*P T Babie**

JUDICIAL FEDERALISM AND *SUB SILENTIO* AMENDMENT OF THE *REAL PROPERTY ACT 1886* (SA)

WHAT IT IS AND WHY IT MATTERS, OR, HOW I LEARNED TO STOP WORRYING AND LOVE THE *UNIFORM TORRENS TITLE ACT*[1]

ABSTRACT

This article examines the overriding legislative exception to indefeasibility. In other work, I examine ss 6, 10, and 11 — three intriguing provisions found in the *Real Property Act 1886* (SA) ('*RPA*'). In this article, I argue that while those provisions represent the Parliament's attempt to entrench Torrens system indefeasibility of title by imposing 'manner and form' requirements on future alterations to the *RPA*, judicial consideration, at least of s 6, means that the attempt has, to a great extent, failed. The important part of the story, though, is the role that courts play in sorting out what these entrenching or 'manner and form' provisions might mean. In working that out, one must also account for the fact that the courts, in interpreting those provisions, are themselves amending that legislation *sub silentio*. Often overlooked, judicial interpretation operates in plain sight. And when it engages in the interpretation or construction of a statute for the purposes of clarifying its operation and application, a court amends, and possibly even repeals, parts of that legislation.

* Bonython Chair in Law and Professor of Law, Adelaide Law School, The University of Adelaide.

1 Adapting the title of the classic political satire 'Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb' (Stanley Kubrick (dir), Columbia Pictures (UK), 1964).

I Introduction

It is accepted by some, in both the American[2] and the Australian[3] federal systems, that judicial interpretation of legislation is a form of amendment of the legislation being so interpreted.[4] We might call this judicial activity a form of *sub silentio* amendment: amendment or repeal that occurs 'under silence; without notice being taken; without being expressly mentioned'.[5] Even if it is not full-blooded amendment of the type which a legislature effects, judicial interpretation nonetheless affects the operation of the statute in question. None of this is necessarily problematic; indeed, it is fully understood to be an accepted dimension of the relationship that exists between the legislative and judicial branches of government and the ongoing dialogical development of the common and statute law in a constitutional system of government.[6] That is, of course, until the concept of federalism enters as a variable in the development of both the common and statute law by way of interpretation (*sub silentio* amendment).[7] For then, it is possible that two judicial spheres — one belonging to the national or federal level of government, and others belonging to local, regional, or state/provincial levels of government — may seek to pronounce on the same matter. How do the courts of a federal system handle that issue?

In a previous article, I explored the power of Australian state parliaments to amend Torrens title legislation.[8] Provisions like s 6 of the *Real Property Act 1886* (SA) ('*RPA*') attempt to constrain that power; yet there are a number of complications that emerge as to how a parliament may confer paramountcy upon or 'entrench' that legislation through the imposition of 'manner and form' requirements. We at least

2 John F Manning, 'Inside Congress's Mind' (2015) 115(7) *Columbia Law Review* 1911.

3 Jeffrey Goldsworthy, 'Is Legislative Supremacy Under Threat? Statutory Interpretation, Legislative Intention, and Common Law Principles' (2016) 28 *Upholding the Australian Constitution* 36.

4 William J Aceves, 'Shadow Amendments' (2023) 60(1) *Harvard Journal on Legislation* 27.

5 Bryan A Garner (ed), *Black's Law Dictionary* (12th ed, 2024), 1656 '*sub silentio*'.

6 This has traditionally been associated with constitutional interpretation. See: Peter W Hogg and Allison A Bushell, 'The *Charter* Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)' (1997) 35(1) *Osgoode Hall Law Journal* 75; Peter W Hogg, Allison A Bushell Thornton and Wade K Wright, 'Charter Dialogue Revisited: Or "Much Ado About Metaphors"' (2007) 45(1) *Osgoode Hall Law Journal* 1. But it also applies to the development of common and statute law: Adam Pomerenke, 'Statute and Common Law' (Current Legal Issues Seminar Series, 17 August 2017); Jeremy Webber, 'Institutional Dialogue Between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and Elsewhere)' (2003) 9(1) *Australian Journal of Human Rights* 135.

7 On the interaction of the common law and statute in a federal system generally, and Australia's specifically, see William Gummow, *Change and Continuity: Statute, Equity, and Federalism* (Oxford University Press, 1999) 1–37, 71–113.

8 P T Babie, 'Entrenching Indefeasible Title Pursuant to the *Real Property Act 1886* (SA)' (2025) 32(2) *Australian Property Law Journal* 42.

know this much: within the structure of Australian federalism, whether the South Australian Parliament complies with s 6 or not, it has the express and exclusive constitutional power to enact, alter, and even to repeal the *RPA* and the indefeasibility it confers, and so it acts legitimately in exercising that power.[9]

Reaching that conclusion, however, involves judicial analysis.[10] And the intriguing part of the story is the role of the courts themselves in sorting out what these entrenching or 'manner and form' provisions might mean. In working that out, one must also account for the fact that courts, in interpreting those provisions, *sub silentio* amend that legislation. When it engages in the interpretation or construction of a statute for the purposes of clarifying its operation and application, a court amends, and possibly even repeals parts of that legislation. Often overlooked as a form of amendment, it takes place in plain sight.

Statutory construction is perhaps the most common function of judicial review. It is, in fact, an essential task. Statutes routinely contain language that is ambiguous and subject to multiple interpretations. As Marshall CJ observed, '[s]uch is the character of human language'.[11] Times also change, and statutory language may develop new meanings requiring clarification. What we might call 'shadow amendments' are, therefore, an inevitable outcome of statutory construction. They represent judicial interpretations that can broaden or narrow a statute's reach. These interpretations 'take on a canonical role' and are then construed by courts as if they appeared in the original text.[12]

This 'shadow' or, as I call it here, *sub silentio* judicial amendment, found in every area of law,[13] is, of course, a legitimate and justifiable judicial function. As William J Aceves writes:

> *A priori*, shadow amendments are not problematic. Indeed, they are a necessary feature of judicial review. As Holmes J recognised, 'judges do and must legislate'.

