- disregarding relevant considerations;
- taking into account irrelevant considerations;
- some, but not all errors of law;
- acting in bad faith;
- acting extremely unreasonably.[32]

15.19 Helen Robertson provides a useful survey of Federal Court cases that identified additional examples of jurisdictional error. These include a failure to:

- ask the correct question;
- consider all elements of a claim;
- properly undertake the jurisdictional task of review;
- correctly address the prescribed criteria for a decision;
- afford procedural fairness.[33]

15.20 In *Plaintiff S157*, the High Court made it clear that where there is a jurisdictional error, a privative clause is ineffective to oust judicial review. In light of this constitutional jurisdiction, courts may construe privative clauses much more narrowly than the text of the provision suggests, to the point that such clauses may sometimes be largely or even entirely deprived of effect.[34] A number of commentators have therefore expressed the view that such clauses are of little value. Professor Mary Crock and Edward Santow state that jurisdictional error is 'fatal to the effectiveness of most privative clauses'.[35] Aronson and Groves comment that courts 'have long responded to legislative attempts to limit or completely exclude the scope of judicial review of administrative action with a mixture of incredulity, hostility, and thinly disguised disobedience'.[36]

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32 Ibid 256. The High Court has said that 'it is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error': *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531, 573.

33 Helen Robertson, 'Truth, Justice and the Australian Way—*Plaintiff S157 of 2002 v Commonwealth*' (2003) 31 *Federal Law Review* 373, 390.

34 See, eg, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. Section 474 of the *Migration Act 1958* (Cth) purports to exclude challenging, appealing, reviewing, quashing or any calling into question a 'privative clause decision'. It also purports to exclude prohibition, mandamus, injunction, declaration or certiorari as a remedy in any court. In *Plaintiff S157/2002* the High Court unanimously rejected the literal interpretation, and held that the writs of mandamus and prohibition were available for decisions involving jurisdictional error.

35 Mary Crock and Edward Santow, 'Privative Clauses and the Limits of the Law' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 347.

36 Aronson and Groves, above n 15, 940.

15.21 The courts have justified such interpretive approaches by reference to the assumption that legislation should, as far as reasonably possible, be interpreted in a way that favours constitutional validity.[37]

15.22 Additionally, a separate constitutional mechanism which protects access to the courts is s 75(iii) of the *Constitution*. It vests original jurisdiction in the High Court in all matters 'in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party'.

Principle of legality

15.23 The principle of legality provides some protection to judicial review.[38] When interpreting a statute, courts will presume that Parliament did not intend to restrict access to the courts, unless this intention was made unambiguously clear.[39] For example, in *Magrath v Goldsborough Mort & Co Ltd*, Dixon J said:

> The general rule is that statutes are not to be interpreted as depriving superior Courts of power to prevent an unauthorized assumption of jurisdiction unless an intention to do so appears clearly and unmistakably.[40]

15.24 The usual mechanism for restricting access to the courts is a 'privative clause'—'essentially a legislative attempt to limit or exclude judicial intervention in a certain field'.[41] Some examples include clauses that make orders, awards or other determinations final, clauses forbidding courts from granting remedies traditionally used in judicial review, 'no invalidity' or 'conclusive evidence' provisions, and clauses prescribing time limits.[42] Another, blunter technique is stipulates that anything a body does shall have effect as if enacted by Parliament, and vests exclusive jurisdiction in that body. However, privative clauses are read narrowly by the courts.

15.25 In *Public Service Association (SA) v Federated Clerks' Union*, Dawson and Gaudron JJ said:

> Privative clauses … are construed by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied.[43]

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37 The long history of authority to this effect was noted in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [71] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). While this approach may lead the courts to interpret privative clauses in a manner that gives them very limited scope, alternative approaches may be more likely to require courts to find that a privative clause was invalid on constitutional grounds. Once this possibility is recognised, the value of interpretive approaches that enable some effect to be given to privative clauses can be understood.

38 The principle of statutory interpretation known as the 'principle of legality' is discussed more generally in Ch 2.

39 *Momcilovic v The Queen* (2011) 245 CLR 1, [43]–[44] (French CJ).

40 *Magrath v Goldsbrough Mort & Co Ltd* (1932) 47 CLR 121, 134.

41 Young, above n 6, 277.

42 Administrative Review Council, *The Scope of Judicial Review* (Report 47, Australian Government, 2006), Appendix 2.

43 *Public Service Association (SA) v Federated Clerks' Union of Australia* (1991) 173 CLR 132, 160 (Dawson and Gaudron JJ). Quoted with approval in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [30]–[32] (Gleeson CJ).

