of citizenship by descent as ‘exorbitant’.\textsuperscript{92} But the right to citizenship by descent — \textit{jus sanguinis} — is also the law of other many countries.\textsuperscript{93} It could not be reasonably suggested that laws which confer citizenship \textit{jure sanguinis} exceed the nationality jurisdiction of a state. Indeed, it is one of the bases of citizenship law in most European states.\textsuperscript{94} This does not seem to have dismayed the Court in \textit{Re Canavan}.

The Court was also willing to look beyond the word of British law when it interpreted Xenophon’s ‘British overseas citizenship’ as though it were no citizenship at all.\textsuperscript{95} This was a choice to put substance above form in dealing with foreign law, though the Court had done the exact opposite in respect of s 44(i) itself.

In both examples, the Court’s interpretive choices avoided results which it considered undesirable. The problem with the Court’s reasons in respect of Canavan and Xenophon is that neither of the Italian or British laws can fairly be said to be of the ‘extreme’ or ‘absurd’ type envisaged by Brennan J in \textit{Sykes}.\textsuperscript{96}

It is one thing to take a view that a foreign law is ‘exorbitant’; it is another to say, as the Court did, that it should not be given effect in Australia. The Court has left entirely unclear the basis on which it will defy the word of foreign law. If its aim was

\textsuperscript{91} Ibid.

\textsuperscript{92} Twomey, above n 89, 16; Transcript of Proceedings, \textit{Re Canavan, Re Ludlam, Re Waters, Re Roberts (No 2), Re Joyce, Re Nash, Re Xenophon} [2017] HCATrans 201 (12 October 2017) 181; cf Attorney-General (Cth), ‘Annotated Submissions of the Attorney-General of the Commonwealth’, Submission in \textit{Re Canavan, Re Ludlam, Re Waters, Re Roberts (No 2), Re Joyce, Re Nash, Re Xenophon}, Nos C11, C12, C13, C14, C15, C17, C18/2017, 26 September 2018, 1–2 [5]–[6].

\textsuperscript{93} The Italian law of descent is based on the ancient principle of \textit{jus sanguinis}, which is a common basis of the citizenship law of many countries. It is also the law of at least two other countries with significant diaspora communities in Australia: Greece and Ireland. See, eg, Spyridon Vrellis, \textit{Private International Law in Greece} (Kluwer Law International, 2011) 174; Siobhán Mullally, ‘Citizenship and Family Life in Ireland: Asking the Question “Who Belongs”?’ (2005) 25 \textit{Legal Studies} 578.


\textsuperscript{95} \textit{Re Canavan} (2017) 349 ALR 534, 563 [134].

\textsuperscript{96} \textit{Sykes} (1992) 176 CLR 77, 113 (Brennan J).
to provide ‘certainty’, the Court’s interpretations of foreign law only raised more questions.

C Constitutional Problems

One such question was whether Minister Josh Frydenberg was ineligible for being a Hungarian citizen by descent. Frydenberg’s Jewish mother was born stateless in the Budapest ghetto. It was a country that, the Prime Minister protested, ‘would have pushed them into the gas chambers had … the war [not] ended’. To find Frydenberg ineligible would add legal insult to historical injury. Frydenberg’s status was not referred to the High Court. Still, his case shows the potential conflict between the values of s 44(i), as expressed by the Court’s interpretation in Re Canavan, and those of Australian society.

The Court certainly had its mind turned to the values of the Constitution. It defended its strict reading against the uncertainties of a mental element, which would be ‘apt to undermine stable representative government’. In this case, the Court followed an approach taken in two other s 44 cases that ‘expanded, rather than narrowed, the potential circumstances in which s 44 applies’. The Court decorated its judgment in the language of democracy, purporting to be its defender against the unscrupulousness of politicians.

But does dual citizenship actually undermine the integrity of a democratic representative? This is, of course, a question of whether s 44(i) is a good law, not a question of how it should be interpreted. Reform, therefore, has attracted considerable support. It has since been concluded by a Parliamentary Committee that there

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97 Re Canavan (2017) 349 ALR 534, 546 [48]. See also the Court’s description of the alternative submissions as inviting ‘uncertainty and instability’ at [19].