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9 Pursuant to s 107 of the *Constitution of Australia*. The state power to legislate with respect to land was acquired progressively, first, by the colony of New South Wales and, subsequently, by the other colonies as they were carved out of that first colony, and by the states which were the successors to those colonies at federation: Andrew G Lang, *Crown Land in New South Wales: The Principles and Practice Relating to the Disposal of and Dealings with Crown Land Pursuant to the Crown Lands Consolidation Act, 1913, Western Lands Act, 1968, Returned Soldiers Settlement Act 1916, War Service Land Settlement Act, 1914, Closer Settlement Acts & Related Legislation* (Butterworths, 1973) 15 [201]; Paul Babie, 'Rome in the Antipodes: *Emphyteusis* and the Australian Perpetual Lease' in Joe Sampson and Stelios Tofaris (eds), *Essays in Law and History for David Ibbetson: Querella* (Hart Publishing, 2024) 205–15, 206–7.

10 *South-Eastern Drainage Board (South Australia) v Savings Bank of South Australia* (1939) 62 CLR 603.

11 *McCulloch v Maryland*, 17 US 316, 414 (1819).

12 Aceves (n 4) 30 (citations omitted).

13 Ibid.

> In the realm of statutory construction, interpretation is legislation and, therefore, interpretation *is* law.[14]

These amendments become problematic, in Aceves' view, 'when they ignore the plain meaning of a statute or reject legislative intent'.[15] Another problem can emerge, though, as a consequence of federalism. And a strange twist of the Australian model of federalism exacerbates that problem.

The Australian federal model places one court, the High Court of Australia, in the paradoxical position of being the final arbiter of what a Torrens system in any one of the states may be, notwithstanding the fact that each state alone has the power to enact its own unique legislation. No less than a former Chief Justice of that Court has said this: 'since the establishment of the High Court as Australia's final appellate court, the common law, as declared by it, stands as one common law for the whole of Australia.'[16] By arrogating to itself the power to act as the final court of the common law, expounding the 'common law of Australia',[17] the High Court, in pronouncing on one piece of Torrens legislation — South Australia's, for instance — establishes a standard intended to apply to all Torrens legislation, notwithstanding the differences in the common law of property and the operation of Torrens systems among the individual states.

This article explores federal judicial *sub silentio* amendment of the *RPA* by the High Court. It contains four parts. Part II outlines the answers provided by the classical model of federalism in the United States, characterised by a restrained or limited form of what has come to be called judicial federalism. Part III argues that the Australian model of federalism employs what I call *aggressive* judicial federalism. Part IV argues further that aggressive judicial federalism is problematic, for reasons demonstrated by the High Court's 2020 decision in *Deguisa v Lynn*,[18] a seemingly innocuous case about the notification of restrictive covenants within the *RPA*. Part V concludes.

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14 Ibid 32 (emphasis in original), quoting *Southern Pacific Company v Jensen*, 244 US 205, 221 (1917).

15 Aceves (n 4) 32.

16 Robert French, 'Bending Words: The Fine Art of Interpretation' (Guest Lecture Series, University of Western Australia, Faculty of Law 20 March 2014), citing *Lipohar v The Queen* (1999) 200 CLR 485, 500; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563 ('*Lange*').

17 Leslie Zines, 'The Vision and the Reality' in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (LexisNexis Butterworths, 2004) 3, 11.

18 (2020) 268 CLR 638 ('*Deguisa* (HCA)').

II Classical Federalism

The Americans invented the modern federal system of government. The classical model[19] upon which the American experiment rests, as Kennedy J wrote, represents an attempt to

> split the atom of sovereignty. … citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.[20]

Federalism establishes two fundamental poles of governmental power. First, its separation, into three branches, the executive, legislative, and judicial, and, second, its division, between a general, national, central, or federal sphere, and local, regional, or state spheres. Within each of the latter two spheres of power, the national and the regional, power is separated between the three branches of governmental power.[21] What that has been taken to mean, on the classical American model, is that there will be no bleeding of power as between the two levels or spheres. Thus, the law, as developed by legislatures and courts, operates in water- or air-tight compartments,[22] the federal and the state, with no cross-boundary involvement.[23] Albeit in the Canadian context, Lord Atkin, in the Privy Council, famously wrote: 'While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure'.[24]

What this means in practice is that law over which the legislature or the courts have authority in one sphere is immune from interference from the legislature or courts

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19 I am grateful to my friend and colleague, Professor Arvind P Bhanu, of Amity University School of Law, Delhi, India, for a very helpful conversation which clarified my thinking on the concept of the classical model of federalism in the United States and India.

20 *US Term Limits, Inc v Thornton*, 514 US 779, 838 (Kennedy J) (1995). See also Cynthia L Cates, 'Splitting the Atom of Sovereignty: Term Limits, Inc's Conflicting Views of Popular Autonomy in a Federal Republic' (1996) 26(3) *Publius: The Journal of Federalism* 127.

21 Judith Resnik, 'What's Federalism For?' in Jack M Balkin and Reva B Siegal (eds), *The Constitution in 2020* (Oxford University Press, 2009) 269, 270.

22 See *A-G (Canada) v A-G (Ontario)* [1937] AC 326, 354 (Lord Atkin) ('*Canada v Ontario*'). See also Scott Bennett, 'The Politics of the Australian Federal System' (Research Brief, 1 December 2006).

