

The Loan

5. On or about 25 March 2008, Westpac entered into a loan agreement in writing with the first and second defendants (**Loan Agreement**), pursuant to which Westpac advanced to the defendants the sum of \$300,000.00 (**Loan**) on the terms set out in the Loan Agreement.
6. The Loan Agreement consisted of:
 - (a) a loan offer setting out the details of the Rocket Repay Home Loan provided by Westpac to the first and second defendants and accepted by the defendants (**Loan Offer**); and
 - (b) a Booklet of Standard Terms and Conditions version wpac.029 dated December 2007 (**General Terms and Conditions**).
7. At pages 1 to 16 of the Exhibit is a copy of the Loan Offer executed by the first and second defendants. This is a true copy of the original Loan Offer in the possession of Westpac and is one of Westpac's Business Records.
8. At pages 17 to 46 of the Exhibit is a copy of the General Terms and Conditions, which is one of Westpac's Business Records.

Alexander Manoel

Deponent

ME 252364808_7



Witness

24. At no time in the Court below or these proceedings to date have the Plaintiffs been permitted to cross examine the deponents employed by the Second Defendant and the proposed Third Defendant.
25. The Plaintiffs seek an order from the court that the Deponents referred to above be made available for cross examination.
26. The Plaintiffs respectfully submits, and asks this Honourable Court to find as a fact, that:
 - a) the interpretation of the term "**The Loan Agreement**" sworn into evidence by the Second Defendant as referred to be the Deponent in paragraph 4 above is perjury and an offence under s20 of COTUNA.
 - b) In support of that request the Plaintiffs refer to "The Information Statement"²³ deposed by the Second Defendant and notes the requirement for a proposed credit contract as follows:

²³ Pages 12 of Bundle Exhibits marked as AM-1 annexed to the affidavit of Alex Manoel dated 28th April 2025

INFORMATION STATEMENT

THINGS YOU SHOULD KNOW ABOUT YOUR PROPOSED CREDIT CONTRACT

This statement tells you about some of the rights and obligations of yourself and your credit provider. It does not state the terms and conditions of your contract.

If you have any concerns about your contract, contact your credit provider and, if you still have concerns, your Government Consumer Agency, or get legal advice.

THE CONTRACT

1. How can I get details of my proposed credit contract?

Your credit provider must give you a pre-contractual statement containing certain information about your contract. The pre-contractual statement, and this document, must be given to you before:

- your contract is entered into; or
- you make an offer to enter into the contract,

whichever happens first.

2. How can I get a copy of the final contract?

If the contract document is to be signed by you and returned to your credit provider, you must be given a copy to keep.

Also, the credit provider must give you a copy of the final contract within 14 days after it is made. This rule does not, however, apply, if the credit provider has previously given you a copy of the contract document to keep.

If you want another copy of your contract write to your credit provider and ask for one. Your credit provider may charge you a fee. Your credit provider has to give you a copy:

- within 14 days of your written request if the original contract came into existence 1 year or less before your request; or
- otherwise within 30 days of your written request.

27. It was acknowledged by the Plaintiffs on those dates that it was a term and condition of the Second Defendant pursuant to the Loan Offer that Westpac Lenders Mortgage Insurance (“LMI”) was compulsory and accepted that term and condition.

Initial fees and charges.

You must pay these before you draw your loan. However, any fees and charges which the Lender agrees to finance from your loan can be paid when you first draw your loan.

- **lenders mortgage insurance charge** \$3,135.00
- **bank cheque issuance fee** \$10.00

per bank cheque. Payable if you request the Bank to issue more than one bank cheque during settlement. The first bank cheque issued is free. The actual amount of this fee will only be known at the time of settlement. By accepting this Loan Offer you agree to pay the actual amount of this fee;

- **loan establishment fee** Nil

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Any mortgage listed above which mortgages to the Lender an interest in real property also mortgages to the Lender any proceeds of insurance policies related to the real property.

.....
TO WHOM WILL THE AMOUNT OF YOUR LOAN BE PAID?

You authorise the Lender to disburse (pay out) your loan in accordance with instructions received from you or your solicitor / agent / conveyancer.

.....
You'll need to instruct the Lender, if you haven't already, how to pay the following amounts. If you don't instruct the Lender, these amounts will be deducted from your loan proceeds.

- The following amounts payable to:

Westpac Lenders Mortgage Insurance Limited.	\$3,135.00
Registration Charges Account:	\$1,133.80
Stamping Charges Account:	\$16,060.00
Bank Cheque Issuance Fee:	\$10.00

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28. The Plaintiffs:

- a) Do not have any record of a credit contract executed by them and certified in accordance with law.
- b) Do not know and cannot say if a Credit Contract was entered into with the Second Defendant because there is no evidence in the proposed Third Defendant's OR Second Defendant's affidavit materials filed thus farof the existence of any credit contract.
- c) Did not provide personal guarantees at any time in support of the Loan Offer as evidenced by the absence of any registration of Personal Property Security Interest on the Personal Property Security Register ²⁶against them by the Second Defendant
- d) do not know or understand the nature of the Stamping Charges referred to above in which regard the website of Westpac refers to Stamp Duty Payable calculated on the purchase price of the land and the cost of LMI insurance:

<https://www.westpac.com.au/personal-banking/home-loans/calculator/stamp-duty-calculator/>

²⁵ Page 7 ibid

²⁶ ANNEXURE 2

29. concede that the evidence of the Second Defendant deposed on the 28th April 2025 (**ONE DAY BEFORE THE COUNTY COURT HEARING ON 30TH APRIL 2025**) evidence AUD\$300,000 was advanced on the 28th of April 20028

Rocket Repay Home Loan Account Transaction Details				
Account details for the period from 27 APR 2008 to 28 MAY 2008				
Date	Description	Withdrawal	Deposit	Balance
2008				
27 Apr	Opening Balance			0.00
28 Apr	INITIAL DRAWING OF LOAN	300000.00		-300000.00
02 May	REFUND OF STAMP DUTY		2250.00	-297750.00
08 May	DEPOSIT ST ALBANS VIC		759.54	-296990.46
15 May	DEPOSIT ST ALBANS VIC		829.50	-296160.96
22 May	DEPOSIT ST ALBANS VIC		629.50	-295531.46
28 May	INTEREST	1960.46		-297491.92
28 May	Closing Balance			-297491.92

30. The above disclosed web site refers to Loan Mortgage Insurance as follows:

What is LMI?

Lender's mortgage insurance (LMI) is a one-off premium paid by the borrower, that protects the bank against any loss if you're unable to repay your loan, and the proceeds of the sale are not enough to pay your loan in full. You're likely to need to pay LMI if your loan-to-value ratio (LVR⁺) is more than 80% i.e. you're borrowing more than 80% of the property's purchase price. LMI can be paid upfront or spread across the term of the loan.

How do you calculate Lenders Mortgage Insurance (LMI)?

The Lender's Mortgage Insurance calculation is based on the size of your deposit and your loan amount. If you borrow over 80% of the purchase price of the property, you are likely to need to pay an LMI premium.

Is LMI an upfront cost?

You can pay LMI immediately, as an upfront cost. Or you may be able to choose to add it to your loan repayments, so the cost is spread across the term of the home loan. Keep in mind that adding an LMI premium to your loan balance will mean you pay interest on it over the life of the loan.

How do I avoid LMI with less than 20% deposit?

With Westpac's Family Security Guarantee, a member of your family may be able to act as guarantor, using the equity in their home to help you buy your home.

If you're a registered midwife or nurse earning at least \$90k a year, you could get a home loan with a 10% deposit, without paying lenders mortgage insurance^{}. Credit criteria, T&Cs and charges apply.*

²⁷ Page 67 Ibid.

How much is LMI usually?

The amount of LMI you pay will depend on the size of your deposit and how much you borrow. Use the calculator on this page to see whether you may need to pay LMI and, if so, an estimate of how much.

What does LMI stand for?

LMI stands for Lender's Mortgage Insurance.

What's the difference between LMI and loan protection insurance?

Lender's Mortgage Insurance is paid by the borrower, and it protects the bank against any loss if you're unable to repay your loan. Loan protection insurance is also paid by the borrower and may pay off your mortgage in the event of terminal illness or death.

When does LMI usually apply?

Lender's Mortgage Insurance is a premium that usually applies if you need to borrow over 80% of the purchase price of the property you want to buy.

Evidence relied upon by the Second Defendant filed in

31. COUNTY COURT No. CI-23-01883

- a) Brenda Jones Affidavit of Service dated 6th May 2023 relating to service on the 4th of May 2023 of:
 - a) Originating Writ of Summons dated 27th April 2023
 - b) Statement of Claim dated 26th April 2023
- b) Minters Affidavit sworn by Samantha Gee-Clark on 22 May 2023, no annexures.
- c) Ben Gordon De Silva (Legalstream) Affidavit of Service dated 23rd May 2023
Default Notice dated 2nd August 2022
- d) Brenda Jones Affidavit of Service dated 6th June 2023 relating to service on 1st June 2023 of Letter from Minter Ellison dated 26th May 2023 annexing Default Judgment for "Recovery of Land" dated 24th May 2023 in:
 - a) default of filing a defence,
 - b) the amount of costs of \$3,926.40
 - c) Westpac Affidavit sworn by Alex Manoel dated 28th April 2025 annexing Bundle Exhibits of 548 pages marked as AM-1.

32. SUPREME COURT: S ECI 2025 02829

- a) Shufei Qu Affidavit on behalf of the Proposed Third Defendant sworn 2 July 2025
(ONE DAY BEFORE THE SUPREME COURT HEARING SET DOWN FOR 4th JULY 2025)

Evidence relied upon by the Plaintiffs filed in:

33. COUNTY COURT No. CI-23-01883

- a) Dorota- Donata Borkowski Affidavit dated 6th May 2025 annexing exhibits marked as:
- “A” Copy of the Default Judgment dated 24 May 2023
 - “B” Copy of the purported Warrant of Possession dated 26 June 2024
 - “C” Photographs documenting property damage from enforcement
 - “D” Correspondence with the Sheriff of Victoria
 - “E” Extracts from Westpac internal memos, AFCA file
 - “F” Written notices and formal communications with parties
 - “G” Personal hearing notes from 30 April 2025 and County Court transcript request
 - “H” Timeline of Events and FOI confirmation
- b) Dorota- Donata Borkowski Affidavit dated 13th May 2025 annexing exhibits marked as:
- “I” County Court transcript dated 30 April 2025
 - “J” Timeline of Title and Enforcement Events (confirming post-eviction eCT registration of interest of Minter Ellison)
- c) Dorota- Donata Borkowski Affidavit dated 19th May 2025 annexing exhibits marked as:
- “K” Internal Westpac memo extracts confirming enforcement was pre-authorised
 - “L” Order made by Judge Burchell on 30 April 2025 in CI-23-01883

34. SUPREME COURT: S ECI 2025 02829

- a) Dorota- Donata Borkowski Affidavit dated 24th June 2025 annexing exhibits marked as:
- “DDB 1” Search of the Title dated 4th April 2025
 - “DDB 2” Form 5G Originating Process as finalised with Registry and the Originating Summons
 - “DDB 3” Instructions Registry Review Public Officials confined the nature of the Application on 14th May 2025
 - “DDB 4” Instructions Registry Review Public Officials confined the nature of the Application on 19th May 2025
 - “DDB 5” Copy of internal processes of the Second Defendant marked as ANNEXURE 5 by the proposed Fifth Defendant
 - “DDB 6” Notice of Summons and Notice of Indictment dated 23rd June 2025 seeking leave and/or abridge time to file a Defence Statement of Counter Claim/ Indictment Information in the Court below and/or file a Statement of Claim/ Indictment Information seeking leave to amend the Claim
 - “DDB 7” Amended Statement of Claim (*Defence and Counterclaim in Ci-23-01883*) and Cross Claim / Indictment Information dated Monday, 23 June 2025

“DDB 8” Decision of the proposed Fifth Defendant dated 7th April 2025
“DDB 9” County Court 23 June 2025 “HARDIMAN LETTER” Borkowski v CCV & Westpac.
“DDB 10” Service on the Court registry by email with an Interlocutory application dated 23rd June 2025

- b) Dorota- Donata Borkowski Affidavit dated 30th June 2025 annexing exhibits marked as:

“A” Copy of the purported Warrant of Possession dated 26 June 2024
“B” FOI Documents from Sherriff’s Office
“C” Letter from Registrar of Titles confirming Administrative Hold on title dated 4th June 2025
“D” Extracts from Westpac internal memos, AFCA file confirming foundational Loan and Mortgage Documents are missing from Westpac Files
“E” Documentary evidence of Activation and Payout of Lenders Mortgage Insurance to the Second Defendant

THE MATTERS ARISING IN THE PROCEEDINGS

35. The Plaintiffs rely on the following definitions a being applicable to the Mortgage and/or the Certificate of Title amongst all the possessions previously located on the Land:

- **“asset” means:**²⁸
 - (a) *an asset of any kind or property of any kind, whether tangible or intangible, movable or immovable, however acquired; and*
 - (b) *a legal document or instrument in any form, including electronic or digital, evidencing title to, or interest in, such an asset or such property, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, debt instruments, drafts and letters of credit.*
- **“funds” means:**²⁹
 - (a) *property and assets of every kind, whether tangible or intangible, movable or immovable, however acquired; and*
 - (b) *legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such property or assets, including, but not limited to, bank credits, travellers’ cheques, bank cheques, money orders, shares, securities, bonds, debt instruments, drafts and letters of credit.*
- **“Public official” shall mean:**³⁰

²⁸ COTUNA

²⁹ the Suppression of Terrorism Financing Act 2002 (AU)

³⁰ UNCAC

- (i) *any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority;*
 - (ii) *any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party;*
 - (iii) *any other person defined as a "public official" in the domestic law of a State Party. However, for the purpose of some specific measures contained in chapter II of this Convention, "public official" may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party;*
- ***"Property"**³¹ shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets;*
 - ***"Proceeds of crime"**³² shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;*
 - ***"Freezing" or "seizure"**³³ shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;*
 - ***"Confiscation"**³⁴, which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;*
 - ***"Predicate offence"**³⁵ shall mean any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 23 of this Convention;*

36. The Plaintiffs seek orders arranging for the cross- examination of:

- a) The Decision Maker acting for the First Defendant
- b) The Deponents for the Proposed Third Defendant and the Second Defendant.