99 Re Canavan (2017) 349 ALR 534, 548 [54].

100 Re Day (No 2) (2017) 343 ALR 181; Re Culleton (No 2) (2017) 341 ALR 1.

101 Twomey, above n 89, 13.

102 The Court’s judgment makes many appeals to the ‘system of representative and responsible government established under the Constitution’: Re Canavan (2017) 349 ALR 534, 545 [39], [43]–[44], 546 [48], 548 [54], 550 [67].

is ‘no viable alternative other than amending the Constitution’\textsuperscript{104} to repeal ss 44–5 ‘in their entirety’.\textsuperscript{105}

Australia today is very different to what it was at Federation. Forty nine per cent of Australians were either born abroad — in a diverse list of countries — or have at least one foreign-born parent.\textsuperscript{106} The repeal of s 44(i) would acknowledge that a sense of supranational belonging, which may take legal form as a second citizenship, does not undermine the integrity of someone’s Australianness.

\section*{VI Conclusion}

The broad question for the High Court in \textit{Re Canavan} was essentially ‘what role does foreign law play in determining who is eligible to participate in Australian democracy?’ In my analysis, I have tried to show that the Court has left that unclear because of its treatment of foreign law. To a flawed question, the Court gave a flawed answer. What is clear, however, is that \textit{Re Canavan} is one of several recent judgments in which the Court has looked poorly upon attempts to loosen the Constitution’s prohibitions on certain classes of electoral nominee. The most one can hope is that the authority of \textit{Re Canavan} will have its life cut short by the repeal of s 44(i). But, given the difficulty of constitutional reform, that might be a false hope.

\textsuperscript{104} Joint Standing Committee on Electoral Matters, above n 103, 98 [5.23].

\textsuperscript{105} Ibid 96 [5.6].

I Introduction

The special case of *Brown v Tasmania* required the High Court of Australia to consider the constitutional validity of the *Workplaces (Protection from Protesters) Act 2014* (Tas) (‘Protestors Act’), which enacted numerous anti-protesting provisions in relation to forestry land in Tasmania. The plaintiffs, Dr Bob Brown and Ms Jessica Hoyt, contended that numerous provisions impermissibly burdened the implied freedom of political communication, and were therefore invalid. The majority found all the impugned provisions invalid, whereas Gordon J partially dissented in finding only one provision invalid, and Edelman J fully dissented. The High Court was presented with an opportunity to clarify the relevant test for validity in implied freedom cases, particularly the relevance of structured proportionality testing as established in *McCloy v New South Wales*. The case also presented the first opportunity in 20 years for the High Court to thoroughly examine how and in what contexts the implied freedom protects political communication that takes the form of protest. Conclusively, the test for validity remains the test established in *Lange v Australian Broadcasting Corporation*, as restated, with a slim majority affirming proportionality testing as a viable analytical tool. Justice Gageler and Justice Gordon voiced reservations and concerns about proportionality testing, thus diminishing the ability for *Brown* to establish strong authority on the matter. Whether proportionality testing is suitable to the Australian constitutional system remains contested and is likely to be subject to continuous scrutiny. Meanwhile, the decision confirms that protest and physical assembly are protected by the implied freedom, although does not entirely explain when the freedom is enlivened.
II Factual Background

The plaintiffs, Dr Bob Brown and Ms Jessica Hoyt, were at different times present in the Lapoinya Forest to protest and raise public awareness of logging. Both were directed to move by police who believed they were protesting in an area where doing so was prohibited by the *Protestors Act*. They were subsequently arrested and charged: Dr Brown was charged under s 8(1), while Ms Hoyt was charged under s 6(4). Although the charges were later dropped because of a lack of evidence that the plaintiffs had actually entered a prohibited area (and thus they were not in fact ever subject to the *Protestors Act*), the validity of the *Protestors Act* was challenged on the ground that it impermissibly burdened the implied freedom of political communication.