23 The Supreme Court of the United States has been very clear on this: *Swift v Tyson*, 41 US (16 Pet) 1 (1842); *Erie Railroad Co v Tompkins*, 304 US 64 (1938). See also: Zachary B Pohlman, 'Stare Decisis and the Supreme Court(s): What States Can Learn from *Gamble*' (2020) 95(4) *Notre Dame Law Review* 1731; Thomas W Merrill, 'The Common Law Powers of Federal Courts' (1985) 52(1) *University of Chicago Law Review* 1.

24 *Canada v Ontario* (n 22) 684.

of the other. There may be instances of cooperation between governments to take account of interdependent realities,[25] and there may be examples of what has come to be known as 'judicial federalism' in the judicial sphere — areas of cooperation between the federal and state court systems.[26] But judicial cooperation is limited either to matters that clearly involve federal matters as found in the *Constitution*,[27] or to matters which clearly transcend state borders and only relate to the common law in matters that seem beyond the power of individual states to manage.[28] Thus, in matters relating to the common law — by which I mean both legislation and its interpretation by the courts, and that law which is still entirely judge-made[29] — the classical American model ensures the general policy of immunity of the federal and state spheres, resulting in 51 systems of common law, one that is federal, and 50 others for each of the states. And this is particularly so in the case of property law.[30]

Sitting atop each of the 51 systems of common law, then, is a final court of appeal for that system — the Supreme Court of the United States for the federal, and the final state court for each of the states.[31] For over 180 years, the position has been clear:[32] other than in federal matters — in the interests of providing a clear, consistent response to constitutional questions[33] — neither judicial sphere would presume to interfere with the common law or statutory interpretation of another sphere, whether it be federal in relation to one of the states, or one state with respect to another state or the federal system.[34] That classical model largely holds in Australia with the notable exception of one very significant court: Australia's final federal court, the High Court.

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25 Resnik (n 21) 271–2.

26 Ibid 276–7.

27 Sandra Day O'Connor, 'Our Judicial Federalism' (1984) 35(1) *Case Western Reserve Law Review* 1.

28 Resnik (n 21) 276–7; Tracy Hester, 'Climate Tort Federalism' (2018) 13(1) *Florida International University Law Review* 79.

29 See Pomerenke (n 6).

30 Abraham Bell and Gideon Parchomovsky, 'Of Property and Federalism' (2005) 115(1) *Yale Law Journal* 72.

31 Anthony J Bellia, 'State Courts and the Making of Federal Common Law' (2005) 153(3) *University of Pennsylvania Law Review* 825; Alton B Parker, 'The Common Law Jurisdiction of the United States Courts' (1907) 17(1) *Yale Law Journal* 1; John T Parry, 'Some Realism About Choice-of-Law Statutes and the Common Law: The Oregon Example' (2023) 27(1) *Lewis and Clark Law Review* 197. See also: Robert Cover, 'Foreword: Nomos and Narrative' (1983) 97(1) *Harvard Law Review* 4, especially 40–4; Robert Cover, 'The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation' (1981) 22(4) *William and Mary Law Review* 639.

32 For recent examples, see, e.g.: *Ford Motor Co v Montana Eighth Judicial District Court*, 592 US 351 (2021); *Snay v Burr*, 167 Ohio St 3d 123 (2021).

33 The classic federal apology for a national supreme court comes from Alexander Hamilton, '*Federalist* No 22', in Edward Bourne (ed), *The Federalist: A Commentary on the Constitution of the United States* (1947) 148.

34 *Swift v Tyson*, 41 US (16 Pet) 1 (1842); *Erie Railroad Co v Tompkins*, 304 US 64 (1938). See also Resnik (n 21) 270.

III Aggressive Judicial Federalism

The High Court of Australia takes judicial federalism far beyond the limited form of that concept found in the United States. We might call its understanding of its federal role as *aggressive* judicial federalism. Using this model of federalism, the High Court takes the position that it expounds not a federal common law limited to those matters in which the Commonwealth holds an express grant of power pursuant to the *Constitution*, but the Australian common law.

How this came to be is not clear; what is clear is that whatever happened, it happened quickly. Leslie Zines writes that within three years of the High Court coming into operation, its 'effect … on [s]tate court judgments was devastating.'[35] Perhaps the 'poorer quality' of state court judgments resulted in the 'scholarly standards applied by the High Court' giving rise to the High Court's expansive view of this power.[36] Still, it would be another six decades before the High Court justices saw their task not only as a national court of appeal, but of expounding a 'national common law'.[37] The reason the High Court justices waited lies not in their shrinking before the enormity of the task, but the fact that during that time the Privy Council remained the final court of appeal for Australia.[38] Thus, as Sir Owen Dixon wrote, the 'common law was one system which should receive uniform interpretation and application "not only throughout Australia but in every jurisdiction of the British Commonwealth where the common law rules".'[39] This meant that the High Court followed not only Privy Council decisions, but also House of Lords and even English Court of Appeal precedent.[40] From 1963, however, the High Court shifted its position, and stopped following the House of Lords,[41] and between 1975 and 1986 all Commonwealth and state appeals to the Privy Council ceased.[42]

35 Zines (n 17) 11.

36 Ibid.

37 Ibid.

38 *Constitution of Australia* s 74. That avenue, of course, no longer exists: *Privy Council (Limitation of Appeals) Act 1968* (Cth) ('*Privy Council Limitation Act*'); *Privy Council (Appeals from the High Court) Act 1975* (Cth) ('*Privy Council HCA Act*'); *Kirmani v Captain Cook Cruises Pty Ltd [No. 2]; Ex parte A-G (Qld)* (1985) 159 CLR 461.

39 Zines (n 17) 11, citing Sir Owen Dixon, 'Jesting Pilate' in Severin Howard Zichy Woinarski (ed), *Jesting Pilate: And Other Papers and Addresses* (Law Book, 1965), 198–9.