37. No. CI-23-01883 Minter Ellison Affidavit dated 22 May 2023

- a) Samantha Gee-Clerk, paralegal in the employ of Minter Ellison swore this affidavit in the County Court Commercial Division Banking and Finance in proceeding No. CI-23-01883 deposing in words to the following effect:

³¹ UNCAC

³² UNCAC

³³ UNCAC

³⁴ UNCAC

³⁵ UNCAC

- b) No appearance had been entered by the Defendants in those Proceedings/ The Plaintiffs in these proceedings.
- c) Peter Scalzi of that firm instructed her that:
 - ii. the whole of the secured moneys due under the default notices had not been repaid.
 - iii. Possession be sought for recovery of land under **s78** of the *Transfer of Land Act 1958* (Vic).
- d) Peter Scalzi and the Deponent breached their paramount duty owed to the court to confirm with the Second Defendant if:
 - a) There was any debt whatsoever payable by the Plaintiffs in any exact amount.
 - b) The Mortgage and the Debt had been securitised by the Second Defendant such that the Second Defendant was not owed any money.
 - c) The terms and conditions of the Loan Mortgage Insurance with subsequent proceeds could be used to pay the Loan Mortgage in full
- e) The Plaintiffs respectfully submit that the failure to undertake the steps referred to above is defined as “Organised Crime” and “Terrorist Acts” within the meaning of:
 - a) *COTUNA*
 - b) *The Common Law*
 - c) *Combating Serious Organised Crime Act 2001 (AU)*
 - d) *the COTUNA Amendment Act 2002 (AU)*,
 - e) *the Suppression of Terrorism Financing Act 2002 (AU)*

being corrupt conduct within the meaning of UNCAC

38. The Deponent:

- a) sought orders to be made for Default Judgment in the amount of \$3,926.40 for costs and
- b) did not make a claim to outstanding money or
- c) make any reference to any default notices required by law to be served on the Plaintiffs by the Second Defendant in order to apply for orders of possession and/or warrant of possession
- d) did not refer to the affidavit of service of Ben Gordon De Silva (Legalstream) Affidavit of Service dated 23rd May 2023 evidencing service of
 - a) the First Default Notice dated 2nd August 2022
 - b) the Second Default Notice dated 1st December 2022 pursuant to Section **76** of the *Transfer of Land Act /1958 (VIC)* and Section 88 of Schedule 1 of

the National Credit Code in the amount of \$2,096.34 alleging principal debt of \$50,489.05 excluding enforcement expenses.

39. The Plaintiffs note that the above-mentioned affidavit:

- a) has not been served on the plaintiffs at any time, and
- b) is not the subject of an affidavit of service, and
- c) was obtained by me from the County Court File, and
- d) does not disclose ant exhibits annexed to the above-described affidavit, and
- e) does not make any claim for any alleged outstanding money or refer to the Statement of Claim annexed to the affidavit of service, and

40. The Plaintiffs agree there was no money owed at that time nor was there any money that could become payable at any other or subsequent time.

LEDGER TRANSFER TIMELINE

Date	From	To	Loan
14 Sep 2010	3SL22	MSLCP	0747
29 Sep 2010	MSLCP	MSLDP	0747
1 Oct 2010	MSLDP	MSLD1	0747
30 Aug 2018	MSLCP	MCMMP	0747
30 Aug 2018	MCMMP	MSLCP	0747
30 Apr 2014	MSL31	MSLA1	0747
2 Jun 2022	FSL21	FSL22	5046
17 Jun 2022	FSL22	MSL31	5046
9 Dec 2018	FSL13	FSL21	5046
27 Apr 2020	HOLD	FSL11	5046
30 Jan 2016	DFLT	DLMM	0747

41. Full Ledger Transfer Interpretations (Loan Accounts 0747 & 5046)

- a) **Date:** 14 Sep 2010^{[[L]]}_{[[SEP]]}**From:** 3SL22^{[[L]]}_{[[SEP]]}**To:** MSLCP^{[[L]]}_{[[SEP]]}**Loan:** 0747^{[[L]]}_{[[SEP]]}**Interpretation:** Loan 0747: Transferred from 3SL22 to MSLCP. Reclassified within master servicing ledgers—MSL entries often denote internal ledger segments for trust servicing.
- b) **Date:** 29 Sep 2010^{[[L]]}_{[[SEP]]}**From:** MSLCP^{[[L]]}_{[[SEP]]}**To:** MSLDP^{[[L]]}_{[[SEP]]}**Loan:** 0747^{[[L]]}_{[[SEP]]}**Interpretation:** Loan 0747: Transferred from MSLCP to MSLDP. Reclassified within master servicing ledgers—MSL entries often denote internal ledger segments for trust servicing.
- c) **Date:** 01 Oct 2010^{[[L]]}_{[[SEP]]}**From:** MSLDP^{[[L]]}_{[[SEP]]}**To:** MSLD1^{[[L]]}_{[[SEP]]}**Loan:** 0747^{[[L]]}_{[[SEP]]}**Interpretation:** Loan 0747: Transferred from MSLDP to MSLD1. Reclassified within master servicing ledgers—MSL entries often denote internal ledger segments for trust servicing.

- d) **Date:** 30 Aug 2018^[SEP]**From:** MSLCP^[SEP]**To:** MCMMP^[SEP]**Loan:** 0747^[SEP]**Interpretation:** Loan 0747: Transferred from MSLCP to MCMMP. Movement between master cash management or pooling modules—indicates internal restructuring or batching.
- e) **Date:** 30 Aug 2018^[SEP]**From:** MCMMP^[SEP]**To:** MSLCP^[SEP]**Loan:** 0747^[SEP]**Interpretation:** Loan 0747: Transferred from MCMMP to MSLCP. Movement between master cash management or pooling modules—indicates internal restructuring or batching.
- f) **Date:** 30 Apr 2014^[SEP]**From:** MSL31^[SEP]**To:** MSLA1^[SEP]**Loan:** 0747^[SEP]**Interpretation:** Loan 0747: Transferred from MSL31 to MSLA1. Assigned to a securitisation ledger—MSLA codes typically designate tranches or trust pools (e.g., A1, B2).
- g) **Date:** 02 Jun 2022^[SEP]**From:** FSL21^[SEP]**To:** FSL22^[SEP]**Loan:** 5046^[SEP]**Interpretation:** Loan 5046: Transferred from FSL21 to FSL22. Transferred between financial structure ledgers—commonly tied to RMBS warehouse or funding pool adjustments.
- h) **Date:** 17 Jun 2022^[SEP]**From:** FSL22^[SEP]**To:** MSL31^[SEP]**Loan:** 5046^[SEP]**Interpretation:** Loan 5046: Transferred from FSL22 to MSL31. Reclassified within master servicing ledgers—MSL entries often denote internal ledger segments for trust servicing.
- i) **Date:** 09 Dec 2018^[SEP]**From:** FSL13^[SEP]**To:** FSL21^[SEP]**Loan:** 5046^[SEP]**Interpretation:** Loan 5046: Transferred from FSL13 to FSL21. Transferred between financial structure ledgers—commonly tied to RMBS warehouse or funding pool adjustments.
- j) **Date:** 27 Apr 2020^[SEP]**From:** HOLD^[SEP]**To:** FSL11^[SEP]**Loan:** 5046^[SEP]**Interpretation:** Loan 5046: Transferred from HOLD to FSL11. Transferred from a holding ledger—this is consistent with temporary staging before active ledger or trust assignment.
- k) **Date:** 30 Jan 2016^[SEP]**From:** DFLT^[SEP]**To:** DLMM^[SEP]**Loan:** 0747^[SEP]**Interpretation:** Loan 0747: Transferred from DFLT to DLMM. Moved from default to delinquency monitoring—may represent pre-securitisation mitigation or investor repurchase protection.

Date	Code	From	To	Type
24 Apr 2010	ARCLS	3SL23	MSL31	Ledger Reassignment
30 Apr 2010	ARCLS	MSL31	MSLD1	Ledger Reassignment
17 Jun 2011	ARCLS	3SL12	MSLCP	Ledger Reassignment
19 Nov 2010	ARCLS	3SL23	MSLCP	Ledger Reassignment
30 Mar 2022	ARCLS	MSLA7	3HOLC	Ledger Reassignment

30 Mar 2022	CXFR	MSLA7	DHLD	Cross-Account Transfer
11 Feb 2023	MEMO	037149390747	MSLA7MTM A	Primary Loan Allocation
11 Feb 2023	MEMO	037186655046	MSLA7MTM A	Non-Interest Split Allocation

42. Ledger Prefix Decoding Legend (Westpac Internal)

Prefix / Code	Likely Meaning	Context / Function
ARCLS	Account Reclassification	Automated reallocation between internal ledger pools or servicing structures
CXFR	Customer Cross-Reference Transfer	Transfer between associated accounts (e.g., main to split loan)
3SLxx	Structured Loan Ledger (Batch ID xx)	Likely represents loans grouped for pooling or warehousing pre-securitisation
MSLxx	Master Servicing Ledger (xx = category or trust ledger)	Internal ledger for managing loans across investor portfolios or trust segments
MSLDx	Master Servicing Ledger – Default or Delinquent	Likely subledger tracking loans in hardship or arrears during pool reclassification
MSLAx	Mortgage Securitisation Ledger Allocation (e.g., MSLA1)	Allocation into RMBS tranches (e.g., A1 = senior tranche in trust pool)
MSLA7MTMA	Specialised internal tag (MTMA = Mortgage Trust Management Account)	Indicates pooled loan assignment to a managed trust or investor ledger
3HOLC	Holding Control Pool (inferred)	Temporary ledger used to stage or exit loans from poolable structures
DHLD	Default/Hardship Ledger Destination (inferred)	Indicates the loan was flagged for enforcement risk or hardship monitoring
FSLxx	Funding Structure Ledger (e.g., FSL11, FSL21, FSL22)	RMBS-related warehouse or funding conduit identifiers
MCMMP	Master Cash Management Mortgage Pool	Backend cash flow or remittance pool for securitised loans
DLMM	Delinquency Loss Mitigation Module	Internal system used to monitor or recover loss-prone loans

IMPUNITY

43. Impunity (like the words pain, penal, and punish) traces to the Latin noun poena, meaning "punishment." The Latin word, in turn, came from Greek poinē, meaning "payment" or "penalty." People acting with impunity have prompted use of the word since the 1500s. An illustrative example from 1660 penned by Englishman Roger Coke reads:

"This unlimited power of doing anything with impunity, will only beget a confidence in kings of doing what they [desire]."