A The Challenged Provisions

A protestor is defined by the *Protestors Act* as a person engaging in a ‘protest activity’, on ‘business premises’ or in a ‘business access area in relation to business premises’, in the furtherance of a specified issue.5 ‘Business premises’ includes any forestry land premises declared to be ‘permanent timber production land’ under the *Forest Management Act 2013* (Tas) (‘FMA’) where ‘forest operations’, including planting trees, quarrying, burning off and land clearing, are carried out.6 A ‘business access area’ is land ‘outside business premises’, such as a footpath or road, that must be traversed to access the entrance or exit to a business premise.7

Section 6 prohibits any conduct that ‘prevents, hinders or obstructs the carrying out of a business activity’ or hinders access to an entrance or exit of the business premises or business access area if the protestor had actual or imputed knowledge that the action would have that effect.8 Police officers have wide powers to direct a person or group to leave,9 or physically remove them,10 if the police officer ‘reasonably believes’ they are conducting protest activities in business premises or business access premises. The police have powers of arrest under s 13(1). Section 8(1) provides that a person must leave a business premises after being directed by a police officer, and must not re-enter that premises for four days. Part 4 deals with penalties.

While the constitutional validity of the *FMA* was not questioned, an understanding of its provisions was relevant to the question of the validity of the *Protestors Act*.11

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5 *Protestors Act* s 4.
6 Ibid ss 3, 5.
7 Ibid s 3.
8 Ibid ss 6(2)–(3).
9 Ibid ss 11(7)–(8).
10 Ibid s 13(3).
Under the FMA, a ‘forestry manager’ can, by issuing verbal notices or erecting signs, designate an area as being prohibited from public entry.\(^{12}\)

**B The Issues Before the High Court**

The defendant abandoned their challenge to the plaintiffs’ standing.\(^{13}\) Consequently, the primary issue before the High Court was whether the Protestors Act impermissibly trespassed on the implied freedom. This required the High Court to engage with the question of what the correct test for a breach of the implied freedom is, and in what contexts the implied freedom applies to assembly and protest.

**III The Decision**

By a 5:2 majority, the High Court held that numerous provisions,\(^{14}\) including those mentioned above, were invalid. In reaching this conclusion, the Court diverged in its application of the restated implied freedom test.

**A The Implied Freedom Test**

In the absence of express individual rights, the High Court has implied a freedom of political communication from the structure of the Constitution, consistent with the maintenance and preservation of representative and responsible government.\(^{15}\) The implied freedom is not an individual right nor is it absolute, but rather operates as a limit on legislative power.\(^{16}\) A two-limb test was developed in Lange,\(^{17}\) further refined in Coleman v Power,\(^{18}\) to analyse whether a law impermissibly burdens the implied freedom. The first limb of the test was restated in McCloy:

1. Does the law effectively burden the freedom in its terms, operation or effect?

If ‘no’, then the law does not exceed the implied limitation and the inquiry as to validity ends.\(^{19}\)

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\(^{12}\) FMA ss 9, 21, 22, 23.


\(^{14}\) Protestors Act ss 6(1)–(4), 8(1), 11(1)–(2), 11(6)–(8), 13, pt 4.


\(^{17}\) (1997) 189 CLR 520, 567.


The second limb has been subject to greater controversy, exacerbated by the majority judgment in *McCloy*, which imported a three-step proportionality methodology requiring analysis of suitability, necessity and adequacy in balance.\(^{20}\) The reformulation was later critiqued for altering the ‘traditional formulation’,\(^{21}\) thus *Brown* provided the High Court with an opportunity to clarify its position.

The plurality accepted the Attorney-General’s invitation\(^{22}\) to restate the latter part of the *Lange* test adopted by the majority in *McCloy*:\(^{23}\)

The commencing words of Questions 2 and 3 stated in *McCloy* should read:

2. If ‘yes’ to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

3. If ‘yes’ to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?\(^{24}\)

In restating the test, the plurality clarified that compatibility testing of the purpose occurs prior to compatibility testing of means, which is incorporated in the later analysis of whether the law is appropriate and adapted.\(^{25}\)

The submission by the Attorney-General for Queensland (intervening) that proportionality testing was not appropriate in Australia, and that *McCloy* should be reopened, was not accepted.\(^{26}\) Instead, the plurality and Nettle J confirmed the use of proportionality testing as a useful *tool*, not a *test*, and affirmed that the *Lange* test, as restated, remains the core test in assessing validity.\(^{27}\)

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25 Ibid. Reference to ‘responsible government’ disappeared from the test as restated in *McCloy* (2015) 257 CLR 178, but was re-inserted by the plurality in *Brown*: at 363–64 [104].
B The Validity of the Protesters Act