15.26 Dawson and Gaudron JJ went on to say:

> Thus, a clause which is expressed only in general terms may be construed so as to preserve the ordinary jurisdiction of a superior court to grant relief by way of the prerogative writs of mandamus or prohibition in the case of jurisdictional error constituted by failure to exercise jurisdiction or by an act in excess of jurisdiction.[44]

15.27 Using this approach, the courts have held that a privative clause has no impact on remedies not named in that clause.[45] This includes constructions that, for instance, conclusions that protecting a tribunal's orders or directions did not protect a tribunal's rejection of a submission that there was insufficient evidence of a certain fact.[46] Similarly, the courts have held that protecting a decision did not extend to protecting unstated assumptions.[47]

15.28 A 'no appeal' clause modifies or repeals an earlier statutory grant of appeal rights, and has no effect on the availability of judicial review.[48] For example, in *Hockey v Yelland*, the High Court held that a Queensland statute that provided that determinations by a medical board 'shall be final and conclusive' and the claimant 'shall have no right to have any of those matters heard and determined by an Industrial Magistrate, or, by way of appeal or otherwise, by any Court or judicial tribunal whatsoever'[49] did not 'oust the jurisdiction of the Supreme Court to issue writs of certiorari'. Gibbs CJ said:

> It is a well recognized principle that the subject's right of recourse to the courts is not to be taken away except by clear words … The provision that the board's determination shall be final and conclusive is not enough to exclude certiorari … The words of the further provision … are in my opinion quite inapt to take away from the Court its power to issue certiorari for error of law on the face of the record.[50]

15.29 Provisions which prescribe time limits for bringing an action, or include alternative processes for bringing an appeal or challenging a decision have generally been accepted by courts, as they still provide for judicial oversight.[51] In *Commissioner*

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44 *Public Service Association (SA) v Federated Clerks' Union of Australia* (1991) 173 CLR 132, [18] (Dawson and Gaudron JJ).

45 See, eg, *Palmer Tube Mills (Aust) Pty v Ltd v Semi* [1998] 4 VR 439, 459; *Barnard v National Dock Labour Board* [1953] 2 QB 18; *Woodward v Loadman (No 2)* 216 FLR 114. For example it was held that a clause ousting 'jurisdiction to grant relief or a remedy in the nature of certiorari, mandamus, prohibition or *quo warranto*' did not oust declaratory relief: *Woodward v Loadman (No 2)* 216 FLR 114.

46 *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100, 119.

47 *R v Commonwealth Industrial Court Judges; Ex parte Cocks* (1968) 121 CLR 313, 321. A similar decision is *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531.

48 *R v McMillan; Ex Parte Metropolitan Milk Board* (1939) 41 WALR 110, 116; *R v Industrial Appeals Court; Ex Parte Henry Berry & Co (Australasia) Ltd* [1955] VLR 156, 163–4; *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 271; *Bignell v Casino Control Authority (NSW)* (2000) 48 NSWLR 462, 480.

49 *Workers' Compensation Act 1916* (Qld) (repealed), quoted in *Hockey v Yelland* (1984) 157 CLR 124, 128 (Gibbs CJ).

50 Ibid.

51 Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis Butterworths, 3rd ed, 2012), [15.3.6]. However, given the constitutionally entrenched minimum provision of judicial review, (discussed below), it is unclear whether any time limits can set an absolute deadline for access to judicial review: *Hoxton Park Residents Action Group Inc v*

of Taxation v Futuris Corporation Ltd, the High Court held that conclusive evidence and no invalidity clauses do not constitute privative clauses where full appeal rights are available.[52]

International law

15.30 Article 14.1 of the *International Covenant on Civil and Political Rights* (ICCPR) provides that in the determination of a person's 'rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.[53] The phrase 'suit at law' has been taken to include some administrative law matters, and this right extends to all individuals, including non-citizens.[54]

Bills of rights

15.31 In some countries, bills of rights or human rights statutes provide some protection of procedural fairness.

15.32 In the United States, persons enjoy a constitutional guarantee of due process in the administration of the law.[55] Any person who alleges a deprivation of due process or equal protection, may bring an application for review of the constitutionality of the action (or failure to act). In New Zealand, art 27(2) of the *New Zealand Bill of Rights Act 1990* (NZ) grants a right to judicial review to a person affected by a decision by a public authority or tribunal.

Justifications for limits on judicial review

15.33 Limits on judicial review have been justified on a number of grounds, including the need for certainty and efficiency. Professor Simon Young has written that privative clauses

> have been employed by parliaments over many years for many reasons—a desire for finality or certainty, a concern about sensitivity or controversy, a wish to avoid delay and expense, or a perception that a matter requires specialist expertise and/or awareness of executive context.[56]

15.34 However, stakeholders expressed concerns about current restrictions on access to the courts. They emphasised that restrictions should only be imposed in exceptional circumstances.

Liverpool City Council [2010] NSWLEC 242 (26 November 2010) [53]. A deadline cannot exclude access to judicial review by way of the constitutional writs set out in s 75(v) of the *Constitution*: *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 672.

52 *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 167.

53 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.1.

54 United Nations Human Rights Committee, *General Comment No 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial* 90th Sess, UN Doc CCPR/C/GC/32 (23 August 2007) [16]–[17].