44. While royals may act with impunity more easily than others, the word impunity can be applied to the lowliest of beings as well as the loftiest:

"The local hollies seem to have lots of berries this year. ... A single one won't harm you, but eating a handful would surely make you pretty sick, and might kill you. Birds such as robins, mockingbirds, and cedar waxwings eat them with impunity."³⁶

45. The Plaintiffs respectfully submit the Defendants, and the proposed Defendants and related Public Officials act with impunity³⁷ without fear of prosecution because:

- a) the Quintet of Attorney Generals have abdicated the Common Law/ Statutory role of Champion of the Public Interest
- b) the Law societies of Australia act as secret societies.³⁸

Mr McRAE: *This is the one clause on which the Opposition will divide. It is a new clause. We have heard the incredible doctrine this evening that no amendment, no matter how logical, reasonable or sensible, will be accepted. Taking into account the realities of that comment, we must draw the line when it comes to total secrecy. The Law Society is now assuming Mafia proportions. It has written the Bill and the amendments, it has appointed the members, it controls the whole of the discipline, and the money, and now it even keeps the accounts. If Government back-benchers are not disturbed about that, I am absolutely stunned.*

Mr McRAE: *I am trying to indicate to the Government back-benchers that, if they want to get some respectability into this whole farce, the circumstances that we have had tonight, they should at least make the society produce the accounts in Parliament. If everything else is to be secret, Parliament has no function at all.*

Mr Crafter: *It is a secret society.*

Mr McRAE: *It is a totally secret society. I indicated earlier that in many ways I support the Law Society, but in other respects I am critical of it.*

³⁶ (Karl Anderson, The Gloucester County Times, 22 Dec. 2002).

³⁷ *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) HCA 11

³⁸ Hansard of the House of Assembly of South Australian Parliament on the 10th June 1981 at p 4180

OUR CORRUPT LEGAL SYSTEM;

46. The Plaintiffs rely on the works of Evan Whitton was Editor of The National Times, Chief Reporter at The Sydney Morning Herald, and Reader in Journalism at Queensland University. He received the Walkley Award for National Journalism five times and was Journalist of the Year 1983 for '*courage and innovation*' in reporting an inquiry into judicial corruption. He began researching the West's two legal systems in 1991 after observing how each system dealt with the same criminal, police chief Sir Terence Lewis. He was then a columnist on a legal journal, Justinian This is his eighth non-fiction book

Whitton's work noticed

'*A dazzling writer, incisive and addictive*'. – Dr George Miller, director Babe, Happy Feet.

a) Trial by Voodoo (1994)

'*The only book in the language that critically examines the law as a whole.*' – Professor Alex Ziegert, Sydney University.

The Cartel (1998)

'*Evan Whitton has said, with I think consummate wisdom: "Truth and justice require ... the abolition of rules for concealing evidence."*' – Sir Laurence Street, former Chief Justice, NSW.

'*Whitton has a remarkably extensive knowledge of the legal system and the way it works ... rich in anecdote ... a wealth of historical knowledge and research ... His insights are always valuable...*' – Justice Ian Callinan, High Court of Australia.

Serial Liars (2005)

'*... confronts all the major lawyer arguments and disposes of them.*' – Brett Dawson, former Crown Prosecutor.

Other books by Evan Whitton

Can of Worms (1986)

Amazing Scenes (1987)

*Can of Worms II (1987)

*The Hillbilly Dictator (1989, *updated edition 1993)

*Trial by Voodoo: Why the Law Defeats Truth and Democracy (1994)

*The Cartel: Lawyers and Their Nine Magic Tricks (1998)

*Serial Liars (2005)

The books marked * are available online at www.netk.net.au/WhittonHome.asp

WOE UNTO YOU YE LAWYERS

47. The Plaintiffs also rely on the work of FRED RODELL, Professor of Law, Yale University written in 1939³⁹ quoting:

“Woe unto you, lawyers! For ye have taken away the key of knowledge: ye entered not in yourselves, and them that were entering in ye hindered.” — Luke. XI, 52

48. Since at least 100 A.D.

- a) the legal system represented in Australia by over 90,000 lawyers has been unregulated; self-regulation is mis-regulation⁴⁰
- b) the judiciary have been unregulated.⁴¹

“Explored by Jacques Derrida when he patiently deconstructed - we must acknowledge that justice, in any situation, depends upon a full and fair accounting of the facts of that situation. If, instead of facts, fictions are introduced that are contrary to the facts, then any claimed “just solution” based on such fictions cannot⁴² achieve justice in the real world.⁴³ The proposition is so elementary that it usually achieves justice goes without saying.”

49. The Hayne Royal Commission found that Fake Regulation in Australia has reached system wide pandemic proportions.⁴⁴

50. The Evidence will show that nothing has changed since the Letters Patent establishing that Royal Commission in 2017.

“UNCOVERING THE SECRET THATCHER FILES: WHAT BRITAIN THOUGHT ABOUT AUSTRALIA”⁴⁵

³⁹ <https://1drv.ms/w/c/13ebd865c7415cd4/EdRcQcdl2OsggBNgzglAAAABqN-UUNJXWJMdcVSA4s4HKA?e=ijkhad>

⁴⁰ D'Amato, Anthony, "Self-Regulation of Judicial Misconduct Could Be Mis-Regulation" (2010). Faculty Working Papers. Paper 69. <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/69>

⁴¹ The Ultimate Injustice: When A Court Misstates the Facts, 11 Cardozo L. Rev. 1313 (1990) July/August, 1990, by Anthony D'Amato FNA

⁴² Any “just solution” can only be achieved by sheer coincidence—for example, if the fictions happen to cancel themselves out

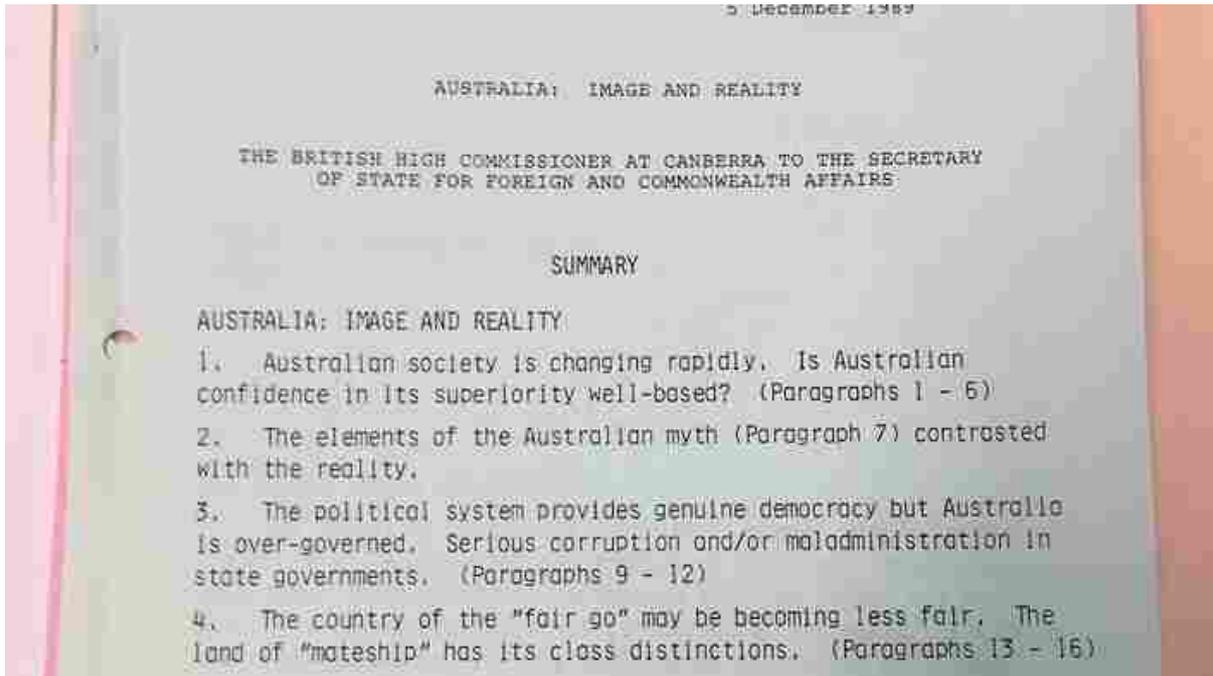
⁴³ A contrary-to-fact statement is not, I suggest, an “interpretation” of the underlying fact. It may be that all law must be interpreted; some of the more radical deconstructionists among us believe that law is nothing more than interpretation. We assert that the words of law have no independent existence. Our interpretations of the law constitute the law; there is nothing “behind” the interpretation. But it is quite otherwise, we believe, when we come to facts. To be sure, facts have to be interpreted; they are *not ding an sich* (Kant's term for things-in-themselves).

No matter how generous and loose the interpretation of a fact may be, we cling to the bedrock belief that we cannot simultaneously assert the existence and nonexistence of a fact. We believe that interpretation as a term is misused if it is cited as an operation that can turn a fact into a non-fact. My belief on this score is more ontological than epistemological; it has to do with a conviction that the real world, unlike texts, does not allow for the assertion of the opposite of a fact. If A killed B, an impermissible “interpretation” of this statement is that A did not kill B. Conversely, if A did not kill B, an impermissible “interpretation” of this statement is that A killed B. This is not so much epistemological as it is ontological because it turns more on what we know about the real world than what we know about language and texts

⁴⁴ The Farce of Fake Regulation: Royal Commission Exposed Australia: Wilson Sy, 29 March 2019. Investment Analytics Research.

⁴⁵ SBS News; 30th December 2016 by Brett Mason

51. relevantly sets out details of a report from the British High Commissioner dated 10th December 1986;



*“Sir John Coles, who concluded that **“redefining Britain’s relationship with Australia”** was **“long overdue”**;*

In a confidential and colourful 15-page dispatch titled 'Australia: Image and Reality', Sir John attempts to help bureaucrats in London better understand the “rapidly changing Australian society”.

“In order to protect and advance our substantial interests we need to be as aware of the nature of that society as we are of the societies of our European, North American and other allies”, his dossier begins.

“But somehow that knowledge does not come so easily in the case of Australia.

“The British media show little interest in the real problems of this country.

“The Australian myth is that this is the land of opportunity, the land where the class system of Britain and elsewhere does not exist, where no person is better than the next, where everyone is entitled to 'a fair go', where the 'battler', given a modicum of luck, can achieve the good life and rise to whatever position his talents entitle him.

“This land of ‘mate ship’ and democracy has more private schools than Britain.

“And the ‘battler’? The people of this country have become ‘soft’.

“The effects of easy living on the majority of Australians are all too apparent in the relative absence of the work ethic and in denigrating attitudes towards achievement and productivity.

“The soap-opera ‘Neighbours’ is a more accurate picture of Australia than the ‘Flying Doctors’.

“The confidence that Australia is the best is a constant in the daily scene here.

“The Australian audience loves to be told that this or that Australian achievement has no equal. “Much of the impetus which drives Australia to its excellence in sport is fired by a national determination to assert Australianness against the rest of the World.

The High Commissioner went on to make a devastating assessment of Australia’s three tiers of government – local, state and federal.

“Despite the much expressed contempt for governments this is in some ways the greatest nanny-state of all.

“The major charge which can be fairly levelled against public administration in Australia is that of corruption.

“Some of the states are notorious,” he noted, adding that earlier in 1989 “many heads rolled” in Queensland.

“The New South Wales Minister for Police told me some time ago that if there was ever an enquiry into corruption in his own police force it would make the Queensland affair look like a children’s tea-party.

“The long-established corruption and maladministration in the States are a bad blemish on the country’s political system.

“The quality of government at State level is generally poor.

“Yet I do not find that surprising.

“The population base of 16 million is too small to provide politicians of high quality to man political parties in nine separate political units.”

The High Commissioner observed, “the Australian media are notorious for their low standards of journalism, their scurrilousness, triviality and bias”, and their reporting of the Prime Minister’s visit was largely “snide comment, half-baked and out-of-date ideas about Britain and grudging admiration of the Prime Minister”

There was, however, one topic on which the pair did agree: Australia receiving one of two original copies of the Australian Constitution.

A directive sent from Downing Street reveals that, despite refusals from the Lord Chancellor and Civil Service, Mrs Thatcher was “sympathetic to the request” and pushed ahead with her instructions for one of the documents to be sent to Canberra.

The memo read: “(T)he Prime Minister said that the birth of a nation was a remarkable event and not to have it legitimized by a birth certificate must be galling, especially when the foster parents had two. She wondered how people in this country would feel if somebody else had two copies of the Magna Carta and we had none. She thought we were being selfish in refusing the Australians.”

Mr Hawke had made four formal requests that had been politely declined, refusing to accept the offer of a replica, noting, “permanent possession of the original document containing the Australian Constitution is a matter of great consequence for all Australians”.

The Foreign Minister, Gareth Evans, didn't appear, however, to share the Prime Minister's determination. When Britain's Foreign Secretary raised the issue with him directly during a meeting at CHOGM in Kuala Lumpur in 1989, the minutes noted,

“Senator Evans reacted with surprise... saying that ‘he didn't give a stuff about the Constitution Act’”.