1 The Plurality

The joint judgment took the defendant to have accepted that the law burdens the freedom.28 In affirming the McCloy proportionality methodology, the plurality engaged in the sequential analysis of suitability, necessity and adequacy in balance; however, the plurality concluded their analysis prior to reaching the final, and most controversial, step in the inquiry. As s 8 significantly diverged from the purpose of the Protesters Act by focusing solely on deterring the conduct of protesters,29 and s 11 operated as a ‘blanket exclusion’, both provisions failed the test of suitability.30 Section 6 and the remaining provisions passed the test of suitability, but failed the test of necessity,31 which required consideration of ‘alternative, reasonably practicable, means of achieving the same object’ in a less restrictive way.32 After comparing the operation of the Protesters Act with the pre-existing legal framework, namely the FMA, their Honours held that the Protesters Act ‘operates more widely than its purpose requires’ and was therefore not necessary.33 The vagueness of the legislation was crucial to this finding. Due to the ambiguities inherent in the practical determination of where ‘business premises’ and ‘business access areas’ begin and end, their Honours held that it was possible for police officers to mistakenly remove lawful protestors who had not in fact entered land covered by the Protesters Act.34 In Brown, it was not contested that both plaintiffs had been wrongfully arrested by police officers who mistakenly thought the plaintiffs were on land covered by the Protesters Act.35

2 Justice Nettle

Justice Nettle has previously refrained from having to ‘delve into strict proportionality’.36 However, in this instance, after determining the provisions to be both suitable and necessary,37 his Honour concluded that the provisions were invalid on the basis that they failed the test of adequacy in balance. Setting a high threshold for whether a law was inadequate in balance, Nettle J noted that a provision that is both suitable and necessary should not be deemed inadequate in balance unless its burden is “grossly disproportionate” to, or as otherwise going “far beyond”, what can reasonably be

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29 Ibid 371 [135].
30 Ibid 371 [135]–[136].
31 Ibid 371–73 [138]–[146].
32 Ibid 371–72 [139].
33 Ibid 372–73 [140]–[146].
34 Ibid 355–56 [73].
conceived of as justified in the pursuit of the legitimate purpose.\(^3^8\) Applying this test, Nettle J concluded the impugned provisions collectively provided ‘very broad-ranging and far-reaching means’,\(^3^9\) which created a burden ‘grossly disproportionate to the achievement of the stated purpose of the legislation’.\(^4^0\) Given the interlinked nature of the provisions, severance was not an option.\(^4^1\)

3 Justice Gageler

Justice Gageler ultimately found the provisions invalid, reaching this conclusion without recourse to proportionality testing. After characterising the burden as ‘direct, substantial and discriminatory’,\(^4^2\) his Honour reiterated previous sentiments that the ‘level of scrutiny appropriate’ for a law that imposes a burden on the implied freedom lies along a ‘spectrum’.\(^4^3\) In the present case, Gageler J held that the provisions required ‘very close scrutiny’ as they ‘operate in their terms to target action engaged in for the purpose of political communication’ and impose a ‘significant practical burden’.\(^4^4\) Justice Gageler considered that the ‘requisite analysis’ involved examination of whether the impugned provisions had a ‘compelling purpose’ followed by an ‘examination of whether the burden they impose on political communication in pursuit of such a purpose might be justified as no greater than is reasonably necessary to achieve such a purpose’.\(^4^5\) His Honour found the provisions both narrower and broader than their legitimate purpose: the ‘underinclusiveness’ of ss 6 and 8, the immediate criminal consequence of ss 8(1) and 6(4), and the broad police discretion in ss 11 and 13.\(^4^6\) Conclusively, the burden was ‘greater than is reasonably necessary’ and in fact ‘nothing short of capricious’.\(^4^7\)

4 Justice Gordon

Justice Gordon held that the provisions (save for s 8(1)(b)) were valid, resisting the adoption of strict proportionality testing. Consequently, Gordon J found it ‘difficult to see how the provisions are not reasonably appropriate and adapted.’\(^4^8\) Therefore, her Honour held that it was ‘not necessary (or helpful) to consider’ the tests of necessity

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\(^3^9\) Brown (2017) 261 CLR 328, 423–24 [292].

\(^4^0\) Ibid 425 [295].

\(^4^1\) Ibid 425–26 [296]–[297].

\(^4^2\) Ibid 389 [199].

\(^4^3\) Ibid 389–90 [201], citing Tajjour v New South Wales (2014) 254 CLR 508, 580 [151].