55 *United States Constitution* amend V.

56 Young, above n 6, 277.

15.35 The Refugee Advice and Casework Service submitted that restrictions on access to judicial review should require 'a heavy burden of proof to justify encroachment upon a principle so central to the rule of law'.[57] The Public Interest Advocacy Centre suggested that any limits on judicial review should be 'strict, limited and exceptional, closely tied to legitimate purpose and justifiable on public interest grounds'.[58] The Human Rights Law Centre submitted that where 'powers are invasive or infringe upon rights and freedoms, there should be a proportionate availability of judicial review'.[59]

Laws that restrict access to the courts

15.36 Set out below is a short discussion of three areas of Commonwealth law which have sought to exclude judicial review by way of privative clauses, some of which have already been considered by the courts.

Migration Act 1958 (Cth)

15.37 Restrictions on access to the courts under the *Migration Act 1958* (Cth) (*Migration Act*) were introduced in 1992, with limits imposed on grounds for review, and stricter time limits to bring an application for review.[60] A mandatory requirement to seek merits review before accessing judicial review was also introduced.[61] Following that, additional attempts were made to impose absolute time limits,[62] include a no invalidity clause, and most controversially, to exclude judicial review for any administrative decisions under the *Migration Act*.

Time limits

15.38 The *Migration Act* stipulates a 35-day time limit for an application in the Federal Circuit Court for judicial review.[63] The Federal Circuit Court has the power to extend that time limit, upon application, if it considers that it is necessary in the interests of the administration of justice to make the order.[64] However, the High Court has held that the time limit, relating as it does to 'migration decisions', does not apply to an application for review before a decision is made.[65]

No invalidity clauses

15.39 Section 69(1) of the *Migration Act* provides that

> non-compliance by the Minister with Subdivision AA or AB or section 494D in relation to a visa application does not mean that a decision to grant or refuse to grant

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57 Refugee Advice and Casework Service, *Submission 30*.
58 Public Interest Advocacy Centre, *Submission 55*.
59 Human Rights Law Centre, *Submission 39*.
60 Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998* (April 1999), [1.11].
61 Ibid.
62 The High Court held that an attempt to impose a maximum 84-day limit on the time to bring an application for judicial review was constitutionally invalid: *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.
63 *Migration Act 1958* (Cth) s 477(1).
64 Ibid s 477(2).
65 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319.

> the visa is not a valid decision but only means that the decision might have been the wrong one and might be set aside if reviewed.

15.40 The High Court held that this provision does not affect the ability to test the validity of the decision in court. It provides temporary efficacy to visa decisions unless and until they are reviewed.[66]

15.41 Under s 501G, a failure to provide reasons for a decision to cancel a visa does not affect the validity of the decision. However, the High Court held that mandamus could compel the decision maker to provide reasons. If the reasons demonstrate that a reviewable error was made, the applicant may bring an application for judicial review of that decision. The provision simply operates to ensure that a failure to give reasons, in and of itself, does not give rise to invalidity.[67]

Ouster clause

15.42 In 2001, s 474 of the *Migration Act* was inserted by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth), seeking to oust the judicial review jurisdiction of the courts in migration decision. It states that a privative clause decision:

> (a) is final and conclusive; and
>
> (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
>
> (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.[68]

15.43 As discussed above, in *Plaintiff S157 v Commonwealth*, the High Court read down this provision, stating that it does not apply to any decision involving jurisdictional error.[69] In *Re Refugee Tribunal; Ex parte Aala,* the High Court held that a jurisdictional error arises when a decision maker 'makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do'.[70] The High Court gave an expansive interpretation to the notion of jurisdictional error in this and later decisions, which means that the scope of decisions that may be affected by jurisdictional error—and thus not protected by a privative clause—is now very wide; so wide that it may be that an ouster clause offers no real protection against any legal error. It appears that there is little value in including such a clause in legislation.[71]

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66 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 88, 98; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Palme* (2003) 216 CLR 212, 223, 228.

67 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Palme* (2003) 216 CLR 212.

68 *Migration Act 1958* (Cth) s 474(1).

69 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

70 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, [163].

71 See, eg, Aronson and Groves, above n 15, 940; Nicholas Gouliaditis, 'Privative Clauses: Epic Fail' (2010) 34 *Melbourne Univeristy Law Review* 870, 883; Crock and Santow, above n 35, 347.