40 Ibid 11.

41 *Parker v The Queen* (1963) 111 CLR 610; *Skelton v Collins* (1966) 115 CLR 94; *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221; *Geelong Harbour Trust Commissioners v Gibbs Bright and Co* (1974) 129 CLR 576; *Viro v The Queen* (1978) 141 CLR 88; *Privy Council HCA Act* (n 38).

42 *Privy Council HCA Act* (n 38); *Privy Council Limitation Act* (n 38); *Australia Act 1986* (Cth); *Australia Act 1986* (UK). See Sonali Walpola, 'After the Australia Acts' (2021) 21(1) *Oxford University Commonwealth Law Journal* 31.

The power for the High Court to step into the shoes of the Privy Council with respect to the common law is found in s 73 of the *Australian Constitution*, which allows appeals to the High Court in any matter in which an appeal would have existed from a State Supreme Court to the Privy Council. Thus, as appeals to the Privy Council in matters of the common law were possible from such courts, so, too, were they possible to the High Court once Privy Council appeals ceased. As John Quick and Robert R Garran put it, the words of s 73 'make the High Court not merely a federal court of appeal, but a national court of appeal of general and unlimited jurisdiction'.[43] As such, the High Court finds itself atop the judicial pyramid of Australia, settling matters which, in the American classical federal model, would be left to final state appellate courts.

And the High Court, far from being timid about the use of this power, at least from 1996, emphatically expounds the common law of a national system, the common law of Australia.[44] In *Lange v Australian Broadcasting Corporation*, the Court wrote that 'there is one common law in Australia which is declared by this Court as the final court of appeal',[45] and in *Kable v Director of Public Prosecutions*, 'there is a common law of Australia as opposed to a common law of the states'.[46] Zines concludes that this means that 'the creation of the High Court as a general court of appeal has produced a body of law that does not belong to either of the usual federal categories of "Commonwealth" and "State" and is simply "Australian" or "national".'[47]

Of these developments, Zines concludes that 'the vision of the founders, and of Australian judges until the latter half of the twentieth century, of uniformity of common law would be impossible today even if it were regarded as desirable'.[48] Putting to one side its desirability, and accepting its existence, the question is whether it is useful, especially in relation to the Torrens system. And it matters because, in interpreting Torrens legislation for any jurisdiction and then purporting to make that a 'national' standard, the Court subtly amends the legislation of every Torrens jurisdiction. A national conclusion seems problematic for it forces every system into one box, notwithstanding subtle differences in the legislation itself and the practice that has grown up around it in that jurisdiction. The local court is better placed to understand those nuances and that practice, and to develop the law accordingly. At the very least, this matters enough that we ought to pay attention to it.

The High Court undoubtedly has the power to hear appeals of common law matters and statutory interpretation of state legislation pursuant to s 73 of the *Australian*

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43 John Quick and Robert R Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, rev ed, 2015) 893, s 305.

44 *Lange* (n 16) 563; *Kable v DPP (NSW)* (1996) 189 CLR 51, 113 ('*Kable*').

45 *Lange* (n 16) 563.

46 *Kable* (n 44) 113.

47 Zines (n 17) 12.

48 Ibid 13.

Constitution. That does not, however, impose an obligation on that Court to do so. Indeed, the Court could have taken the same view of its position with respect to the states that the Privy Council took of its relationship to Australia: that the local courts know local conditions better than the central courts, and so ought to have the final word on the common law that operates and of statutory interpretation of legislation enacted there.[49] As an early commentator on the treatment of state courts by the High Court whimsically suggested:

> A standard sentence [should be placed] at the end of State judgments as follows:
>
> We are unanimously of the opinion that judgment ought to be entered for (say) the plaintiff, but to save the trouble and expense to parties of an appeal to the High Court we order judgment to be entered for the defendant.[50]

The High Court held then, and holds now, the power to hear such appeals. But there is no requirement or obligation that it exercise that power so as to expound, substantively, the common law of Australia. Nor is there an obligation to interpret legislation for one state in a way that affects the meaning of that legislation either for that state, or for other states the legislation of which is not under review. It might just as easily have used that power to state that the common law of the states ought to be developed by their own courts, according to local conditions, as did the Privy Council with respect to Australia itself. That may seem unusual to those schooled on Australia's aggressive judicial federalism, but it is entirely appropriate to those who know federalism in its classical form.

Any number of cases could be used to demonstrate the pitfalls of aggressive judicial federalism applied to Torrens legislation, and why we should pay attention to the harm it might do. The next part uses just one of those matters — one that has drawn a great deal of attention in South Australia: the *Deguisa v Lynn* saga.[51]

IV Why It Matters

While one Australian parliament may not cross the federal Rubicon by legislating for another state, or the Commonwealth, likewise, do so in relation to a power reserved to the states — including the power to enact Torrens legislation — the High Court, through its application of aggressive judicial federalism, can, with impunity. Thus, by interpreting one Torrens statute according to principles drawing upon all of

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49 See generally *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221.

50 Zines (n 17) 11, citing a correspondent in *The Morning Post*.

51 In-text references to *Deguisa v Lynn* or *Deguisa* refer generally to the litigation saga spanning four cases: *Lynn v Deguisa* [2017] SADC 78 ('*Deguisa (No 1)* (SADC)'); *Lynn v Deguisa (No 2)* [2018] SADC 84 ('*Deguisa (No 2)* (SADC)'); *Deguisa v Lynn* [2019] SASCFC 107 ('*Deguisa* (FCSC)'); *Deguisa* (HCA) (n 18). Where a particular court's approach is discussed, this will be made evident in-text using the short name of the case assigned in this footnote.

them, the High Court does through judicial interpretation what a parliament cannot, namely, legislate for another state or, indeed, legislate in a way not permitted by that state itself, as indicated by the existence of entrenching or manner and form requirements. Therefore, in an attempt to standardise the common law for Australia, the High Court entrenches law with respect to the Torrens system in ways that drafters of provisions like s 6 of the *RPA* undoubtedly would have found reprehensible, but were powerless to prevent.