THE ROME STATUTE

52. Under article 13 of the Rome Statute, there are three ways the exercise of the Court's jurisdiction can be triggered where crimes under the Court's jurisdiction appear to have been committed. In all three instances, the Prosecutor must carry out an independent and impartial evaluation before deciding to proceed:
- a) Any State Party of the Rome Statute may refer a situation requesting the Prosecutor to carry out an investigation. The Prosecutor will open an investigation if the legal criteria are met. *This happened in the situations of the Democratic Republic of the Congo, Uganda, Central African Republic (on two occasions), Mali, Palestine, Venezuela and Ukraine;*
 - b) The United Nations Security Council (UNSC) may also refer a situation to the Prosecutor, who will open an investigation if the legal criteria are met. *To date, this happened in the situations of Darfur (Sudan) and Libya.*
 - c) Finally, the Prosecutor may open an investigation on his own initiative. The Prosecutor may decide to open an investigation – if the Prosecutor decides to proceed, he must seek legal authorization from the judges. *This happened in the situations in Kenya, Côte d'Ivoire, Georgia, Burundi, Afghanistan, Bangladesh/Myanmar, and the Philippines.*
53. A State not Party to the Statute may also accept the exercise of jurisdiction on an ad hoc basis, by submitting a declaration pursuant to article 12(3) of the Rome Statute. An ad hoc declaration is not the same as a referral and still requires the triggering of the Court's jurisdiction – which can happen by one or more States Parties referring the situation or by the Prosecutor seeking authorization from the judges.
54. The Court's jurisdiction may be exercised with respect to any Rome Statute crime committed on the territory or by the nationals of a State Party. The same applies where a State not Party to the Statute lodges a declaration with the Court.
55. The only exception to the above is where the UNSC refers a situation under Chapter VII of the UN Charter, which can relate to any situations involving any UN Member State (including with respect to the territory of a State not Party to the Rome Statute).
56. Any State Party of the Rome Statute may refer a situation requesting the Prosecutor to carry out an investigation. The Prosecutor will open an investigation if the legal criteria are met.
57. This happened in the situations of the Democratic Republic of the Congo, Uganda, Central African Republic (on two occasions), Mali, Palestine, Venezuela and Ukraine;

58. The United Nations Security Council (UNSC) may also refer a situation to the Prosecutor, who will open an investigation if the legal criteria are met.
59. Pursuant to Article 14 of the Rome Statute, Australia MUST, as the relevant State Party, refer to the Prosecutor the situation arising in the State of Victoria, Australia, concerning systemic and coordinated acts of unlawful property seizure, fraudulent judicial conduct, and suppression of legal remedies. These acts demonstrate patterns consistent with crimes against humanity under Article 7 of the Statute, notably persecution, inhumane acts, and other abuses committed under color of law.

Respectfully Submitted on Thursday, 3 July 2025

DOROTA-DONATA BORKOWSKI
and
MICHAEL-MARK BORKOWSKI

Plaintiffs

ANNEXURE 1



Approved by The Real Estate Institute of Victoria Ltd.
and approved by the Victorian Lawyers RPA
under S 53A of the Estate Agents Act 1980



CONTRACT NOTE

Cooling-off period

IMPORTANT NOTICE TO PURCHASERS

Section 31 Sale of Land Act 1962

If none of the exceptions listed below applies to you, you may end this contract within 3 clear business days of the day that you sign the contract. To end this contract within this time, you must either give the vendor or the vendor's agent written notice that you are ending the contract or leave the notice at the address of the vendor or the vendor's agent.

If you end the contract in this way, you are entitled to a refund of all the money you paid EXCEPT for \$100 or 0.2% of the purchase price (whichever is more).

EXCEPTIONS - The 3-day cooling-off period does not apply if -

- The property exceeds 20 hectares in size and is used mainly for farming.
- The property is used mainly for industrial or commercial purposes.
- You received independent advice from a solicitor before signing the contract.
- You previously signed a similar contract for the same property.
- You bought the property at or within 3 clear business days before or after a publicly advertised auction.
- You are an estate agent or a corporate body.

THE ESTATE AGENT BORG NOMINEES PTY LTD TRADING AS JOHN KENTERS REAL ESTATE
TAYLORS LAKES - SHOP 28 WATERGARDENS SHOPPING CENTRE TAYLORS LAKES

Phone: 94491666 Fax 94491777 Mobile 0405816183 Refer John BUSUTIL for

THE VENDOR ANTHONIE'S CONSTRUCTIONS PTY LTD
OF 1 FERGUS COURT STRENGTHAM

has obtained from

THE PURCHASER ROBERTA BORKOWSKI & MICHAEL BORKOWSKI
7 SILVERDENE AVENUE SYDENHAM

this offer to purchase

THE PROPERTY 15 JACARANDA DRIVE Taylors Hill

and

THE CHATELS All existing window/Floor coverings, light fittings and
fixtures of a permanent nature

for

THE PRICE of \$ ~~320,000~~ *Plus any GST* which includes any GST, payable by a

DEPOSIT \$34,000 of \$ 33,000 by 6 13 2008 (of which \$ _____ has been paid) and

THE BALANCE of \$ ~~297,000~~ plus any GST (unless the price includes any GST)

\$306,000 (a) on 8 15 2008 or earlier by agreement or
(b) as described in the Special Conditions overleaf.

SUBJECT TO

1. _____

↑ insert any tenancies or leases affecting this property

2. The vendor providing the purchaser with *vacant possession OR *receipt of the rents and profits of the property upon acceptance of title by the purchaser and receipt of the consideration then due to the vendor under terms of this contract.

3*. Finance - The lender (if any) approving the loan on the security of the property by the approval date or any later approval date allowed by the vendor. The purchaser may end the contract if the loan is not approved by the relevant approval date only if the purchaser -

- (a) has made immediate application for the loan
- (b) has done everything reasonably required to obtain approval of the loan
- (c) serves written notice ending the contract on the vendor on or before 2 business days after the approval date, and
- (d) is not in default under any other condition of this contract when the notice is given.

All money must be immediately refunded to the purchaser if the contract is ended.

PURCHASER'S FINANCE Lender _____
Loan being not less than \$ _____ Approval Date 1 12

4. The general conditions of sale, other than GC 3, contained in the Contract of Sale of Real Estate, prescribed under section 99 of the Estate Agents Act 1980.

5. Any special conditions on the back of, or attached to, this Contract Note.

Insert as appropriate whenever asterisk () appears

THE VENDOR'S STATEMENT

required by Section 32(1) of the Sale of Land Act 1962 is attached to, and included in, this Contract Note and discloses details of any easements and covenants affecting the property

This offer is made by the purchaser on

21/2/2008 and will lapse at midnight on 1/2

Signature/s of the *purchaser

[Signature] *Director of the purchaser

BY SIGNING THIS DOCUMENT YOU WILL BE LEGALLY BOUND BY IT

This offer is accepted by the vendor on

22/2/2008
[Signature]

Signature/s of the vendor

*Director of the vendor

The parties acknowledge being given a copy of this Contract Note by the agent at the time of signature.

VENDOR'S SOLICITOR

VANTAGE Bay PTY LTD Conveyancing Attention
services, 6 PEDERSEN AVENUE RESERVOIR
Phone: 9460 8955 Fax: 9460 8277 DX:

PURCHASER'S SOLICITOR

GENERAL Conveyancing Company Attention DIANNE FARRELL
313 KELLOR ROAD ESSENDON NORTH
Phone: 9374 1277 Fax: DX:

SPECIAL CONDITIONS ("SC")

91. GST -

1.1 Purchaser to reimburse GST

1.1.1 If the price is expressed as a dollar amount "plus any GST", and a supply made under this contract is a taxable supply, the purchaser must pay to the vendor at settlement, in addition to the dollar amount specified as the price of the supply, an amount equal to the GST payable by the vendor in respect of the supply.

1.1.2 Except in respect of a supply of real property to which the margin scheme is to apply, the purchaser is not required to pay an amount on account of GST until provided with a tax invoice.

*1.2 Margin Scheme [~~Delete if not applicable~~]

The vendor and purchaser agree that the margin scheme is to apply to the supply of real property made under this contract. [Note that, if the margin scheme is to apply, the parties need to consider whether the supply is eligible, the means of working out the margin and who is to pay for any valuation.]

*1.3 Supply of going concern [~~Delete if not applicable~~]

1.3.1 The parties agree that the supply made under this contract is the supply of a going concern.

1.3.2 The purchaser warrants that it is registered for GST.

1.3.3 The price specified does not include GST but, if any supply under this contract is a taxable supply, SC1.1 applies to that supply.

*1.4 Farming business [~~Delete if not applicable~~]

1.4.1 The vendor warrants that the property is land on which a farming business has been carried on for at least the five (5) years preceding the date of supply. [Note that, with cash contracts, supply occurs at settlement but, with terms contracts, supply will generally occur when any part of the consideration, other than the deposit, is paid.]

1.4.2 The purchaser warrants that it intends that a farming business will be carried on, on the land.

1.4.3 The price specified does not include GST but, if any supply under this contract is a taxable supply, SC1.1 applies to that supply.

1.5 No merger

This special condition will not merge upon settlement.

1.6 Definitions

In this contract:

"farming business" has the meaning given to it by the GST law.

"GST" has the meaning given to it in the GST law, but includes penalties and interest imposed under the GST law.

"GST law" has the meaning given to it in A New Tax System (Goods and Services Tax) Act 1999 (as amended).

This is subject to the sale of 45 Eumarella street Tullamarine 3043. To be done by Monday 25th FEBRUARY 2008.

[Signature]

* Delete or insert as appropriate wherever the asterisk(*) appears.

† If the GST will not apply to the sale, and no part of SC 1 is otherwise relevant, SC 1 may be deleted.

Note: In this Contract, "GST" means the goods and services tax imposed by the A New Tax System (Goods and Services Tax) Act 1999 (as amended).

ANNEXURE 2

Australian Government
Australian Financial Security Authority



PPSR
Personal Property
Securities Register

20/06/2025

Grantor Search Certificate

This is a grantor search certificate for a grantor search

This Search certificate is provided under section 174 of the *Personal Property Securities Act 2009*

Search certificate number: 8228734059720001

Search number: 822873405972

This search certificate reflects the data contained in the PPSR at 20/06/2025 14:57:12 (Canberra Time).

Search Criteria Details

Grantor type:	Individual
Given names:	Michael Mark
Family name:	Borkowski
Date of birth:	08/05/1972
PPSR registration state searched:	Current
Collateral class:	All collateral classes
PMSI:	Registrations that are either a PMSI or not a PMSI
Transitional:	Not Transitional Transitional - non migrated Transitional - migrated
Registration Kind:	All registration kinds
Sort registrations by number:	Ascending

PPSR Registration Details

There is no security interest or other registration kind registered on the PPSR against the individual grantor in the search criteria details.

How to verify this certificate on the PPSR

You can use the search number from an original search (as shown on this certificate) to retrieve the original search results and to issue a copy of the search certificate at <https://transact.ppsr.gov.au/ppsr/Home>.

There is no fee, however this process will not provide any update to the information in the original search.

Privacy and Terms and Conditions

The Australian Financial Security Authority is subject to the *Privacy Act 1988* which requires that we comply with the Australian Privacy Principles (APPs) set out in the Act. The APPs set out how Australian Government agencies should collect, use, store and disclose personal information and how individuals can access records containing their personal information.

Access to and use of the PPSR is subject to the General Conditions of Use, as well as other relevant terms and conditions. All relevant terms and conditions can be found at www.ppsr.gov.au.

End of search certificate

Page 1 of 2



Australian Government
Australian Financial Security Authority



PPSR
Personal Property
Securities Register

20/06/2025

Grantor Search Certificate

This is a grantor search certificate for a grantor search

This Search certificate is provided under section 174 of the *Personal Property Securities Act 2009*

Search certificate number: 7971105909210001
Search number: 797110590921

This search certificate reflects the data contained in the PPSR at 20/06/2025 14:52:55 (Canberra Time).

Search Criteria Details

Grantor type:	Individual
Given names:	Dorota
Family name:	Borowski
Date of birth:	07/04/1971
PPSR registration state searched:	Current
Collateral class:	All collateral classes
PMSI:	Registrations that are either a PMSI or not a PMSI
Transitional:	Not Transitional Transitional - non migrated Transitional - migrated
Registration Kind:	All registration kinds
Sort registrations by number:	Ascending

PPSR Registration Details

There is no security interest or other registration kind registered on the PPSR against the individual grantor in the search criteria details.

How to verify this certificate on the PPSR

You can use the search number from an original search (as shown on this certificate) to retrieve the original search results and to issue a copy of the search certificate at <https://transact.ppsr.gov.au/ppsr/Home>. There is no fee, however this process will not provide any update to the information in the original search.

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End of search certificate

Page 1 of 2

Letter to the Governor-General

Letter to the Governor-General



Her Excellency the Honourable Sam Mostyn AC
Governor-General of Australia
Government House
Yarralumla ACT 2600

Your Excellency

We write with deep concern regarding remarks attributed to you in *The Sydney Morning Herald* of 24 June 2025, in which you are reported as stating: *“But the King doesn’t direct me and I don’t seek his advice. It’s the prime minister and the ministry I take my counsel from, and that I work with.”*

Such a statement, if accurately reported, appears to depart from the conventions that have long guided the office of Governor-General. While it is understood that the Governor-General acts on ministerial advice in most matters, the office is held as the representative of the Sovereign, not as a delegate of the Prime Minister. The distinction is not merely symbolic; it is foundational to the integrity of our constitutional system.