15.44 One of the key rationales advanced for seeking to restrict access to the courts is that the volume and cost of litigation in the migration context is too high, and litigants seek to abuse the system to delay their removal from Australia.[72]

15.45 The Legal and Constitutional Affairs Committee considered this issue during its Inquiry into the Migration Legislation (Judicial Review) Bill 1998. Submissions to that Inquiry stated that the large volume of litigation may also be due to the limited availability of lawyers to assist applicants and the complexity of migration litigation.[73] Further, high rates of withdrawal are the norm in all areas of litigation,[74] and 'mischief is not indicated by leaving at the door of the court'.[75]

15.46 Based on evidence given by the Federal Court in 1999, that 72.3% of migration cases were disposed of within nine months,[76] the Legal and Constitutional Affairs Committee stated that 'it also appears that the amount of time to be gained from drawing out appeals to the courts may not always be extended'.[77]

15.47 While the Legal and Constitutional Affairs Committee ultimately supported the use of a privative clause,[78] it also recommended that the Government consider, as a matter of high priority, other avenues to address issues raised during hearings, including relating to the availability of assistance, and abuse of process.[79] It also concluded that case management measures were the solution to dealing with abuse of process issues.[80]

15.48 The Administrative Review Council (ARC), in its 2012 consideration of the separate statutory scheme for review of migration decisions, concluded that case management measures and assistance to applicants are more appropriate than excluding judicial review to reduce the volume and cost of litigation in the context of migration proceedings.[81]

15.49 Under s 494AA, judicial review is excluded (except under the *Constitution*) of matters relating to the entry, processing and detention of asylum seekers arriving by boat, who landed at an 'excised offshore place'. The Explanatory Memorandum noted

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72 Commonwealth, *Parliamentary Debates*, House of Representatives, Migration Legislation Amendment Bill (No. 4) 1997 Second Reading Speech, 25 July 2007 (Philip Ruddock, Minister for Immigration and Multicultural Affairs).

73 For a summary of these submissions, see Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998* (April 1999), [1.52]–[1.56].

74 Australian Law Reform Commission, Submission No 14 to Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998*, April 1999.

75 Australian Law Reform Commission, Transcript of Evidence to Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998*, April 1999.

76 Federal Court of Australia, Submission No 17 to Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998*, April 1999.

77 Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998* (April 1999), [1.70].

78 Ibid rec 4.

79 Ibid rec 1.

80 Ibid [3.40].

81 Administrative Review Council, *Federal Judicial Review in Australia*, Report No 50 (2012), [6.16]; Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998* (April 1999), rec 2, [3.40].

that this bar on proceedings sought to 'limit the potential for future abuse of legal proceedings'.[82] The Senate Standing Committee for the Scrutiny of Bills did not accept this justification, stating that 'such provisions are contrary to the principles and traditions of our judicial system which see judicial review and due process as fundamental rights'.[83]

15.50 In 2013, the bar on legal proceedings under s 494AA was extended to any asylum seeker who arrived by boat at any place on or after 1 June 2013. This was a response to the *Report of the Expert Panel on Asylum Seekers*,[84] and sought to ensure that 'all arrivals in Australia by irregular maritime means will have the same legal status regardless of where they arrive'.[85]

15.51 Similar restrictions apply in relation to transitory persons.[86] Additionally, such a person cannot challenge, other than under the *Constitution*, any actions taken to bring them to Australia,[87] including for example the safety of vessels used for such transportation, or the use of reasonable and necessary force.[88]

15.52 While these provisions explicitly do not seek to affect the constitutionally entrenched judicial review, they are drafted in a manner that appear to exclude a wide range of decisions under the *Migration Act* from review.

General corporate regulation

15.53 The Australian Securities and Investments Commission (ASIC) submitted that ss 1274(7A) and 659B of the *Corporations Act 2001* (Cth) are examples of provisions which restrict access to the courts.[89]

15.54 Section 1274(7A) provides that a certificate of registration is conclusive evidence that the company is duly registered on the specified date, without recourse to judicial review which might invalidate the registration. ASIC submitted that this restriction was justified because the potential harm from setting aside the decision as a result of a review outweighs the public interest in the proper exercise of the power.[90]

15.55 Section 659B precludes persons other than ASIC or certain officers or government agencies from seeking judicial review, other than under s 75(v) of the *Constitution*, in relation to a takeover bid until the bid is complete. However, the Takeovers Panel may decide whether there has been unacceptable conduct, and undertake merits review of ASIC decisions while the bid is ongoing. ASIC submitted

82 Explanatory Memorandum, Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001.
83 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2002* (February 2002), 46.
84 Angus Houston, Paris Aristotle, Michael L'Estrange, 'Report of the Expert Panel on Asylum Seekers' (August 2012).
85 Revised Explanatory Memorandum, Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012.
86 *Migration Act 1958* (Cth) s 494AB.
87 Ibid.
88 Ibid s 198B(2).
89 Australian Securities and Investments Commission, *Submission 74*.
90 Ibid.

that the potential harm from delays arising from a review process outweigh the public interest in the proper exercise of the power.[91]