Deguisa represents such an attempt to standardise the common law and statutory interpretation of Torrens legislation across all states in Australia. It is hardly classical federalism at work. Quite the contrary. It involved the protection of restrictive covenants and their notation on the Register pursuant to the *RPA*. The litigation called into play ss 69 and 128B (which, at the time of the litigation was s 128)[52] of the *RPA*:

> **69 — Title of registered proprietor indefeasible**
>
> The title of every registered proprietor of land shall, subject to such encumbrances, liens, estates, or interests as may be notified on the certificate of title of such land, be absolute and indefeasible.
>
> **128B — Encumbrance of land**
>
> (1) If land is to be charged with, or made security for, the payment of an annuity, rent-charge or sum of money in favour of a person, an encumbrance in the appropriate form must be executed by the registered proprietor and the person.
>
> (2) This section only applies to land intended to be charged or made security under this Act by the registration of an encumbrance.

Deguisa obtained planning approval to subdivide land held in fee simple to build two townhouses. The land had once been part of a large parcel of land which was subdivided and sold in the 1960s pursuant to what Lynn claimed was a common building scheme. In its schedule of dealings, the certificate of title for the relevant lot referred to a memorandum of encumbrance purporting to be a restrictive covenant. This covenant was lodged for registration and recorded on a previously cancelled certificate of title when the lot was first sold in 1965. Among other things, the memorandum of encumbrance prohibited the erection of any building or buildings other than 'a dwellinghouse', and also prohibited the erection of 'multiple dwellings'. Neither the memorandum of encumbrance nor Deguisa's certificate of title identified the other lots intended to be benefited by the restrictive covenant in the memorandum of encumbrance. Lynn claimed that building two townhouses on Deguisa's lot infringed the restrictive covenants. The litigation history of the case carries significance.

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52 In 2016, the *Real Property (Electronic Conveyancing) Amendment Act 2016* (SA), s 43, substituted s 128B for the original, and substantially similar, s 128.

A *District Court*

In the District Court, Judge Tilmouth accepted that a common building scheme constitutes a recognised means of creating a restrictive covenant and that such covenants are enforceable only in equity.[53] The primary issues were: (1) whether restrictive covenants were notified on the Register; and (2) whether a person dealing in land was required to make searches beyond the Register in order to ascertain restrictive covenants that may bind successors in title to the parties who created them.

In respect of the first issue, Judge Tilmouth cited extensive South Australian precedent[54] and secondary literature[55] to affirm the long-standing South Australian practice for the notation of a restrictive covenant as an encumbrance registrable as a rent charge pursuant to ss 128 and 128B of the *RPA*.[56] Judge Timouth noted that '[t]his court should not now overrule [earlier precedent], even if it was satisfied that the decision was wrong'.[57] Citing Debelle J in *Burke v Yurilla SA Pty Ltd* ('*Burke*'), Judge Tilmouth found that 'the practice has not only stood for at least 50 years, but has been acted upon, if not with the approval, at least without apparent disapproval by the Registrar-General'.[58]

This animated the second issue. Again, having reviewed the South Australian authorities,[59] Judge Tilmouth concluded that

> [t]he fact of the matter is that before purchase, the defendants were clearly on notice of the existence of an encumbrance over their land. Any reasonable and simple search in the Lands Title[s] Office reveals the existence of nearby subdivisions at the very least, even if more had to be done in order to precisely identify the benefitted properties. As noted earlier, the terms of the encumbrance itself are typical of the language used where subdivision is involved and therefore suggestive in itself, of little else than subdivision.

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53 *Deguisa (No 1)* (SADC) (n 51) [21]–[34], [43]–[65].

54 *Deguisa (No 2)* (SADC) (n 51) [8].

55 G A Jessup, *Forms and Practice of the Lands Titles Office of South Australia* (Lands Titles Office of South Australia, 1st ed, 1940) ('*Forms and Practice of Land Titles Office (1940)*'); G A Jessup, *Lands Titles Office Forms and Practice* (Law Book, 4th ed, 1963) ('*Forms and Practice of Land Titles Office (1963)*'); Don Mackintosh and R J White, Thomson Reuters, *Jessup's Lands Titles Office: Forms and Practice SA* (at Service 10 August 2024).

56 *Deguisa (No 1)* (SADC) (n 51) [21]–[34]; *Deguisa (No 2)* (SADC) (n 51) [6], citing *R J Elder Smith & Company Limited* [1936] SASR 209; *Blacks Ltd v Rix* [1962] SASR 161 ('*Blacks*'); *Clem Smith Nominees Pty Ltd v Farrelly* (1978) 20 SASR 227 ('*Clem*'); *Burke v Yurilla SA Pty Ltd* (1991) 56 SASR 382 ('*Burke*').

57 *Deguisa (No 1)* (SADC) (n 51) [33], quoting *Burke* (n 56) 396 (Debelle J) (which itself cited extensively from *Blacks* (n 56)).

58 *Deguisa (No 1)* (SADC) (n 51) [32], quoting *Burke* (n 56) 394.

59 *Deguisa (No 1)* (SADC) (n 51) [63]–[65], citing *Clem* (n 56); *Burke* (n 56); *Netherby Properties Pty Ltd v Tower Trust Ltd* (1999) 76 SASR 9 ('*Netherby*').