We are particularly concerned that the phrasing of your remarks may be interpreted as dismissive of the King’s role and suggestive of an overly close alignment with the Prime Minister and his government.

The Governor-General must remain above politics and be seen to uphold the impartiality and dignity of the Crown. To imply that counsel is sought exclusively from the Prime Minister and ministry risks undermining public confidence in the independence of the high office to which the King has appointed you.

If Your Excellency does not wish to uphold the duties, conventions, and constitutional responsibilities of the Governor-General as the King’s representative in Australia, we respectfully submit that resignation would be the appropriate course.

Yours sincerely,

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Judicial Review of the Exercise of Discretionary Public Power¹

This address is concerned with two topics.

Part 1 concerns the constitutional implications of the phrases “the Supreme Court of any State” and “or of any other court of any State” as those terms are used in s 73 of Chapter III of the Constitution, and the limitations upon State executive and legislative power according to the *Kable*² and *Kirk*³ principles. **Part 2** concerns the notion of “unreasonableness” and the implications of the High Court decision in *Minister for Immigration and Citizenship v Li*⁴ in the review of the exercise of discretionary power and whether the decision-maker has exceeded the limits of the power.

Part 1

The impressive London statue of Winston Churchill by Ivor Roberts-Jones has Churchill looking across to the Westminster Parliament and particularly the House of Commons to where the statue of Oliver Cromwell stands outside the House.

That gaze seems appropriate because Churchill looked upon and described Cromwell as “our greatest man”⁵, bound up in the assertion of the “supremacy of Parliament” which would, over time, ultimately be regarded as the expression of the will of a sovereign people.

The point of Churchill’s observation really is that the great English constitutional struggles which took many forms were concerned with the *supremacy of Parliament* and not with any notion of the *separation of powers*.

The colonial legislatures reflected that Westminster model.

As Chief Justice French has observed in *Totani*⁶ there was, at Federation, no doctrine of separation of powers entrenched in the Constitutions of the States although unsuccessful

¹ An address given on 27 April 2017 to the Queensland Chapter of the Australian Institute of Administrative Law

² *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51

³ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531

⁴ (2013) 249 CLR 332. As to a brief outline of the context of the discretionary decision of the Tribunal under challenge in *Li*, see footnote 123

⁵ This is a remark made by Churchill in a BBC interview with Malcolm Muggeridge. The source of the title of Antonia Fraser’s biography of Cromwell, “Cromwell, Our Chief of Men”, 1973, may have been influenced by this remark but the title seems, clearly enough, to be drawn from John Milton’s Sonnet 16 “Cromwell, our chief of men, who through a cloud ...”.

⁶ *South Australia v Totani* (2010) 242 CLR 1, French CJ at [66]

attempts were made in New South Wales, Western Australia and South Australia in the 1960s and 1970s and in Victoria in 1993 to persuade courts of the existence of such a doctrine⁷.

The Commonwealth Constitution, of course, provides for a distribution of Commonwealth executive, legislative and judicial power.

Of present relevance to the supervisory jurisdiction of administrative decision-making at the Federal and State level is Chapter III of the Constitution and the way in which it vests the judicial power of the Commonwealth by s 71 of the Constitution. I will return to this aspect of the matter shortly because of its centrality to the constitutionalisation of the supervisory jurisdiction exercised by the State Supreme Courts, of administrative decision-making. One of the limitations on Commonwealth legislative power, of course, is the well-known *Boilermakers'* doctrine⁸.

The Constitution also reflects at least three other features of present importance. The *first feature* is the conception on which the Constitution is framed which has come to be known as the *Melbourne Corporation* principle, put this way by Sir Owen Dixon in 1947⁹:

The foundation of the Constitution is the *conception of a central government* and a number of *State governments separately organized*. The Constitution *predicates their continued existence as independent entities*. Among them it distributes powers of governing the country. The framers of the Constitution do not appear to have considered that power itself forms part of the conception of a government. They appear rather to have conceived the States as bodies politic whose existence and nature are independent of the powers allocated to them. The Constitution on this footing proceeds to distribute the power between State and Commonwealth and to provide for their inter-relation, tasks performed with reference to the legislative powers chiefly by ss 51, 52, 107, 108 and 109.

The *second feature* is the notion discussed by Mason CJ in 1992 in *Australian Capital Television Pty Ltd v The Commonwealth*¹⁰ that the *very concept* of representative government and representative democracy signifies government by the people through their representatives and, translated into constitutional terms, the Constitution brought into existence a system of representative government in Australia in which elected representatives

⁷ See footnotes 223 to 227, *ibid* at [66]; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, French CJ at [22]

⁸ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; the *Boilermakers'* doctrine prevents the Commonwealth Parliament from conferring judicial power on bodies other than courts and prevents it from conferring any power that is not judicial power (or power incidental to judicial power) on courts specified in s 71 of the Constitution.

⁹ *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 82; emphasis added

¹⁰ (1992) 177 CLR 106 at 137 and 138

exercise sovereign power on behalf of the Australian people¹¹. Thus, in 1997 in *Lange v Australian Broadcasting Corporation*¹², the High Court held that the Constitution provides for an “implied freedom” of political communication as “an indispensable incident of that [constitutional] system of representative government”¹³. The freedom is not absolute. As Gummow and Hayne JJ observe in *Mulholland v Australian Electoral Commission*¹⁴, the High Court had, put anecdotally, had enough of the “great difficulties” created by the phrase “absolutely free” in s 92, to give rise to another “incompletely stated ‘freedom’ ... discerned in the Constitution”¹⁵. Thus the freedom is limited. It gives rise to invalidity in the exercise of legislative or executive power which burdens the freedom in a way which is “not reasonably appropriate and adapted” to secure a legitimate end compatible with the constitutionally prescribed system of government.

I mention this matter of the implied freedom because of its potential role of invalidating exercises of legislative and executive power as the source of a discretion.

If a Federal or State Act confers a power upon a decision-maker, a question might arise whether, *first*, the terms of the conferral burden the freedom and *second*, if so, whether the burden is “reasonably adapted” as described. The terms of the Act might, however, confer a discretionary power in terms which do not burden the freedom as a matter of construction of the Act, yet, the exercise of the discretion conferred in *unconfined* terms may *operate* in a way that burdens the freedom. The discretion might be exercised consistent with the Constitutional limitation or it might not.

A number of modern statutes confer broad discretionary powers which might, when exercised by the repository of the power, impose conditions on a citizen that burden the freedom. That was the unsuccessful contention in 2012 in *Wotton v State of Queensland*¹⁶ concerning the exercise of powers by the Parole Board to impose particular conditions on Wotton’s release on parole. As to the relationship between the statute and the exercise of the discretionary powers conferred by it, the majority¹⁷ accepted these propositions¹⁸:

¹¹ *ibid* at 138

¹² (1997) 189 CLR 520

¹³ *ibid* at 559

¹⁴ (2004) 220 CLR 181 at [179]

¹⁵ *ibid* at [179]

¹⁶ (2012) 246 CLR 1

¹⁷ I prefer to use the term “majority” rather than “plurality”; French CJ, Gummow, Hayne, Crennan and Bell JJ.

¹⁸ *Wotton v State of Queensland* (2012) 246 CLR 1 at [22], submissions put by S J Gageler SC, Solicitor-General for the Commonwealth; emphasis added

... (i) where a putative burden on political communication has its *source* in *statute*, the issue presented is one of a limitation upon legislative power; (ii) whether *a particular application* of the statute, by the exercise or refusal to exercise *a power* or *discretion* conferred by the statute, is valid is not a question of constitutional law; (iii) rather, the question is whether the repository of the power has complied with the statutory limits; (iv) if, on its proper construction, the statute complies with the constitutional limitation, without any need to read it down to save its validity, any complaint respecting the *exercise of power* thereunder in a given case, such as that in this litigation concerning the conditions attaching to the Parole Order, does not raise a constitutional question, as distinct from a *question* of the *exercise of the statutory power*.

There is a continuing debate about the constitutionality of the exercise of such a discretion and about aspects of these observations in *Wotton* in the literature¹⁹. I do not propose to examine that debate any further here. I simply wish to draw your attention to it.

The *third feature* is that s 106 of the Constitution preserves and continues the Constitution of each State, subject to the Commonwealth Constitution.

Section 71 *vests* the judicial power of the Commonwealth in the High Court and in such other Federal Courts as the Parliament creates and in such other courts as it *invests* with federal jurisdiction.

Section 73 places the High Court at the appellate apex of the Australian courts system conferring jurisdiction to hear appeals from all judgments, decrees, orders and sentences of any federal court or court exercising federal jurisdiction or of “the Supreme Court of any State” or of “any other court of any State” (apart from any Justices of the High Court exercising original jurisdiction).

Section 75(iii) provides that the High Court has original jurisdiction in all matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party.

Critically, s 75(v) provides that the High Court has original jurisdiction in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

Section 76 provides for the conferral, by Parliament, upon the High Court of original jurisdiction in any “matter” arising under the Constitution or involving its interpretation

¹⁹ Professor James Stellios, ‘Marbury v Madison: Constitutional Limitations and Statutory Discretions’ (2016) 42 *Australian Bar Review* 324

(s 76(i)); or arising under any laws made by the Parliament (s 76(ii)); and otherwise by s 76(iii) and s 76(iv).

Section 77 provides that, with respect to any of the matters mentioned in ss 75 or 76, the Parliament may make laws defining the jurisdiction of any federal court; defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to “or is invested in the courts of the States”; and *investing* any “court of a State” with federal jurisdiction.

Certiorari is not referred to in Chapter III but lies as ancillary to the effective exercise of the jurisdiction conferred by s 75(v)²⁰.

Although the term “prohibition” was thought to import the law relating to the grant of prohibition by King’s Bench²¹, the terms “prohibition” and “jurisdiction” are regarded as “constitutional expressions”. Thus, prohibition lies in circumstances not contemplated by the Court of King’s Bench including conduct undertaken under an invalid law of the Parliament or conduct beyond the executive power of the Commonwealth. Importantly, prohibition will go under s 75(v) in respect of a *denial of procedural fairness* by an officer of the Commonwealth resulting in a decision made in *excess of jurisdiction*²². In other words, such a decision engages “jurisdictional error”.

The underlying principle here has relevance for contemporary *Wednesbury*²³ unreasonableness and the observations on that topic in *Li*²⁴. The background context is this. In 1985, in *Kioa v West*²⁵, Mason J observed that the law had developed to a point where it could be accepted that there is a *common law* duty to act *fairly*, in the sense of according procedural fairness in the making of administrative decisions which affect rights, interests and legitimate expectations subject only to the clear manifestation of a contrary statutory intention. Brennan J, on the other hand, took a different view in the same case, regarding the *jurisdiction* of a court to review judicially, on the ground of a denial of procedural fairness, a decision made in the exercise of a statutory power, as dependent upon the “legislature’s

²⁰ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, Gaudron and Gummow JJ at [14]

²¹ *R v The Judges of the Federal Court of Australia; Ex parte The Western Australian National Football League (Incorporated)* (1979) 143 CLR 190 at 201, Barwick CJ

²² *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, Gaudron and Gummow JJ at [14]

²³ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

²⁴ *Minister for Immigration v Li* (2013) 249 CLR 332

²⁵ (1985) 159 CLR 550 at 584

intention” that observance of the principles of natural justice “is a condition of the valid exercise of the power”²⁶. Ultimately, it is a question of statutory construction.

Brennan J said this²⁷:

... the *statute* determines whether the exercise of the power is conditioned on the observance of the principles of natural justice. The statute is construed, as all statutes are construed, against a *background* of common law notions of justice and fairness and, when the statute does not expressly require that the principles of natural justice be observed, the court construes the statute on the footing that “the justice of the common law will supply the omission of the legislature” ... The true intention of the legislature is thus ascertained. When the legislature creates certain powers, the courts *presume* that the legislature *intends* the principles of natural justice to be observed in their exercise in the absence of a clear contrary intention.

Brennan J put the matter in more emphatic terms in this way²⁸:

Observance of the principles of natural justice is *a condition* attached to the power whose exercise it governs. There is *no free-standing common law right* to be accorded natural justice by the repository of a statutory power. There is no right to be accorded natural justice which exists independently of statute and which, in the event of a contravention, can be invoked to invalidate executive action taken in due exercise of a statutory power.

The *content* of the principles to be applied may be another matter, as a question of statutory construction.