Taxation

15.56 The Tax Institute submitted that ss 175 and 177 of the *Income Tax Assessment Act 1936* (Cth) (*ITAA*)—as conclusive evidence provisions—restrict access to the courts.[92] Under s 175, the validity of an assessment by the Commissioner of Taxation is not affected by non-compliance with provisions with the *ITAA*. Under s 177, the production of a notice of assessment is conclusive evidence of the due making of the assessment, and reviews of the assessment are only available under pt IVC of the *Taxation Administration Act 1953* (Cth). The High Court in *Commissioner of Taxation v Futuris Corporation Limited* held that the effect of s 175 of the *ITAA* is that relief under s 75(v) of the *Constitution* is available only if the assessment did not amount to a true assessment, because it is provisional, or not in good faith.[93]

15.57 This reflects a general approach by the courts that, where adequate provision is made by statute for review by a court or tribunal, the court should, in its discretion, decline to exercise its judicial review jurisdiction.[94]

15.58 The different approaches to no invalidity clauses[95] in the migration and taxation contexts emphasise that, in considering a privative clause, the question for the court is whether the applicant has access to the courts for redress, whether by way of appeal rights or judicial review.

Other issues

Decisions exempt from review under the ADJR Act

15.59 The Law Council of Australia submitted that decisions excluded from review under sch 1 of the *ADJR Act* should be examined, and the justification for their exclusion critically considered.[96] The Institute of Public Affairs noted that a large number of Acts are excluded from review under the *ADJR Act*.[97]

15.60 The ADJR Act is a statutory expansion of the common law right to access to the courts. It is subject to a number of limits, some of which result in review under the *ADJR Act* being narrower than available at common law. However, the *ADJR Act* does not preclude judicial review in the areas it does not cover.

15.61 This is because, in addition to extending the High Court's original jurisdiction to the Federal Court, s 39B(1A)(c) vests the Federal Court with jurisdiction over 'any matter arising under any laws made by the Parliament, other than a matter in respect of

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91 Ibid.
92 The Tax Institute, *Submission 68*.
93 *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 [25].
94 See, eg, *Vanmeld Pty Limited v Fairfield City Council* (1999) 46 NSWLR 78, 106, 114; *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707, 722–4.
95 Compare the treatment of: *Income Tax Assessment Act 1997* (Cth) s 175; *Migration Act 1958* (Cth) s 69(1).
96 Law Council of Australia, *Submission 75*.
97 Institute of Public Affairs, *Submission 49*.

which a criminal prosecution is instituted or any other criminal matter'. This has the effect—where other legislation does not override it—of allowing the Federal Court to undertake judicial review, even where the *ADJR Act* does not apply. The Administrative Review Council noted that 'there are fewer apparent limitations on the right to commence proceedings under s 39B(1) than under the *ADJR Act*'.[98]

Standing

15.62 Standing refers to 'the set of rules that determine whether a person is entitled to commence proceedings'.[99] A number of stakeholders submitted that narrow standing provisions are not justified, noting that it may be difficult for representative organisations to demonstrate that they have standing to bring a claim.[100]

15.63 The ALRC, in its 1996 report into standing in public interest litigation, recommended the adoption of open standing, allowing any person to commence and maintain public law proceedings, unless:

- the relevant legislation clearly excludes the class of persons of which the applicant is one; or
- it would not be in the public interest in all the circumstances, because it unreasonably interferes with a person with a private interest's ability to act differently.[101]

Conclusion

15.64 In light of the High Court's approach to privative clauses in *Plaintiff S157*, it appears that such clauses have little to no effect in limiting access to the courts. The ARC, in its 2012 consideration of the scope of judicial review, stated that privative clauses which attempt to 'restrict or exclude judicial review entirely will not be successful'.[102]

15.65 The Australian Government should consider a review of privative clauses in Commonwealth laws. Where the underlying policy rationale is considered warranted, consideration should be given to whether alternative solutions which do not restrict access to the courts, and are more targeted and effective in addressing the underlying policy issue, may be implemented.

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98 Administrative Review Council, *Federal Judicial Review in Australia*, Report No 50 (2012), [4.9].
99 Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, Report No 78 (1996) [1.1].
100 Public Interest Advocacy Centre, *Submission 55*; Law Council of Australia, *Submission 75*.
101 Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, Report No 78 (1996) Rec 2.
102 Administrative Review Council, *Federal Judicial Review in Australia*, Report No 50 (2012), [6.15].

16. Immunity from Civil Liability

Contents

Summary

16.1 Immunity provisions in legislation can limit the legal protection given to important rights and freedoms. They may operate to allow some interference—usually by government agencies—with a person's liberty, freedom of movement, bodily security, property, and other rights, and deny civil redress. Although sometimes necessary, laws that give immunity from civil liability and authorise what would otherwise be a tort can limit individual rights and require careful justification.[1]

16.2 Laws that give executive immunities a wide application and laws that authorise what would otherwise be a tort are closely related.[2] Notably, an executive immunity may essentially authorise the executive or part of the executive to commit what would

1 The Terms of Reference refer to laws that authorise the commission of a tort, but it is more appropriate to refer to laws that authorise what would *otherwise* be a tort. The fact that conduct is authorised by statute or other lawful authority will usually prevent the conduct amounting to a tort at all.