\(^4^4\) Brown (2017) 261 CLR 328, 390 [203].

\(^4^5\) Ibid 391 [206].

\(^4^6\) Ibid 394–97 [220]–[232].

\(^4^7\) Ibid 396–97 [230]–[232].

\(^4^8\) Ibid 464 [426].
or adequacy in balance. Justice Gordon further warned that elevating ‘necessity’ and ‘adequate in balance’ as ‘determinative’ tests would mark ‘a departure from the existing stream of authority’.50

Regarding the validity of the Protestors Act, Gordon J found that while the laws were directed specifically to protestors, the sections (other than s 8(1)(b)) only applied to conduct that was already unlawful. Justice Gordon focussed on the powers of the Forest Manager under the FMA, as well as the common law of nuisance and trespass.51 Her Honour held that any protest prohibited by the Protestors Act would already either be unlawful under the FMA, or would amount to trespass on Crown land.52 Justice Gordon therefore held that the laws were appropriate and adapted to serve a legitimate purpose. Additionally, in contrast to the opinion of the majority, Gordon J stated the potential misapplication of the provisions by police officers and the difficulty in identifying the geographical bounds of the Protestors Act was a matter of construction and application, therefore not relevant to the inquiry as to whether the Protestors Act is invalid for impermissibly burdening the implied freedom.53

In contrast, Gordon J held that s 8(1)(b) lacked an object compatible with the implied freedom. As s 8(1)(b) prohibits a person from entering a ‘business access area’ regardless of what they intended to do, the provision did not prohibit conduct that was already unlawful.54 Further, the draconian nature of the penalties meant the provision was not appropriate and adapted to achieving any constitutionally permissible purpose.

5 Justice Edelman

Refraining from participating in the debate surrounding proportionality testing altogether, Edelman J considered the provisions valid in their entirety after engaging in a process of statutory interpretation.55 Justice Edelman held that ‘business access areas’ and ‘business premises’ are to be construed narrowly as areas either marked by ‘signs, barriers, or other notices prohibiting entry’ or subject to an oral notice by a Forest Manager exercising their powers under the FMA.56 On this construction, anyone entering ‘business access areas’ or ‘business premises’ to conduct a protest would already be criminally liable for doing so under the FMA. In this way, his

49 Ibid 464 [427]–[428].
50 Ibid 478 [479].
51 Ibid 451 [379].
52 Ibid 443 [357].
53 Ibid 428–29 [307], 442–43 [356], 458–59 [408]. This opinion was echoed by Edelman J: at 488 [509].
54 Ibid 429 [310].
55 Ibid 480–82 [487]–[492], 488–502 [510]–[555].
56 Ibid 481–82 [490]; see FMA ss 21, 22, 23.
Honour dissented as to the interpretation of the *Protestors Act* by the majority of the Court.

Justice Edelman advocated that the fundamental role of Australian Courts is to construe legislation and engage in methods of statutory interpretation to resolve issues of uncertainty and vagueness. As such, his Honour reiterated that the United States doctrine of vagueness has no equivalent in Australian constitutional law.

**IV Comment**

The decision in *Brown* has implications on both a theoretical and practical level. The High Court’s engagement, or lack thereof, with the analytical tool of strict proportionality in implied freedom cases was illuminated in the respective judgments. Likewise, while the decision confirms that the implied freedom protects political communication that takes the form of protest, the potential limits on the operation of the implied freedom in this context remain uncertain.

**A Structured Proportionality**

Incorporating proportionality testing into cases involving the implied freedom has been applauded for enhancing transparency, and providing ‘welcome development’ within an area ‘plagued by confusion’. Proportionality has a long history of relevance in the law, with fundamental developments galvanised by international scholars and the German constitutional system. However, whether it is suited to Australia’s constitutional context is debatable.

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57 *Brown* (2017) 261 CLR 328, 479–81 [484]–[487].

58 Ibid 486–88 [505]–[509]. See also ibid 469–70 [447]–[448] (Gordon J), 373–74 [147]–[151] (Kiefel CJ, Bell and Keane JJ).