Brennan J put the dynamic in this way²⁹:

... [T]he intention to be implied when the statute is silent is that observance of the principles of natural justice *conditions* the exercise of the power although in some circumstances the *content* of those principles may be diminished (even to nothingness) to avoid frustrating the purpose for which the power was conferred. Accepting that the content of the principles of natural justice can be reduced to nothingness by the circumstances in which a power is exercised, a presumption that observance of those principles conditions the exercise of the power is not necessarily excluded at least where, in the generality of cases in which the power is to be exercised, those principles would have a substantial content.

In *Saeed v Minister for Immigration and Citizenship*³⁰, the majority³¹ re-shaped the basis of the principle distilled by Mason CJ, Deane and McHugh JJ in *Annetts v McCann*³². In *Annetts*, their Honours said that it could be treated as settled that when a statute confers

²⁶ *ibid* at 609

²⁷ *ibid* at 609; emphasis added

²⁸ *ibid* at 610; emphasis added

²⁹ *ibid* at 615 and 616; emphasis added

³⁰ (2010) 241 CLR 252

³¹ French CJ, Gummow, Hayne, Crennan and Kiefel JJ

³² (1990) 170 CLR 596 at 598

power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice *regulate* the *exercise* of that power unless those principles are excluded by plain words of necessary intendment. The support cited and quoted for that view included Mason J's observations in *Kioa v West*³³.

In *Saeed*³⁴, the statement of principle is adopted but firmly anchored to the views of Brennan J.

A failure to fulfil the condition governing the exercise of the power means that the decision is not "authorised" by the statute and is thus invalid³⁵, as an *excess* of power.

In 1997, in *Kruger v The Commonwealth*³⁶, Brennan CJ continued this theme of searching, as a matter of construction of the statute, for the legislature's intention and added, in the context of a discretionary power conferred by statute this:

Moreover, when a discretionary power is statutorily conferred on a repository, the power must be exercised *reasonably*, for the legislature is taken to intend that the discretion be so exercised.

Wednesbury was cited as authority for that proposition.

Gummow J adopted that view in *Eshetu*³⁷. The reasoning in *Kruger* was expressly relied upon by Gaudron and Gummow JJ in *Aala*³⁸ to support the reach of *prohibition* on the footing that a failure to accord procedural fairness where the statute has not "relevantly (and validly) limited or extinguished any obligation to accord procedural fairness" results in an *excess* of jurisdiction.

Apart from statute, where an officer of the Commonwealth exercises executive power, a question will arise of whether the relevant aspect of Commonwealth executive power in Chapter II includes a requirement of procedural fairness.

The provisions of Chapter III and particularly ss 71, 73, 75(iii), 75(v) and 77(ii) and 77(iii) contain very significant implications for the supervisory review jurisdiction of the Supreme Court of each State.

³³ (1985) 159 CLR 550 at 584

³⁴ *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, the majority at [13]; see also Brennan J, *Annetts v McCann* at 604-605

³⁵ *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [13]

³⁶ (1997) 190 CLR 1 at 36; emphasis added

³⁷ *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [126]

³⁸ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [40] to [42]

The Federal Parliament may not by legislation deny the High Court its entrenched original jurisdiction in s 75(v). The constitutional writs of mandamus and prohibition go for jurisdictional error and so too certiorari as *ancillary* to that relief. Certiorari, however, is not confined to the review of administrative action for jurisdictional error³⁹. It may lie, subject to the existence of a “matter” in the exercise of jurisdiction under s 75(iii)⁴⁰ or s 76(i)⁴¹ and because no constitutional provision confers jurisdiction with respect to certiorari, it is open to the Parliament to legislate to prevent the grant of such relief (except as ancillary to prohibition and mandamus)⁴². Thus, certiorari might validly be removed for non-jurisdictional error of law on the face of the record.

It is uncontroversial since the decision in 2003 in *Plaintiff S157/2002*⁴³ that federal legislation that purports, by privative clause or otherwise, to remove the High Court’s supervisory jurisdiction of ensuring that Commonwealth officers stay within the limits of legislative and executive authority (that is, review for jurisdictional error) cannot be removed. An administrative decision which involves jurisdictional error is regarded, in law, as no decision at all⁴⁴.

As to State decision-makers, the prevailing view for a long time was that a privative clause appropriately framed in State legislation could remove, from the Supreme Court of a State, review for errors of any kind whether amounting to jurisdictional errors or non-jurisdictional errors⁴⁵. That seemed to be consistent with the views of Gaudron and Gummow JJ in *Darling Casino* in 1997⁴⁶.

In 2010, in *Kirk*⁴⁷, the Court recognised that since the important decision in *Kable*⁴⁸ in 1996, the term “the Supreme Court of any State” in s 73 is a “constitutional term” and thus there must be as Gummow, Hayne and Crennan JJ said in *Forge*⁴⁹ “a body fitting [that] description” with the result that it is beyond the legislative power of a State to alter the

³⁹ *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476

⁴⁰ All matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party

⁴¹ In any matter arising under the Constitution or involving its interpretation

⁴² *Plaintiff S157/2002 v The Commonwealth*, Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [80] and [81]

⁴³ (2003) 211 CLR 476

⁴⁴ *Plaintiff S157/2002 v The Commonwealth*, Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [76]

⁴⁵ Provided that the principles described in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 are satisfied.

⁴⁶ *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602, Gaudron and Gummow JJ at 634

⁴⁷ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531

⁴⁸ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51

⁴⁹ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [63]

character or constitution of its Supreme Court such that it ceases to meet the Constitutional description.

In *Forge*, Gummow, Hayne and Crennan JJ explained the principle in this way⁵⁰:

63 ... The legislation under consideration in *Kable* was found to be repugnant to, or incompatible with, “that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian Legal System. The legislation in *Kable* was held to be repugnant to, or incompatible with, the institutional integrity of the Supreme Court of New South Wales because of the nature of the task the relevant legislation required the Court to perform. *At the risk of undue abbreviation, and consequent inaccuracy*, the task given to the Supreme Court was identified as a task where the Court acted as *an instrument of the Executive*. The consequence was that the Court, if required to perform the task, would not be an appropriate recipient of invested federal jurisdiction. But as is recognised in *Kable*, *Fardon v Attorney-General (Qld)* [(2004) 223 CLR 575] and *North Australian Aboriginal Legal Aid Service Inc v Bradley* [(2004) 218 CLR 146 at 164 [32]], the relevant principle is one which hinges upon maintenance of the defining characteristics of a “court”, or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to “institutional integrity” alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.

64 It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. ...

In *Kirk*, the majority⁵¹ also accepted that, at federation, the Supreme Court of each State had jurisdiction that included such jurisdiction as the Court of Queen’s Bench had in England and the jurisdiction included, having regard to the Privy Council decision in *Colonial Bank of Australasia v Willan*⁵² in 1874, jurisdiction to grant certiorari for jurisdictional error notwithstanding a privative clause in a statute⁵³. It followed that the supervisory jurisdiction of each State Supreme Court was, at federation, and remains, the “mechanism” for the determination and enforcement of the *limits* of the exercise of State executive and judicial power by persons and bodies other than the Supreme Court. It is the path to legality.

The majority put the principles in these terms⁵⁴:

98 ... [The] supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining

⁵⁰ *ibid* at [63] and [64]; emphasis added

⁵¹ French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ

⁵² (1874) LR 5 PC 417 at 422

⁵³ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [97]

⁵⁴ *ibid* at [98] to [100]; emphasis added

characteristic of those courts. And because, “with such exceptions and subject to such regulations as the Parliament prescribes”, s 73 of the Constitution gives this Court appellate jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Courts, the exercise of *that* supervisory jurisdiction is ultimately subject to the superintendence of *this* Court ... in which s 71 of the Constitution vests the judicial power of the Commonwealth.

- 99 ... [Thus] the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are *set* by this Court. To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits of the exercise of State executive and judicial power by persons and bodies other than that Court would be to create *islands of power* immune from supervision and restraint. It would permit what *Jaffe* described as the development of “distorted positions”. And as already demonstrated, it would remove from the relevant State Supreme Court *one* of its defining characteristics.
- 100 [That] is not to say that there can be no legislation affecting the availability of judicial review in the State Supreme Courts. It is not to say that no privative provision is valid. Rather, the observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the *continued need* for, and *utility* of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is *beyond* State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is *not beyond power*.

The above reference to *Jaffe* is a reference to the writings of Professor Jaffe of Harvard University who was writing on the role of judicial review of administrative action throughout much of the same period as Professor Davis of Chicago University. Both of these authors were very influential upon United States jurisprudence in this area and also influential in Australia. As to that, see the observations of the Hon Justice Stephen Gageler in 2015 in the *University of New South Wales Law Journal*⁵⁵.

In the later High Court decision in 2013 of *New South Wales v Kable*⁵⁶ when Mr Kable, who had been imprisoned under the impugned order, unsuccessfully sued the State for damages, the Court explained that the New South Wales Act was beyond the legislative power of the New South Wales Parliament because its enactment was contrary to the requirements of Chapter III. That was so because the exercise of jurisdiction which the Act purported to give to the Supreme Court was held to be incompatible with the institutional integrity of that

⁵⁵ The Hon Justice Stephen Gageler, ‘Whitmore and the Americans: Some American Influences on the Development of Australian Administrative Law’ 38(4) *University of New South Wales Law Journal* 1316

⁵⁶ (2013) 252 CLR 118

Court⁵⁷, as a suitable repository for the exercise of federal jurisdiction as contemplated by s 77(iii) of the Constitution because it rendered the Court an *instrument* of the *executive*.

Mr Stephen McLeish SC, writing as the Solicitor-General for Victoria⁵⁸, has expressed concern that the *Kable* doctrine may have lost its constitutional moorings because the emphasis now seems to be upon whether the jurisdiction, purportedly conferred upon the relevant State Court, is incompatible with the institutional integrity of that court *without* measuring that incompatibility against the notion of whether it remains “a suitable repository for the exercise of federal jurisdiction”. The State legislation, he contends, is only invalid to the *extent* that it confers a jurisdiction which *exceeds* the boundaries of compatibility with the institutional integrity of the State court having regard to whether or not it is or remains a “suitable repository for the exercise of federal jurisdiction”.

For my own part, I am not so sure that, in the more recent authorities, the ship of principle has lost its moorings.

The 1996 *Kable* decision was almost a perfect storm (vehicle) for the development of the principle, fundamentally developed, it seems to me, by Gaudron J and particularly Gummow J in their respective judgments. The legislation involved was the *Community Protection Act 1994* (NSW). It was an Act exclusively directed at Mr Gregory Wayne Kable who had been convicted of the manslaughter of his wife and other offences. He had been sentenced to imprisonment for a minimum term of four years with an additional term of one year and four months. The Act authorised the making of an order by the Supreme Court for the continued detention of Mr Kable beyond the period of what would otherwise have been the date of his release. The legislation operated to bring about the imprisonment of Mr Kable not consequent upon any “adjudgment by the Court of criminal guilt”.

In *Kable*, Gummow J said this⁵⁹:

Plainly, in my view, such an authority could not be conferred by a law of the Commonwealth upon this Court, any other federal court, or a State court exercising federal jurisdiction. Moreover, not only is such an authority non-judicial in nature, it is repugnant to the judicial process in a **fundamental degree**.

⁵⁷ *ibid* at [15] to [17]

⁵⁸ Stephen McLeish SC, ‘The Nationalisation of the State Court System’ (2013) 24 *Public Law Review* 252. Mr McLeish is now a Judge of Appeal, Court of Appeal, Victoria.

⁵⁹ *Kable v Director of Public Prosecutions (NSW)* at (1996) 189 CLR 51 at 132; original emphasis

The function to be fulfilled was not *judicial*. Nor was the power properly characterised as a *judicial function*. Gummow J described it in *Fardon*⁶⁰ as engaging a “legislative plan” to conscript the New South Wales Supreme Court.

The *Kable* principle was applied by the High Court in 2009 in *International Finance Trust*⁶¹ to invalidate s 10 of the *Criminal Assets Recovery Act 1990* (NSW) which enabled a law enforcement authority to seek, ex parte, from the New South Wales Supreme Court, an order preventing any dealing with specified property. Section 10 required the making of the order if the law enforcement officer *suspected* the relevant person had committed any of a broad range of crimes or the officer *suspected* that the property was derived from criminal activity and the Court considered that there were reasonable grounds for the suspicion. The majority construed s 10 as excluding any power in the Supreme Court to review and reconsider the continuation of the ex parte order which amounted to, in effect, sequestration of the property upon “suspicion of wrongdoing” for an indefinite period with no effective curial enforcement of the duty of full disclosure on an ex parte application *where* the only possibility of release from sequestration was upon proof of a “complex of negative propositions”.