2 Both are listed in the Terms of Reference. Executive immunities from statute and from criminal prosecution are outside the scope of this chapter, for reasons set out below.

otherwise be a tort.[3] Statutes that authorise tortious conduct or provide for immunities from civil liability may sometimes apply to non-government actors, for example to those engaging in industrial action, but it is more common for them to apply only to the executive.

16.3 This topic is closely related to some of the other rights, freedoms and privileges considered in this Inquiry. Laws that give executive immunities a wide application and that authorise torts are problematic largely because they limit other individual rights. An immunity from the tort of trespass to land affects a person's property rights.[4] A statute that authorises arrest and detention affects a person's liberty and freedom of movement.[5]

16.4 Some laws that provide for executive immunities from civil liability or that authorise what would otherwise be a tort are no doubt justified. For example, the police need powers of arrest and detention to enforce the law. This is also recognised by the common law.

16.5 This chapter identifies many Commonwealth statutes that give some immunity not only to the federal police, but to other law enforcement agencies, customs officials, defence personnel, immigration officials, security agencies and others. The immunities protect these agencies from liability that might otherwise arise from the exercise of their statutory powers, including powers to arrest or detain people, to seize or retain property, and to carry out intrusive investigations. Such powers and associated immunities are commonly justified on the grounds that they are necessary to prevent crime, protect national security and otherwise enforce the law.

16.6 Although often necessary, executive immunities warrant particular and thorough justification. They limit people's legal rights and have the potential to undermine the rule of law. Greater intrusions into people's rights warrant stronger justification.

16.7 Where government immunities from civil liability are necessary, consideration should be given to their appropriate scope—to the limitations and conditions attaching to the immunities. For example, an immunity provision might make clear that it does not protect a government agency from oversight by the Ombudsman, if this is intended. An immunity provision might also explicitly exclude conduct not done in good faith.

16.8 Many of the issues discussed in this chapter were reviewed more fully in the ALRC's 2001 report, *The Judicial Power of the Commonwealth*. That report included a number of recommendations, including for legislation abolishing the Commonwealth's procedural immunities from being sued[6] and for amendments to the *Judiciary Act 1903* (Cth) to state expressly that the Commonwealth is subject to the same substantive

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3 'In principle, there is no reason for construing a statutory provision limiting liability for government action differently from a statutory provision authorising government action': *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575, [34] (McHugh J).

4 See Chs 18–20.

5 See Ch 7.

6 Australian Law Reform Commission, *The Judicial Power of the Commonwealth—A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) rec 23–1.

obligations at common law and in equity as apply to people of full age and capacity, except as specifically provided by a Commonwealth Act.[7]

16.9 The 2001 report also called for further reviews, including a review of:

- the law relating to claims for compensation for loss arising from wrongful federal administrative action;[8] and
- the circumstances in which a statutory exception (to the principle that the Commonwealth should be subject to the same substantive obligations at common law and in equity as others) is considered necessary or desirable.[9]

A common law principle

16.10 Historically, the executive had the benefit of the broad common law immunity of 'the Crown'.[10] This extended not only to the sovereign, but to the executive government. In *Commonwealth v Mewett*, which includes a discussion of the history and rationale of Crown immunity, Dawson J said:

> The immunities which the Crown enjoys from suit in contract and tort rest, however imperfectly and in different ways, upon the propositions that the sovereign cannot be sued in its own courts and that the sovereign can do no wrong.[11]

16.11 However, it is a fundamental tenet of the rule of law that no one is above the law. This principle applies not only to ordinary citizens, but to the government, its officers and instrumentalities: their conduct should be ruled by the law. AV Dicey wrote that the rule of law encompasses

> equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.[12]

16.12 In general, the government, and those acting on its behalf, should be subject to the same liabilities, civil and criminal, as any individual.

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7 Ibid rec 25–3.
8 Ibid rec 25–2.
9 Ibid rec 25–3.
10 The term 'the Crown' refers to 'the government and its myriad components': Mark Aronson and Harry Whitmore, *Public Torts and Contracts* (LBC Information Services, 1982) 2. In contrast to the government, separate public authorities did not come within crown immunity: Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) 215. Whether or not a government instrumentality is to be regarded as 'the Crown' may be significant on a purely procedural level of deciding whom to sue: Aronson and Whitmore, 30.
11 *Commonwealth v Mewett* (1997) 191 CLR 471, 497. Others have suggested that, at least in theory, the Crown (and thus the executive) has always been regarded in law as able to commit a tort, but there have been *procedural* rules that prevent civil action: see, eg, *Commonwealth v Mewett* (1997) 191 CLR 471; *Bell v Western Australia* (2004) 28 WAR 555, 563–4. However, for the purposes of this chapter, it does not matter greatly whether the historical position of the executive government is characterised as a substantive principle of immunity or a procedural one.
12 AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1985) 202.