1 A Different Constitutional Context

Whilst proportionality tests have assumed a useful place in other areas of Australian law including criminal law and sentencing theory, Australia has refrained from elevating proportionality testing, particularly strict proportionality, to the status of a constitutional principle. Justice Gageler in the present case described it as ‘a tool of analysis, not [a] constitutional principle.’ His Honour has previously expressed that he is ‘not convinced that one size fits all’ in that the ‘standardised’ tests of suitability and necessity would not be appropriate to all laws which impose a restriction on the implied freedom. This concern was echoed in the present case by Gordon J, who further stated that the approach ‘does not reflect the common law method of legal reasoning’.

The High Court has acknowledged that this analytical method ‘has been developed and applied in a significantly different constitutional context.’ Justice Gordon elaborates upon this reservation, noting proportionality testing has been employed in countries that have express individual rights; however, Australia does not have a bill of rights. This point was also reflected in the Attorney-General for Queensland’s submission that proportionality testing is ‘not an apt test’ given Australia does not have ‘prescribed human rights’. As noted above, the implied freedom is neither an absolute nor individual right, and these foundational propositions demonstrate the ‘importance of adopting criteria that are “sufficiently focused adequately to reflect the reasons for the implication of the constitutional freedom”’. Justice Gordon cautioned that recognising the ‘balancing’ stage of proportionality as the ‘most important’, as is the case in some international jurisdictions, would ‘mark a fundamental shift in the nature of the inquiry’ in Australia.

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61 See Kiefel, above n 60, 85.
62 Compared to other constitutional countries including Canada, New Zealand and Germany: Kiefel, above n 60, 86.
64 McCloy (2015) 257 CLR 178, 235 [142].
67 Brown (2017) 261 CLR 328, 466 [433].
71 Brown (2017) 261 CLR 328, 467 [437].
2 Importing Value Judgments

The element of ‘value judgment’ which strict proportionality necessarily encompasses was of significant concern to Gordon J. Her Honour was of the mind that ‘it remains unclear just how the value judgments that are a part of the balancing task described in McCloy are to be made’. Arguably, the lack of guidance is simply due to the modernity of this analytical tool in implied freedom cases — it has only recently been afforded legitimacy in McCloy and Brown. In the present case, Nettle J is the only member of the Court to engage with applying the test of strict proportionality, and thus provides the only authoritative guidance as to its application. Given the common law ‘proceeds incrementally’ it is realistic that ‘one should not expect a single judgment to provide all the answers.’ However, in absence of such guidance, value judgments ‘risk overstepping the boundaries of [the Court’s] supervisory role’, contrary to the very value the implied freedom seeks to protect — representative and responsible government.

3 An Inevitable Test?

Departure from the original Lange test in favour of a test incorporating proportionality was arguably ‘inevitable’. The High Court has previously stated consideration of what is ‘appropriate and adapted’ is synonymous with an inquiry of proportionality, suggesting its adoption is not a novel idea. Further, scholars have argued the second limb of the Lange test is ‘conceptual[ly] equivalent’ to a proportionality test, thus the Court in both McCloy and Brown have expressed a previously implicit test — proportionality is ‘in-built’ to the very concept of ‘appropriate and adapted’. The test

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72 Ibid 464–68 [429]–[438].
74 Ibid 422–25 [290]–[295].
78 Lange (1997) 189 CLR 520, 567 fn 272: the High Court held there was ‘little difference between the test of “appropriate and adapted” and the test of proportionality.’ Chief Justice Gleeson considered ‘whichever expression is used, what is important is the substance of the idea it is intended to convey’: Mulholland (2004) 220 CLR 181, 197 [32].
80 Mason, above n 59, 114.
of proportionality as adopted in McCloy was justified humorously by French CJ and Bell J in *Murphy v Electoral Commissioner*, where their Honours stated ‘the adoption of that approach in McCloy did not reflect the birth of some exotic jurisprudential pest destructive of the delicate ecology of Australian public law’ but rather provided ‘a mode of analysis applicable to some cases … but not necessarily all’.\(^8\) The High Court in the present case reflects a similar qualification that proportionality testing is merely a tool of analytical assistance, with the ultimate test of validity still being the *Lange* test as restated.\(^8\)

Arguably, the very *recognition* of the implied freedom assumes that ‘value-laden reasoning’ will eventually result.\(^3\) The freedom was implied from the structure of the Constitution to preserve representative and responsible government, which are core values of Australian democracy. Therefore, at least the analytical methodology of proportionality testing ensures value judgments are defined, confined and ‘rule-like’.\(^4\) Perhaps the High Court should focus on developing guidelines and criteria for applying proportionality in the Australian context so as to address the concerns of Gordon and Gageler JJ. This was a recommendation foreshadowed by Justice Kiefel (as her Honour then was) when she proposed ‘greater acceptance of proportionality as a general principle in constitutional law [might arise] if it is seen as applied to the attainment of something approaching a constitutional objective’.\(^5\)

**B Implications for Protest**

While the decision in *Brown* has theoretical implications with respect to the *Lange* test, the practical ramifications of the decision in terms of the protection of protest must also be considered.