It was also applied in *Totani*⁶² in 2009 to invalidate s 14(1) of the *Serious and Organised Crime Control Act 2008* (SA). The Act’s aim was to disrupt and restrict the activities of organisations involved in serious crime and it conferred powers on the Attorney-General, on the application of the Commissioner of Police, to make a declaration in relation to an organisation if satisfied that members of it associated for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity. Section 14(1) required the Magistrates Court to make a “control order” against a person if satisfied that the person is a member of a declared organisation. Whether and why an organisation should be declared was entirely a matter for the Executive. The only question left to the Court was whether a person was a member of a declared organisation. Section 14(1) was invalid because it authorised the Executive to enlist the Court to implement the decisions of the Executive in a manner repugnant to, or incompatible with, its institutional integrity or, put another way, it had the effect of reducing the Court to “an instrument of the Executive”⁶³.

⁶⁰ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [100]

⁶¹ *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319

⁶² *Totani v South Australia* (2010) 242 CLR 1

⁶³ *ibid*, Crennan and Bell JJ at [436]

It was applied in *Wainohu*⁶⁴ to invalidate the *Crimes (Criminal Organisations Control) Act 2009* (NSW). The Act recited that it was enacted to provide for the making of declarations and orders for the purpose of disrupting and restricting the activities of criminal organisations and their members. It made provision for Judges of the Supreme Court of New South Wales to give their consent to be declared “eligible judges” for the purposes of Part 2 of the Act. It empowered the Commissioner of Police to apply to an eligible Judge for an order declaring an organisation to be a “declared organisation” for the purposes of the Act. A majority held the Act invalid because it exempted eligible Judges from any duty to give reasons in connection with the making or revocation of a declaration of an organisation as a declared organisation. This feature of the Act was critical to the conclusion that the Act was repugnant to or incompatible with the continued institutional integrity of the Supreme Court of New South Wales. The question was not whether the task to be performed by an eligible Judge would be performed as *persona designata*, or whether the task of the eligible Judge was to be characterised as judicial or administrative. The critical matter was the exemption from an obligation to give reasons for the making of a declaration or the revocation of a declaration order.

As to examples of statutory instruments which were held to be valid, see *K-Generation*⁶⁵ in which s 28A of the *Liquor Licensing Act 1997* (SA) was held not repugnant to or incompatible with the continued institutional integrity of the relevant South Australian State courts because those courts could determine “for themselves” both whether the relevant information (classified by the Commissioner of Police as criminal intelligence) met the definition of criminal intelligence in the Act and left those courts free to determine what steps were to be taken to maintain the confidentiality of the information.

In *Condon*⁶⁶, Gageler J held the relevant sections of the *Criminal Organisation Act 2009* (Qld) valid on the footing that although the use by the Commissioner of the Police Service of declared criminal intelligence could, in some circumstances, amount to an abuse of process, there was a procedural solution to that problem. The solution lay in the capacity of the Supreme Court of Queensland to stay a substantive application made by the Commissioner (for a declaration that a particular organisation was a “criminal organisation”) in the exercise of its *inherent jurisdiction* in any case in which practical unfairness to a respondent became

⁶⁴ *Wainohu v New South Wales* (2011) 243 CLR 181

⁶⁵ *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501

⁶⁶ *Condon v Pompano Pty Ltd* (2013) 252 CLR 38

manifest. Thus, the criminal intelligence provisions of the Act were saved from incompatibility with Chapter III of the Constitution *but only* by reason of the preservation of “that capacity”⁶⁷. The majority⁶⁸ held that although the procedure might be novel and thus said to amount to a denial of procedural fairness, “attention must be directed to questions of fairness and impartiality”⁶⁹. The majority also said this: “*Observing that the Supreme Court can and will be expected to act fairly and impartially, points firmly against invalidity*”⁷⁰. Thus, the provisions were not repugnant to or inconsistent with the institutional integrity of the Supreme Court.

In *Kable*, Gaudron J observed⁷¹ that a matter of significance emerging from a consideration of the provisions of Chapter III is that the Constitution does not permit of *different grades or qualities of justice* depending upon whether judicial power is exercised by State courts or federal courts created by the Parliament. That being so, State courts have a role and existence *transcending* their status as State courts which directs the conclusion that Chapter III requires that the Parliaments of the States cannot legislate to confer powers on State courts which are repugnant to or incompatible with “their exercise of the judicial power of the Commonwealth”⁷².

Gaudron J also observed that the prohibition on State legislative power which derives from Chapter III is *not at all* comparable with the limitation on the legislative power of the Commonwealth derived from the *Boilermakers’* doctrine.

That follows because the Chapter III limitation on State legislative power is “more closely confined” and relates to “powers or functions imposed on a State court” which are “repugnant to or incompatible with the exercise of the judicial power of the Commonwealth”.

Mr McLeish SC, for example, contends that *Wainohu* is an emblematic example of the *Kable* principle being reformulated based upon “impairment of institutional integrity” *unconditioned* by any consideration of whether the power conferred under the State Act renders the State court unfit as a repository for the vesting of federal jurisdiction. That is said to follow because the majority in *Wainohu* regarded the “touchstone” of the “constitutional principle” to be protection against “legislative or executive intrusion upon the institutional

⁶⁷ *ibid* Gageler J at [212]

⁶⁸ Hayne, Crennan, Kiefel and Bell JJ

⁶⁹ *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [169]

⁷⁰ *ibid* at [169]; emphasis added

⁷¹ (1996) 189 CLR 51 at 103

⁷² *ibid* at 103

integrity of the courts, whether federal or State”⁷³ without any reference to the relationship between such intrusion and the capacity of the relevant court to be or remain a fit repository for the vesting of federal jurisdiction.

Although it is true that the various formulations of the *Kable* principle in later decisions of the High Court do not necessarily expressly capture the precise language of the principle as formulated in *Kable*, it seems to me that two things remain.

First, there can be little doubt that the fundamental principle articulated in *Kable* remains constant throughout.

Second, some later reformulations expressly recognise a synthesis of the principle whilst guarding against inaccuracy.

A question remains of whether invalidity by reason of Chapter III gives rise to something in the nature of a *separation of powers* as if that doctrine had been adopted in the Constitution of each State. It is true that in *Kable*, McHugh J observed that “in some situations the effect of Ch III of the Constitution may lead to the same result as if the State had an enforceable doctrine of separation of powers”⁷⁴. Gaudron J thought not. Williams JA, however, in 2004, put the matter in reasonably plain terms in *Re Criminal Proceeds Act 2002*⁷⁵ in this way:

The principle derived from the majority judgments in *Kable* can be stated in the following terms – a State Supreme Court as one of the judicial institutions invested with federal jurisdiction may not act in a manner inconsistent with the requirements of Ch III of the Constitution.

It seems to me, however, that the principle really is this: a State Act, or provisions of a State Act, which intrude or provide for executive intrusion upon the institutional integrity of the courts of a State in a way, and to the extent that, such a court is rendered unfit as a repository for the vesting of the judicial power of the Commonwealth is, to that extent, invalid. To the extent that Chapter III invalidity approximates a separation of powers within the boundaries of such a principle, that description is an appropriate one within the *limitations* of the principle.

Part 2 - Unreasonableness

⁷³ *Wainohu v New South Wales* (2011) 243 CLR 181 at [105]

⁷⁴ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 118

⁷⁵ *Re Criminal Proceeds Act 2002* [2004] 1 Qd R 40 at 44

As already mentioned, Brennan CJ in *Kruger* observed⁷⁶ that when a discretionary power is statutorily conferred on a repository, the power *must* be exercised *reasonably* because the *legislature is taken to intend* that the discretion be *so exercised*. Thus, the power must, as a matter of construction of the statute conferring the power, be exercised reasonably (unless the plain words of the statute clearly and necessarily convey a different intention).

Normally, the likelihood is that exercise of the power will be *conditioned* by an obligation of reasonableness, as a presumption of law in the construction of the Act conferring the power on the repository. This is unsurprising as it accords with the approach to determining whether the exercise of a power statutorily conferred is conditioned on the observance of the principles of natural justice as earlier mentioned⁷⁷.

In *Abebe*⁷⁸, Gaudron J put the matter more emphatically by saying that it was difficult to see why, if a statute which confers a decision-making power is silent on the topic of reasonableness, the statute should not be construed so that it is an “essential condition” of the exercise of the power that it be exercised reasonably, adding, however, the qualification “at least in the sense that it not be exercised in a way that no reasonable person could exercise it”⁷⁹. That qualification is not (and is less demanding than) the language of *Wednesbury* unreasonableness but it raises the dilemma of an emphatically expressed statutory *condition* of the *exercise* of the power on the one hand, and how conduct falling short of the condition, legal unreasonableness, might be *measured*, on the other hand.

In 1990, in *Attorney-General (NSW) v Quin*⁸⁰, Brennan J also accepted that the legislature is taken, impliedly (unless the Act expressly provides for the matter) to intend that a power be exercised *reasonably* by the repository of the power. That was the view of Hayne, Kiefel and Bell JJ in *Li*⁸¹. In *Quin*, Brennan J expressed observations which have been described by Gageler J as *canonical* about the true nature of the Court’s “duty and jurisdiction” in reviewing administrative action (informed by the well-known observations in 1803 of Marshall CJ in *Marbury v Madison*⁸²). Brennan J said this⁸³:

⁷⁶ (1997) 190 CLR 1 at 36

⁷⁷ See the discussion related to footnotes 23 to 38

⁷⁸ *Abebe v The Commonwealth* (1999) 197 CLR 510 at [116]

⁷⁹ *ibid* at [116]

⁸⁰ (1990) 170 CLR 1 at 36

⁸¹ *Minister for Immigration v Li* (2013) 249 CLR 332 at [63]

⁸² (1803) 1 Cranch 137, at p 177 [5 U.S. 87, at p 111]; “It is, emphatically, the province and duty of the judicial branch to say what the law is”.

⁸³ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35 and 36; emphasis added

The duty and jurisdiction of the court to review administrative action *do not go beyond the declaration and enforcing of the law* which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, *to the extent that they can be distinguished from legality*, are for the repository of the relevant power and, subject to political control, for the repository alone.

The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise. In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power, but those limitations are not calculated to secure judicial scrutiny of the merits of a particular case.

If the exercise of the power, as a matter of law, is conditioned on its exercise "reasonably", it might be thought that a failure to exercise the power "reasonably", gives rise to an *error of law* and causes the repository of the power to exceed the limits of the power.

However, canonical orthodoxy dictates that because the court's duty and jurisdiction do not engage judicial scrutiny of the merits of administrative action (although Brennan J's qualification quoted above should be carefully noted "to the extent that they can be distinguished from legality") and an examination of the reasonableness of a decision "may appear to open the gate"⁸⁴ to "merits review" of an action taken "within power"⁸⁵, the *Wednesbury* incarnation of "unreasonableness" was calculated to leave the merits of a decision unaffected *unless* the decision or action was such as to amount to an *abuse of power* and thus go to *legality* and thus an *excess of jurisdiction*.

The balance was this: *even though* the court acts on an implied intention of the legislature that a power be exercised reasonably, the measure of invalidity is that the court will hold, invalid, a purported exercise of the power if it is "so unreasonable" that "no reasonable repository of the power could have taken the impugned decision or action"⁸⁶. Taxonomically, this was understood as "an abuse of power". The limitation on the exercise of the power, however, was said by Brennan J to be "extremely confined"⁸⁷. In other words, the exercise of the discretion would need to travel well beyond the zone or orbit of reasonableness to ensure that the Court's supervisory role was not ensnared in de facto merits review.

⁸⁴ *ibid* at 36

⁸⁵ *ibid* at 36

⁸⁶ *ibid* at 36

⁸⁷ *ibid* at 36

However, it should not be thought that there is some sort of absolute *binary divide* between the merits of decision-making and the legality of a decision. For example, it may well be that the manner or method of fact-finding falls so short of a proper deliberative process that the power of review or source of authority conferred by an Act has not properly been exercised. Examining that question will involve a comprehensive understanding of the materials and the factual context not with a view to substituting a merits finding for that of the decision-maker but rather to understand the process of fact-finding adopted and whether it was fair and proper. The question of whether inferences properly arise from primary facts found is itself a question of law which necessarily requires an understanding of the materials before the decision-maker and whether the facts found support the contended inferences. There are other examples.

In 1986, in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*⁸⁸, Mason J also expressed observations (also described as canonical) about the court's limited role in reviewing the exercise of an administrative discretion and the role of *Wednesbury* unreasonableness in that context.

Mason J said this⁸⁹:

The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned: *Wednesbury Corporation*.

It follows that, in the absence of any statutory indication of the *weight* to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power. ... I say "generally" because *both principle and authority* indicate that in some circumstances a court may set aside an administrative decision which has *failed to give adequate weight* to a relevant factor of great importance, or *has given excessive weight* to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is "*manifestly unreasonable*". This ground of review was considered by Lord Greene M.R. in *Wednesbury Corporation*, in which his Lordship said that it would only be made out if it were shown that the decision was so unreasonable that no reasonable person could have come to it. ... The test has been embraced in both Australia and England.