16.13 Historically, Australia has shown a 'healthy concern for the rule of law'[13] by limiting this type of immunity by statute—in South Australia as early as 1853.[14] Dr Nick Seddon has written:

> The distance of the tyranny of English ways of thinking together with the need, in a frontier society, for new systems and roles of government combined to make Australia the pioneer of Crown proceedings legislation. … In addition, as has been pointed out by Gummow and Kirby JJ in *Commonwealth v Mewett*, the *Constitution* itself, with its recognition of the role of the High Court as the guardian of the *Constitution*, placed substantial limitations on the maxim that the sovereign could do no wrong.[15]

16.14 The Law Council of Australia (the Law Council) submitted that, in general, 'the whole course of the development of Australian law … points to removal of executive immunity'.[16]

16.15 The general immunity is now abrogated by statute in all Australian states and territories and in the Commonwealth. For the federal government, Crown immunity from suit was abolished by the *Judiciary Act 1903* (Cth),[17] and arguably under s 75(iii) of the *Australian Constitution,*[18] suggesting Australia's constitutional arrangements work against special immunities from suit for governments. Under ss 56 and 64 of the *Judiciary Act* the executive is, so far as possible, subject to the same legal liabilities as citizens.[19]

16.16 Nevertheless, this position could be clarified. In its 2001 report, *The Judicial Power of the Commonwealth*, the ALRC recommended that the *Judiciary Act* be 'amended to state expressly that the Commonwealth is subject to the same substantive obligations at common law and in equity to persons of full age and capacity, except as specifically provided by a Commonwealth Act'.[20] In its submissions, the Law Council supported this and other related recommendations in the ALRC's 2001 report.[21]

16.17 The Commonwealth of Australia therefore now has no general Crown immunity from liability in tort or other civil actions and is subject to the same procedural and substantive laws as those which govern claims by one individual against another.[22] The Crown is also now subject to vicarious liability for the torts of its servants and agents, and may also have a non-delegable duty, to the same extent as an individual.[23]

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13 Nick Seddon, 'The Crown' (2000) 28 *Federal Law Review* 245, 257.
14 See *Claimants' Relief Act 1853* (SA).
15 Seddon, above n 13, 257.
16 Law Council of Australia, *Submission 75*.
17 *Judiciary Act 1903* (Cth) ss 56, 64.
18 Cf *Commonwealth v Mewett* (1997) 191 CLR 471.
19 Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 4th ed, 2009) 176.
20 Australian Law Reform Commission, *The Judicial Power of the Commonwealth—A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) rec 25–3.
21 Law Council of Australia, *Submission 140*; Law Council of Australia, *Submission 75*.
22 *Maguire v Simpson* (1977) 139 CLR 362. See further Aronson and Whitmore, above n 10, 7.
23 The Crown was not, at common law, vicariously liable for the torts of its servants or officers and also had no direct liability to its citizens: Sappideen and Vines, above n 10, 215. But the laws abrogating Crown immunity reverse that position. For example, the Commonwealth was held to have a non-delegable duty in negligence as a school authority to its pupils: *Commonwealth v Introvigne* (1982) 150 CLR 258.

16.18 A 2002 review of the law of negligence, chaired by the Hon David Ipp QC,[24] considered many aspects of public liability and made recommendations that have greatly reshaped the liability of public authorities in many Australian jurisdictions. One recommendation was for the enactment of a 'policy defence' to a claim in negligence:

> [A] policy decision (that is, a decision based substantially on financial, economic, political or social factors or constraints) cannot be used to support a finding that the defendant was negligent unless it was so unreasonable that no reasonable public functionary in the defendant's position could have made it.[25]

16.19 This 'policy defence' does not strictly create an immunity, but instead alters (and lowers) the applicable standard of care—which is another way of protecting someone from civil liability. Western Australia was the only jurisdiction to adopt a version of this recommendation.[26]

Immunity from statute

16.20 Immunity from statute is a related but distinct type of executive immunity. Although this government immunity from statutory obligations is not the subject of this chapter,[27] there have been calls for reform to limit and clarify these immunities. There is a general presumption of statutory interpretation that statutes are not intended to bind the Crown,[28] in the absence of clear words or necessary implication.[29] In 1990, the High Court in *Bropho v Western Australia* held that this presumption only provides limited protection to the government, and gives way to an express or implied intention that legislation binds the executive.[30] However, the law with respect to immunities from statute remains unclear and uncertain. To remove such uncertainty, the ALRC in 2001 recommended that the *Judiciary Act* be amended to provide that the

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24 Commonwealth of Australia, 'Review of the Law of Negligence: Final Report' (2002).

25 Ibid 185, rec 39.

26 *Civil Liability Act 2002* (WA) ss 5U, 5X.

27 The Terms of Reference suggest that laws that give executive immunities a wide application encroach on a traditional principle. But laws that provide for an immunity from statute would be consistent with a traditional Crown immunity, rather than an encroachment upon it. This is not to suggest that such immunities are therefore justified, but only that they are outside the scope of this chapter.