> The position is, as it was held to be in *Burke v Yurilla SA Pty Ltd*, that a person dealing with a registered proprietor is deemed to have notice and will be bound by a restrictive covenant contained in a registered encumbrance endorsed on the Certificate of Title. This is so even when, as here, 'the endorsement conveys little more information than the fact that the encumbrance exists': *Burke v Yurilla*. In that event the defendants were in a position to 'identify the land which is entitled to the benefit of the covenant either from the encumbrance or from other related documents which can be discovered on a search of the Land Titles Office. Moreover as Debelle J emphasised:
>
> > … the paucity of information disclosed by the endorsement will make it necessary in any event to search the Register to ascertain the precise terms and effect of the encumbrance.[60]
>
> Moreover, it is impossible to suppose that a reasonably prudent conveyancer searching the Title on behalf of the defendants as prospective purchasers, would not make further inquiry to ascertain the exact nature of the encumbrance.[61]

Judge Tilmouth held in favour of Lynn; Deguisa appealed to the Full Court of the Supreme Court.

B *Full Court of the Supreme Court*

The Full Court of the Supreme Court agreed with Judge Tilmouth and dismissed the appeal. Justice Peek (with whom Hughes J agreed), wrote the majority judgment; Kourakis CJ dissented.

1 *Justice Peek*

Having reviewed the same South Australian authorities,[62] Peek J agreed with Judge Tilmouth that[63]

> [a] building scheme restrictive covenant[] will be protected under the Torrens System provided that it…is not merely a "covenant in gross" and that the land entitled to the benefit of the covenant must be capable of identification *in some way* from the registered document containing the covenant *or, at least, from other related documents which can be discovered by a search in the Land[s] Titles Office*.[64]

Based upon the authorities, Peek J concludes that the governing principle is

> [w]hat is "notified" to a prospective purchaser by the vendor's certificate of title is everything that would have come to his or her knowledge if a prudent conveyancer

60 *Burke* (n 56) 391 (Debelle J).

61 *Deguisa (No 1)* (SADC) (n 51) [65] (internal citations and footnotes omitted).

62 *Blacks* (n 56); *Clem* (n 56); *Burke* (n 56).

63 *Deguisa* (FCSC) (n 51).

64 Ibid [219] (emphasis in original) (citations omitted).

> had made such searches as ought reasonably to have been made by him or her as a result of what appears on that certificate of title.[65]

Justice Peek continues: 'if one inquires, "What searches of the Register ought reasonably be made by a prospective purchaser?" the applicable principle becomes'

> [a] prospective purchaser is required to make such searches of the Register as ought reasonably be made by a prudent conveyancer having regard to both what appears on the vendor's certificate of title and what comes to his or her knowledge during the course of such reasonable searches.[66]

And finally:

> in addressing the facts of a particular case (such as the present) one will inevitably ask the further and ultimate question: 'Precisely what searches of the Register ought reasonably have been made by the party here?' The process of answering that ultimate question to some extent corresponds to the undeniable tension between the opposing considerations of the traditional approach of the equitable jurisdiction and the ideals of the Torrens System.
>
> Clearly, the answer to any question concerning 'reasonableness of conduct' will very much be informed by matters of detail varying with the particular case. One important thing to bear in mind is that [it is] reasonable searches in the plural; and it is the fact that what searches are reasonably required to be performed will often depend on what, if anything, is found at the outset.[67]

Justice Peek endorsed the process used in South Australia for discovering a building scheme restrictive covenant from a search of the Register as one 'well known to conveyancers.'[68] Taking account of the facts in *Deguisa*, Peek J stated that

> appellants [are] required to inspect the encumbrance referred to on their CT and, on such inspection, [are] put on notice as to the likely existence of the common building scheme by the express memorial on the Memorandum of Encumbrance … referring to 'a common building scheme' together with the form of the encumbrance and the covenants.[69]

That is, in such circumstances, the prudent conveyancer is 'therefore obliged to undertake further reasonable searches of the Register.'[70]

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65 Ibid [29], citing *Burke* (n 56) 390–1 (citations omitted).

66 *Deguisa* (FCSC) (n 51) [253].

67 Ibid [254]–[255] (emphasis in original) (citations omitted).

68 Ibid [257].

69 Ibid [275].

70 Ibid.

For Peek J, the South Australian law with respect to both noting restrictive covenants and the practice for ascertaining its terms was clear.

2 *Chief Justice Kourakis*

Chief Justice Kourakis would have allowed the appeal, holding that under the *RPA*, a restrictive covenant exists only in equity and, as such, 'the interest…can only bind a purchaser for value who has, not only notice, but notice of a kind which is consistent with the indefeasibility of title conferred by the *RPA*.'[71] For that purpose, the Chief Justice approved *Burke*,[72] confirming that

> the device which has been adopted [pursuant to ss 128 and 128B] has been to register an encumbrance which included [a] restrictive [covenant]. [Such an] encumbrance charged the land with a nominal annual rent charge and then went on to include the restrictive covenants.[73]

But, Kourakis CJ continued, 'even if a restrictive covenant is mentioned in an encumbrance, the covenant itself is not a registered instrument'.[74] From this it followed that

> the only form of notice sufficient to bind a subsequent purchaser to a restrictive covenant entered into by a predecessor in title is notice arising from a registered dealing with the land. … The controversy on this appeal is whether notice of the land to which the benefit of the covenant accrues is confined to what is expressly identified on the face of the Certificate of Title of the encumbered land, or a registered instrument noted in it, or whether the benefited properties may be ascertained inferentially from a search of other Certificates of Title and the registered instrument memorialised on them.[75]

On the facts in *Deguisa*, 'the appellants [were] not bound by the restrictive covenant included in the encumbrance, because neither the memorial of the encumbrance, nor the registered instrument itself, identifies the land benefited by it.'[76] In other words, the Chief Justice approved the ss 128 and 128B practice, but disagreed as to the extent of the necessary searches which an interested party must make to ascertain the land benefited by a covenant so noted in the Register.

Thus, while dissenting from the disposition of the appeal, Kourakis CJ nonetheless joined the other three South Australian judicial officers who considered this case in accepting the long-established practice of registering restrictive covenants pursuant

71 Ibid [18].

72 *Burke* (n 56) 386 (Debelle J).