1 *Protest and Assembly as Political Communication*

The decision of where political communication will be articulated is itself often highly political.\(^6\) The location of a protest may be closely connected to its message, to the extent that physical assembly itself constitutes political communication.\(^7\) Therefore, free assembly is often crucial for political communication which takes the form of protest to be effective.\(^8\) Protests use locations of political significance as a

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\(^{81}\) (2016) 261 CLR 28, 52–53 [37].

\(^{82}\) *Brown* (2017) 261 CLR 328, 359 [88] (Kiefel CJ, Bell and Keane JJ).

\(^{83}\) Stone, above n 77, 708.

\(^{84}\) As suggested by Stone: ibid 704.

\(^{85}\) Kiefel, above n 60, 92–3.


\(^{87}\) *Brown* (2017) 261 CLR 328, 383 [182] (Gageler J).

platform for communication. Given that there is no general right to participate in a protest at common law, political communication expressed via protest is vulnerable to curtailment by statute (and, it seems, pre-existing rules of common law). Brown represents one of the few cases since Levy v Victoria where the validity of laws regulating protests and political assembly have been challenged. A majority of the High Court in Brown held that the chosen location for a protest can be central to the influence of the political communication expressed by that protest. The High Court also confirmed that laws directed to restricting protest can fall foul of the implied freedom. In doing so, the High Court approved statements in Levy that political communication extends to non-verbal, expressive conduct and political assembly.

However, the particular idiosyncrasies of the impugned legislation in Brown mean that one must be careful when considering the broader implications of the decision for protests. The main reason for the plaintiffs’ success was that there was great uncertainty as to when the provisions of the Protestors Act would be validly enlivened. The invalidity of the Protestors Act stemmed from the arbitrariness of decisions to be made by a police officer in determining whether the person is in a protected area and is a protestor, rather than the mere fact that the provisions prohibited protest. In fact, protecting a business from hindrance by protestors was held to be a legitimate legislative purpose. Therefore, while the particular legislation in Brown was found to have impermissibly burdened the implied freedom, the decision does not represent any grand statement on freedom of assembly and protest.

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89 See Beth Gaze and Melinda Jones, Law, Liberty, and Australian Democracy (LawBook, 1990) 115.
90 See, eg, Duncan v Jones [1936] 1 KB 218, 222 (Hewart CJ).
91 See the discussion of the limits placed by tort law on the protests in question in Brown (2017) 261 CLR 328: at 364 [107] (Kiefel CJ, Bell and Keane JJ), 408–9 [259] (Nettle J), 451 [379]–[380] (Gordon J). See also Edelman J’s refusal to consider developing the common law to accommodate protest actions: at 506 [563].
92 (1997) 189 CLR 579 (‘Levy’). Levy concerned the entrance onto prohibited hunting areas by a protestor who did not hold a licence. He intended to collect the carcasses of ducks, which had been shot by hunters, for use in a performative protest. In six separate judgments, the High Court found that any burden on the implied freedom placed by the regulation was reasonably appropriate and adapted to protecting public safety: at 599 (Brennan CJ), 608–9 (Dawson J), 614–15 (Toohey and Gummow JJ), 619–20 (Gaudron J), 627 (McHugh J), 647–48 (Kirby J).
94 Ibid 383 [182] (Gageler J), 407–8 [258] (Nettle J), 461 [415] (Gordon J). The plurality took the defendant to have conceded that the law burdened the implied freedom and thus did not need to discuss whether the implied freedom extended to assembly and protest: at 359–60 [89].
Since the invalidity of the Protestors Act was largely due to the vagueness of its provisions, Brown arguably provides little guidance as to how courts will decide future cases where laws seek to hinder protests in future. Based on the discussion that follows, it seems that better drafted legislation banning assembly and protest for similar purposes may be found to be valid.