For present purposes, two things should be noted about these observations.

⁸⁸ (1986) 162 CLR 24

⁸⁹ *ibid* at 40 and 41; emphasis added

First, the *Wednesbury* formulation translates into a notion that the decision is “manifestly unreasonable”.

Secondly, failures to give adequate weight to a relevant factor of great importance or attributing excessive weight to a relevant factor of no great importance is ultimately reduced to a question of whether the decision is manifestly unreasonable rather than one of whether there is an evident failure to take into account relevant considerations or the taking into account of irrelevant considerations.

In 1995, Brennan, Deane, Toohey, Gaudron and McHugh JJ said in *Craig*⁹⁰ that “if an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely upon irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal’s exercise or purported exercise of power is thereby affected, it exceeds its authority or powers”.

Such an error of law amounts to jurisdictional error invalidating any order or decision of the tribunal which reflects it. That position was affirmed in *Yusuf*⁹¹. Importantly, McHugh, Gummow and Hayne JJ observed in *Yusuf* that jurisdictional error in accordance with the *Craig* formulation embraces “a number of different **kinds of errors**”⁹² and the list of errors in *Craig* is “not exhaustive” and the “different kinds of error may well **overlap**”⁹³.

Moreover, their Honours said this⁹⁴:

... The circumstances of a particular case may permit *more than one characterisation* of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of the power is to make *an error of law*. Further, doing so results in the decision-maker *exceeding* the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did *not have authority* to make the decision that was made; he or she did not have *jurisdiction* to make it. Nothing in the Act suggests that the Tribunal [Refugee Review Tribunal] is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law.

⁹⁰ *Craig v South Australia* (1995) 184 CLR 163 at 179

⁹¹ *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82]

⁹² *ibid* at [82], emphasis added

⁹³ *ibid* at [82]; emphasis added

⁹⁴ *ibid* at [82]; emphasis added

Importantly, the High Court’s approach to jurisdictional error in the context of *Craig* is the subject of significant discussion by the majority in *Kirk*⁹⁵.

What is the true scope of unreasonableness?

In *Li*⁹⁶, Hayne, Kiefel and Bell JJ observed that the “legal standard” of unreasonableness should **not** be considered as “limited to what is in effect an irrational, if not bizarre, decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it”. Moreover, Lord Greene MR should not “be taken to have limited unreasonableness in this way” in *Wednesbury*⁹⁷. Lord Greene’s formulation “may more *sensibly* be taken to recognise that an *inference* of unreasonableness may in some cases be *objectively drawn* even where a particular error in reasoning *cannot* be identified”⁹⁸.

That notion conforms with the principles about which Dixon J spoke in *Avon Downs*⁹⁹ concerning a decision of the Federal Commissioner of Taxation:

[T]he fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some misconception. If the result *appears to be unreasonable* on the *supposition* that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a *proper inference* that it is a *false supposition*. It is not necessary that you should be *sure* of the precise particular in which he has *gone wrong*. It is *enough* that you can see that in some way he *must* have failed in the discharge of his *exact function according to law*.

Chief Justice French, in *Li*¹⁰⁰, took the view that Lord Greene’s formulation enabled the Court to intervene due to the “framework of rationality imposed by the statute”¹⁰¹ and the formulation, “so unreasonable that no reasonable authority could ever have come to it”, reflects a limitation “imputed to the legislature” on the basis of which courts can say that Parliament never intended to authorise that kind of decision. The Chief Justice observed that “[a]fter all the requirements of administrative justice have been met in the process and reasoning leading to the point of decision in the exercise of a discretion [which seems to be a reference to a decision-maker not falling into errors of the kind described in *Craig* and

⁹⁵ *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [60] – [77]

⁹⁶ (2013) 249 CLR 332 at [68]

⁹⁷ *ibid* at [68]

⁹⁸ *ibid* at [68]

⁹⁹ *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; emphasis added

¹⁰⁰ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, French CJ at [28]

¹⁰¹ *ibid* at [28]

Yusuf], there is generally *an area of decisional freedom*". That area of decisional freedom, however, cannot be construed "as attracting a legislative sanction to be *arbitrary* or *capricious* or to *abandon common sense*"¹⁰².

That formulation goes beyond the formulation adopted by Hayne, Kiefel and Bell JJ. Moreover, their Honours sought to adopt a *unifying* underlying rationale in relation to the "more specific errors" in decision-making encompassed by unreasonableness. The views of Hayne, Kiefel and Bell JJ are reminiscent of the observations of Mason J in *Peko-Wallsend Ltd* and the majority in *Yusuf*.

In *Li*, Hayne, Kiefel and Bell JJ said this¹⁰³:

The more specific errors in decision-making, to which the courts often refer may *also be seen* as encompassed by unreasonableness. This may be consistent with the observations of Lord Greene MR, that some decisions may be considered unreasonable in more than one sense and that "all these things run into one another"¹⁰⁴. Further, in [*Peko-Wallsend Ltd*] Mason J considered that the preferred ground for setting aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to an irrelevant factor of no importance, is that the decision is "manifestly unreasonable". Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed *a particular error in reasoning*, given *disproportionate weight* to some factor or *reasoned illogically* or *irrationally*, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.

As to the question of when inferences might be drawn of legal unreasonableness, Hayne, Kiefel and Bell JJ saw a close analogy with the way in which inferences may be drawn by an appellate court when reviewing the exercise of a discretion by the primary judge identified in the well understood passages in *House v The King*¹⁰⁵. Their Honours put the matter this way¹⁰⁶:

As to the inferences that may be drawn by an appellate court, it was said in *House v The King* that an appellate court may infer that in some way there has been a failure properly to exercise the discretion "if upon the facts [the result] is unreasonable or plainly unjust". The same reasoning might apply to the review of the exercise of a statutory discretion, where unreasonableness is an inference *drawn from the facts* and from the matters falling for consideration *in the exercise of the statutory power*. Even where some reasons have been provided, as is the case here, it may nevertheless not be possible for a court to comprehend how the decision was arrived at. Unreasonableness is a *conclusion* which may be applied to a decision which lacks *an evident and intelligible justification*.

¹⁰² *ibid* at [28]

¹⁰³ *ibid* at [72]; emphasis added

¹⁰⁴ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229

¹⁰⁵ (1936) 55 CLR 499 at 505

¹⁰⁶ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [76], emphasis added

Two matters are worthy of note.

The *first* is that where errors in decision-making are identified of the kind described in *Craig* and *Yusuf*, those errors, plainly enough, give rise to jurisdictional error on the footing that the decision-maker has exceeded the limits of the statutory power.

The *second* is that it seems inevitable (although the matter remains open to debate) that in circumstances where a *conclusion* of unreasonableness arises in the exercise of the discretionary decision-making power, because a decision “lacks an evident and intelligible justification”, the decision-maker also falls into jurisdictional error and that is so because exercising the power in a way which fails to conform to the “legal standard of reasonableness”¹⁰⁷, recognising that the statute imposes an obligation to exercise the power reasonably, involves an *excess* of jurisdiction.

It may be that more is needed in the sense that unreasonableness in the exercise of the decision-making power in question gives rise to a broader failure to discharge a statutory duty, in the course or performance of which, the decision-making power was exercised.

For example, in *Li*, the decision in question was an exercise of a power of adjournment exercised adversely to Ms Li which carried, with it, the consequence that the Migration Review Tribunal had failed to discharge its “core statutory function” of reviewing, on the merits, the decision of the Minister’s delegate to refuse Ms Li the relevant class of visa¹⁰⁸ as the decision to refuse the adjournment prevented Ms Li from placing a critical document before the Tribunal which the Tribunal knew Ms Li was seeking to obtain and was required as a matter of *fairness* in the discharge and performance of the critical review power.

As to the two streams of unreasonableness made up of unreasonableness inherent in a “conclusion” that a decision lacks an “evident and intelligible justification”, on the one hand, and unreasonableness as an underlying rationale for “the more specific errors in decision-making to which courts often refer”, see also the discussion in the Full Court of the Federal Court in *Minister for Immigration and Border Protection v Singh*¹⁰⁹.

As to the test for unreasonableness, Gageler J said¹¹⁰ that the label “*Wednesbury* unreasonableness” indicates the *special standard* of unreasonableness which has become *the*

¹⁰⁷ *ibid*, Hayne, Kiefel and Bell JJ at [68]

¹⁰⁸ The visa in question was a Skilled-Independent Overseas Student (Residence) (Class DD) visa pursuant to the provisions of the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth).

¹⁰⁹ (2014) 308 ALR 280 at [44], Allsop CJ, Robertson and Mortimer JJ at [44] to [52]

¹¹⁰ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, Gageler J at [106]

criterion for judicial review of administrative discretion, on this ground. Gageler J observed that expression of the *Wednesbury* unreasonableness *standard* in terms of an action or decision that “no reasonable repository of the power could have taken attempts”, albeit imperfectly, to convey the point that judges should not lightly interfere with official decisions on this ground.

In judging unreasonableness, Gageler J put the matter this way in *Li*¹¹¹:

... Review by a court of the reasonableness of a decision made by another repository of power “is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process” but also with “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” [*Dunsmuir v New Brunswick*].

Thus, the decision for Gageler J is a question of whether the decision falls within the range of acceptable possible “outcomes” which are defensible in respect of the facts and law having regard to the notion that judges should not lightly interfere with administrative decision-making on this ground.

A number of other matters should be noted.

First, where no reasons are given for the exercise of a discretionary power, all a supervisory court can do is focus on the outcome of the exercise of the power, in the factual context presented, and assess for itself, whether there is an evident and intelligible justification for the exercise of the power, keeping in mind, of course, that it is for the repository of the power, and the repository alone, to exercise the power. The repository of the power must do so, however, according to law¹¹².

Second, where reasons are given for the exercise of the discretionary power, the court will look to the reasoning process of the decision-maker to identify the factors in the reasoning said to make the decision legally unreasonable. In doing so, the court is confined to the reasons given by the decision-maker. The decision cannot be supported on review by the court on the basis of an hypothesis (living outside the actual reasons for decision) about the things that may otherwise accord reasonableness to the decision.

Third, where the exercise of the power is said to be unreasonable on the footing that the decision-maker has fallen into “the more specific errors in decision-making to which courts often refer” (such as the *Craig* and *Yusuf* formulations recognising, of course, that those

¹¹¹ *ibid*, Gageler J at [105]

¹¹² *Minister for Immigration and Border Protection v Singh* (2014) 308 ALR 280 at [45]

formulations are not “exhaustive”) which may well “overlap”, the reasonableness review will concentrate on an examination of the reasoning process reflected in the reasons given by the decision-maker. Where the challenge to the reasonableness of the exercise of the power is based upon the notion that a conclusion arises¹¹³ that the decision lacks an evident and intelligible justification, the court will examine the reasons, however brief, and determine, in light of those reasons, *and* the facts and matters falling for consideration in the exercise of the statutory power, whether an evident and intelligible justification is lacking.

Fourth, although reference is made to the analogue of *House v The King*¹¹⁴, it must be remembered that on an appeal from the exercise of the discretion by a primary judge, the *court* re-exercises the discretion once it has demonstrated that the exercise of the discretion has miscarried. That is not the role of the supervising court in reviewing an exercise of discretionary power by an administrative decision-maker so as to determine the legality of the exercise of the power.

Fifth, the standard of legal reasonableness determined in accordance with these principles will apply to a range of statutory powers conferred upon decision-makers “but the indicia of *legal unreasonableness* will need to be found in the scope, subject and purpose of the particular statutory provisions in issue in any given case”¹¹⁵.

Sixth, in reviewing a decision on the ground of legal unreasonableness, the supervising court will be required, inevitably, to closely examine the facts upon which the exercise of the power was dependent. This is done not for the purpose of enabling the court to substitute its own view of the exercise of the discretionary power for that of the decision-maker. The point of the exercise is to recognise that any analysis which engages a question of *whether* there is an **evident** and **intelligible** justification for the exercise of the power will involve “scrutiny of the factual circumstances in which the power comes to be exercised”¹¹⁶.

Seventh, it is important to recognise the implications of the observations of McHugh, Gummow and Hayne JJ in *Yusuf*¹¹⁷ that “different kinds of error may well overlap”. In examining the exercise of the power and determining whether it is legally unreasonable, there may well be an interaction between the obligations of procedural fairness in the exercise of the power and the standard of legal reasonableness in the exercise of the power. Thus, in

¹¹³ A conclusion of the kind described in *Li* by Hayne, Kiefel and Bell JJ at [76].

¹¹⁴ (1936) 55 CLR 499 at 505

¹¹⁵ *Minister for Immigration and Border Protection v Singh* (2014) 308 ALR 280 at [48]

¹¹⁶ *ibid* at [48]

¹¹⁷ *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82]