73 *Deguisa* (FCSC) (n 51) [19].

74 Ibid [21].

75 Ibid [24].

76 Ibid [3].

to ss 128 and 128B. The Chief Justice only departed from the others on the question of the breadth of searches necessary in order to ascertain the land benefitted by such a covenant. His Honour's view merely included additional reasonable searches of related documents which can be discovered on a search of the Register. The Chief Justice, in other words, and not unreasonably, placed greater emphasis on the mirror of the Register — that a full and accurate picture of the state of title should be ascertainable from the certificate of title alone. Meanwhile, the majority (again, not unreasonably) placed greater emphasis on the enforceability of the covenant. Deguisa appealed, this time to the High Court. In so doing, it is worth noting that the Full Court might have added the rider I quoted earlier: 'We are … of the opinion that judgment ought to be entered for (say) the plaintiff, but to save the trouble and expense to parties of an appeal to the High Court we order judgment to be entered for the defendant'.[77]

C *High Court of Australia*

The High Court unanimously allowed the appeal.[78] The Court agreed, uncontroversially, with all four South Australian judicial officers that

> advantage has been taken of s 128 of the [*RPA*], which provides for the execution in the appropriate form of an encumbrance where 'land is intended to be charged with, or made security for, the payment of … [a] sum of money, in favour of any person'. The courts have upheld the practice of annexing the restrictive covenant of a common building scheme to an encumbrance which secures the payment of a sum of money. This practice facilitates the registration of an instrument which gives notice on the certificate of title of the burden of the restrictive covenant and of the other lots in the scheme which benefit from it. It must be understood that the rent charge in an encumbrance creates an interest in land, but a restrictive covenant of itself does not.[79]

Thus, as in the South Australian courts, the principal issue was whether the appellants were notified of and bound by the restrictive covenants.[80] The Court held in the negative, because

> [t]he text of s 69 of the [*RPA*], the statutory context in which it is to be construed, and the authoritative judicial exposition of the purpose of the Act, combine to support the conclusion that a person dealing with a registered proprietor of land is not to be regarded as having been notified of an encumbrance or qualification upon the title of the registered proprietor that cannot be ascertained from a search of the certificate of title or from a registered instrument referred to in a memorial entered in the Register Book by the Registrar-General.[81]

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77 Zines (n 17) 11, citing a correspondent in *The Morning Post*.

78 *Deguisa* (HCA) (n 18).

79 Ibid 647 [14], citing *Blacks* (n 56) 163–4; *Burke* (n 56) 389–90; *Netherby* (n 59) 21–2 [71]–[72].

80 *Deguisa* (HCA) (n 18) 646 [8].

81 Ibid 646 [9], 647–8 [14]–[17].

The Court wrote that, 'as will be seen, the path to the resolution of the principal issue in the present case is significantly illuminated by the approach in [*Westfield Management Ltd v Perpetual Trustee Co Ltd* ('*Westfield*')].'[82] In analysing *Westfield*, the Court also referred to *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd*[83] and to *Hutchinson v Lemon*.[84] True enough, these were all Torrens cases, but the first two arose on appeals from New South Wales, dealing with the New South Wales Torrens legislation,[85] and the last was a Queensland trial decision, decided on the basis of the relevant Queensland legislation.[86] The Court concluded:

> The approach of Peek J in the present case is inconsistent with the reasons of this Court in *Westfield*. Those reasons support the proposition that unless reference to an interest is endorsed on the certificate of title or incorporated by reference in a registered instrument notified on the certificate of title, the interest has not been notified on the certificate of title.[87]

And, applying *Westfield* to the *RPA*:

> A person who seeks to deal with the registered proprietor in reliance on the [s]tate's guarantee of the title of the registered proprietor disclosed by the certificate of title in the Register Book (or its electronic equivalent) is not to be put on inquiry as to anything beyond that which is so notified. A common building scheme can operate consistently with the scheme of the Act in relation to the enforceability of the benefit of a restrictive covenant only if those rights are notified on the certificate of title of the burdened land, or by express reference in a memorial on the certificate of title to other registered instruments which contain that information. Anything less is inconsistent with the natural and ordinary meaning of the text of s 69 and the purpose of the Act.[88]

The Court's conclusions may be helpful. They may even be consistent with Torrens policy concerning a system of title by registration. But whether those conclusions are helpful in understanding the *RPA* or even consistent with Torrens policy is not the point. The review of the litigation history of *Deguisa* reveals that all four of the South Australian judicial officers agreed as to the ss 128 and 128B practice for notification, and they did so in the light of local conditions and long-accepted practice — practice which, while not without its critics, had existed in South

82 Ibid 645 [4], citing *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528 ('*Westfield*'). See also analysis of *Westfield* in *Deguisa* (HCA) (n 18) 661–3, [66]–[72].

83 (1971) 124 CLR 73.

84 [1983] 1 Qd R 369 (Connolly J).

85 *Real Property Act 1900* (NSW); *Conveyancing Act 1919* (NSW).

86 *Real Property Act 1861–1980* (Qld).

87 *Deguisa* (HCA) (n 18) 663 [71].