2 Potential Limits on the Use of the Implied Freedom in Protest Cases

The implied freedom does not entail a substantive right: it is a limit on legislative power.\(^{97}\) This necessarily means it does not afford the same protections of speech as analogous constitutional protections, which have the character of rights. The decision in Brown arguably places two further restrictions on the use of the implied freedom in protest cases.

First, there is support for the proposition that if the actions prohibited by legislation would amount to tortious conduct regardless, then the legislation cannot be regarded as burdening the implied freedom.\(^{98}\) Although Gageler J, drawing on Lange,\(^{99}\) noted that the common law may need to grow with, and be modified by, the implied freedom,\(^{100}\) this was not approved in any other judgment. Indeed, Edelman J found it unnecessary and inappropriate to develop the common law to allow people to trespass and commit nuisance in the name of a political cause,\(^{101}\) while Gordon J found that no inconsistency existed between the laws of trespass and nuisance and the implied freedom.\(^{102}\) Given that protests often deliberately obstruct business and government operations,\(^{103}\) the lack of desire to allow these torts to grow with the implied freedom in this respect may limit the use of the implied freedom in protecting protests.

Second, the plurality, and Gageler and Edelman JJ referred\(^{104}\) to McHugh J’s proviso in Levy that if protestors did not have a right to be at the protest site, the implied

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\(^{97}\) See, eg, ibid 360 [90] (Kiefel CJ, Bell and Keane JJ), 430 [313] (Gordon J), 502–3 [557] (Edelman J).


\(^{99}\) Lange (1997) 189 CLR 520.

\(^{100}\) Brown (2017) 261 CLR 328, 385–86 [188] (Gageler J).

\(^{101}\) Ibid 506 [563].

\(^{102}\) Ibid 451 [380].


freedom may not arise. Justice Edelman also cited *Mulholland*, where it was found that the implied freedom could only be enlivened where there is a pre-existing statutory or common law right to do the action. Justice Gageler argued that *Mulholland* and McHugh J’s proviso merely show that the implied freedom does not arise where another valid law already prohibits the action. Meanwhile the plurality declined to express an opinion on the application of these issues. Therefore, it is unclear which view of McHugh J’s proviso and the *Mulholland* decision will prevail. However, a majority of the judgments proceeded on the basis that whether a pre-existing right existed was relevant to whether the implied freedom was burdened. Given this, it seems that the existence of an independent right to engage in particular conduct may be a factor in the determination of whether the implied freedom will be invoked.

As Kirby J noted in dissent in *Mulholland*, the requirement to prove an independent right to engage in political communication would greatly limit the protections afforded by the implied freedom. This restriction would be particularly onerous on political communication which takes the form of protest. One can generally be taken to have the ‘right’ to engage in other conduct from which political communication can arise, such as using the postal service, or donating to political parties. Conversely, political protests often take place specifically in areas where the protestors have no express right to be present — such as private property — or where access has been prohibited by legislation. The lack of an express common law right to protest poses a further limitation. In fact, given the ease with which the right to access formerly public places can be restricted via privatisation and

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107 *Brown* (2017) 261 CLR 328, 504 [560].
108 Ibid 384 [186].
113 *Monis v The Queen* (2013) 249 CLR 92.
114 *Unions NSW* (2013) 252 CLR 530.
legislation, it would seem that an application of Edelman J’s reasoning would mean the implied freedom would protect an ever-diminishing number of protests.

V Conclusion

The invalidity of numerous anti-protesting legislative provisions in Brown has reiterated the value of the implied freedom. The High Court took the opportunity to restate the Lange test for validity of laws in implied freedom cases, with a narrow majority endorsing proportionality testing as a viable analytical tool in conjunction with the foundational restated Lange test. However, the limited engagement with the application of strict proportionality by the High Court challenges the stability and predictability of the place of proportionality testing in implied freedom cases. Likewise, the decision confirms that the implied freedom protects protest; however, the dissenting judgments suggest significant potential limitations on the use of the implied freedom in this context. Namely, the application of the torts of negligence and nuisance, and the potential requirement to show an independent right to engage in the prohibited conduct loom as restrictions on the use of the implied freedom in protest cases. Therefore, although the decision in Brown illuminates the ongoing relevance of the implied freedom, deeper analysis demonstrates theoretical and practical nuances, which render the judgment less impactful than it might first seem.

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