88 Ibid 668 [88].

Australia for at least 77 years.[89] And three of those judicial officers agreed as to the nature of the searches necessitated when an interested party faces the notification of a restrictive covenant according to that accepted ss 128 and 128B practice. The High Court disagreed; twice, it refuted the majority in the Full Court:

> The approach of Peek J in the present case is inconsistent with the reasons of this Court in *Westfield*. Those reasons support the proposition that unless reference to an interest is endorsed on the certificate of title or incorporated by reference in a registered instrument notified on the certificate of title, the interest has not been notified on the certificate of title.[90]

> In addition, it cannot be that, as seems to have been accepted by Peek J in acting upon the expert evidence to which he referred, the operation of s 69 of the Act depends upon whether the surname of the original vendor in a common building scheme is unusual. If generalised searches beyond that of the current certificate of title of a property were required, it would be difficult to draw a line as to when "prudent" searching might cease. This is the sort of complexity and uncertainty that the Act sought to eradicate. More importantly, the scheme of the Act would be reduced to incoherence if the operation of s 69 of the Act were to vary with the surname of the owner of land referred to in a certificate of title that is no longer a folio of the Register Book.[91]

But Peek J was not applying *Westfield* — indeed, he only referred to the case as being consistent with the South Australian authorities.[92] Chief Justice Kourakis, with whom the High Court agreed, did not even cite the case. And, most importantly, the Full Court was not interpreting New South Wales legislation (because, of course, it could not); instead, the Full Court was concerned with the *RPA* and the relevant South Australian authorities, which it thoroughly reviewed, and which were also decided in the light of South Australian conditions and long-accepted practice. Furthermore, even if Peek J were concerned with the New South Wales system (which properly he could not be) that legislation itself contained, in 2017, provision for the registration of restrictive covenants which would have swiftly dealt with the dispute in *Deguisa*.[93] The *RPA* had and has no equivalent to that New South Wales provision — that alone would be sufficient grounds for not applying the principles in *Westfield* to the facts of *Deguisa*.

And therein lies the problem with *sub silentio* amendment when utilised in conjunction with the High Court's aggressive judicial federalism: while the South

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89 Brian Hunter, 'Equity and the Torrens System' (1964) 2(2) *Adelaide Law Review* 208; Jessup, *Forms and Practice of Land Titles Office (1940)* (n 55); Jessup, *Forms and Practice of Land Titles Office (1963)* (n 55); Mackintosh and White (n 55). The practice can be traced at least, then, to 1940, and those references suggest it was already known then; it can therefore be assumed to be older than 77 years.

90 *Deguisa* (HCA) (n 18), 662–3 [71].

91 Ibid 667 [85].

92 *Deguisa* (FCSC) (n 51) [194], [206]–[209] (Peek J, Hughes J concurring).

93 *Conveyancing Act 1919* (NSW) s 88(3).

Australian courts, in accepting the long-standing practice, had certainly *sub silentio* amended the *RPA*, those courts did so in the light of local conditions, which they were better placed to understand than the High Court. The South Australian judges did so in the light of South Australian authorities and not interpretations of the Torrens legislation of other jurisdictions. The problem, then, is one created by the application of aggressive judicial federalism. The High Court amended the *RPA* by using non-South Australian legislation, to some degree uninformed about local South Australian conditions, and in a way that applies to every other Torrens jurisdiction in Australia. The point is not that *sub silentio* amendment is unjustifiable — it clearly is not, quite the contrary, it is absolutely necessary. The point is the identity of the court doing that amending within a federal system. The High Court, in exercising aggressive judicial federalism, is not amending in the light of local conditions and as a matter of the specific legislation from which a controversy arises. And that is why *sub silentio* amendment matters, and why we must be aware of it when it is exercised in conjunction with aggressive judicial federalism.

V Conclusion

In 1859, Sir Robert Torrens wrote to the Governor of the Colony of South Australia that 'the two most important measures of our colonial history have been … Constitutional Government and Reform of the Law of Real Property'.[94] This proved prescient in a way Torrens probably failed to foresee: that Torrens title and constitutional government would become bound up in the federal principle in a way that would potentially undermine the integrity of the Torrens system of which he was so proud. Judicial *sub silentio* amendment, when exercised in concert with aggressive judicial federalism bears the potential to violate the *RPA* in ways that its drafters sought to deny to the very Parliament that had enacted it.

My solution to this problem might surprise you. Rather than perpetuating the fragmentation inaugurated with the federal experiment in 1901, the answer is greater centralisation. Aggressive judicial federalism has, as we have seen, already attempted to standardise the meaning of Torrens title throughout Australia, notwithstanding the difficulties that creates for individual Torrens systems in each of the states and territories. Overcoming those difficulties demands standardisation on the legislative side, too. And that means looking to the potential of an Australian *Uniform Torrens Title Act*.[95] There is little doubt that achieving that objective may prove

94 Letter of R R Torrens to His Excellency Sir Richard Graves MacDonnell , Governor-in-Chief of Her Majesty's Province of South Australia in Robert R Torrens and Henry Gawler, *The South Australian System of Conveyancing by Registration of Title, with Instructions for the Guidance of Parties Dealing, Illustrated by Copies of the Books and Forms in Use in the Lands Titles Office, to which is added, the South Australian Real Property Act as Amended in the Sessions of 1858, with a Copious Index* (Register and Observer General Printing Offices, 1859) iv.

95 Peter Butt, 'A Uniform Torrens Title Code?' (1991) 65(6) *Australian Law Journal* 348; Law Council of Australia, *Uniformity of Property Laws & Procedures: Model Guidelines for a Harmonious System of Torrens Title* (Policy Guidelines, 23 June 2007).

almost impossible.[96] But rather than continue to allow the High Court to attempt to rationalise the differences through piecemeal interpretation of individual state and territory Torrens statutes as and when cases arise, legislative standardisation would allow the Court to continue to exercise aggressive judicial federalism and to expound the common law for the whole of Australia, but to do so while interpreting *one* statute for the whole of Australia.

My proposed solution would not obviate *sub silentio* judicial amendment, but it would militate against anomalous amendments as a result of attempts at standardising an approach to Torrens when using eight differing statutes. I might summarise my solution this way: R R Torrens or: how I learned to stop worrying and love the *Uniform Torrens Title Act*.

96 Tina Hunter, 'Uniform Torrens Title Legislation: Is There a Will and a Way?' (2010) 18(3) *Australian Property Law Journal* 201; Butt (n 95).