28 'Generally speaking, in the construction of acts of parliament, the king in his royal character is not included, unless there be words to that effect': *R v Cook* (1790) 3 TR 519, 521 (Lord Kenyon). See also *Attorney-General v Donaldson* (1842) 10 M & W 117, 124 (Alderson B); *Ex Parte Post Master General; In re Bonham* (1879) 10 Ch D 595, 601 (Jessel MR).

29 *Province of Bombay v The Municipal Corporation of Bombay* [1947] AC 58; *Commonwealth v Rhind* (1966) 119 CLR 584. See also Australian Law Reform Commission, *The Judicial Power of the Commonwealth—A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) [5.171]–[5.172].

30 *Bropho v Western Australia* (1990) 171 CLR 1, 15, 18–19 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); 28 (Brennan J). Where this rebuttable presumption applies and legislation is interpreted as not binding government, it may be said to give the executive a form of 'immunity' from laws which apply to ordinary citizens. In modern times, with the increased outsourcing of governmental functions, the principle could provide protection to parties contracting with the Crown, but only where the application of statutory liability would impair the Crown's legal interests, or prevent the divestment of proprietary, contractual or other legal rights and interests of the Crown: *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1, [64]–[68] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

Commonwealth is bound by every Commonwealth Act enacted after the amendment unless the relevant Act expressly states otherwise.[31]

What is a tort?

16.21 Executive immunity from civil liability most commonly arises in the context of potential tort liability. A tort is a legal wrong which one person or entity (the tortfeasor) commits against another person or entity and for which the usual remedy is an award of damages. Many torts protect fundamental liberties, such as personal liberty, and fundamental rights, such as property rights, and provide protection from interferences by other people or entities and by the Crown. In short, torts protect people from wrongful conduct by others and give claimants a right to sue for compensation or possibly an injunction to restrain the conduct. Like criminal laws, laws creating torts also have a normative or regulatory effect on conduct in society:

> When the legislature or courts make conduct a tort they mean, by stamping it as wrongful, to forbid or discourage it or, at a minimum, to warn those who indulge in it of the liability they may incur.[32]

16.22 A statute authorising conduct that would otherwise be a tort may therefore reduce the legal protection of people from interferences with their rights and freedoms.

16.23 Torts are generally created by the common law,[33] although there are statutory wrongs which are analogous to torts.[34] In addition, many statutes extend[35] or limit[36] tort remedies, while statutory duties and powers may provide a basis for duties or liability in tort, either in the common law tort of breach of statutory duty, or the common law tort of negligence.[37] Many common law torts have a long history, some dating as far back as the 13th century,[38] although others were created more recently.[39]

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31 Australian Law Reform Commission, *The Judicial Power of the Commonwealth—A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) rec 26–1. In its submission to this Inquiry, the Law Council similarly recommended that the *Acts Interpretation Act 1901* (Cth) be amended 'to provide that all Acts are to be taken to bind the Crown in all its capacities, unless expressly stated otherwise': Law Council of Australia, *Submission 140*.

32 Tony Honoré, 'The Morality of Tort Law' in David Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press, 1995) 75.

33 William Blackstone, *Commentaries on the Laws of England*, (Clarendon Press reprinted by Legal Classics Library, first published 1765–1769, 1983 ed) bk III; Fredrick Pollock and Frederic Maitland, *The History of English Law before the Time of Edward I* (Cambridge University Press, 2nd ed, 1899) vol II, ch VIII.

34 For example, the statutory liability for misleading or deceptive conduct in trade or commerce: see fair trading Acts and the *Australian Consumer Law* (Cth) s 18.

35 See, eg, *Compensation to Relatives Act 1987* (NSW). See also equivalent acts in other states and territories that extend tort liability to fatal accidents.

36 See, eg, *Civil Liability Act 2002* (NSW). See also how workers' compensation legislation limits common law claims and how state and territory Uniform Defamation Acts regulate defamation claims.

37 Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 2012) 583; Sappideen and Vines, above n 10, 149–50; 215–22.

38 SFC Milsom, *Historical Foundations of the Common Law* (Lexis Nexis Butterworths, 2nd ed, 1981) 283; Pollock and Maitland, above n 33; JH Baker, *An Introduction to English Legal History* (Butterworths, 1971) 82–5. Despite their common law origins, most tort actions are subject to some statutory variation of the common law principles by state and territory legislation. Numerous statutes limit actions or defences,

16.24 Although a tort may also amount to a crime, claims in tort are civil claims generally brought by people seeking compensation from the tortfeasor for injury or loss. Torts may be committed by individuals, corporate entities or public authorities, including government departments or agencies. Tort liability includes both personal liability and vicarious liability (for torts committed by employees or agents).

16.25 Torts include assault, battery, false imprisonment, trespass to land or goods, conversion of goods, private and public nuisance, intimidation, deceit, and the very expansive tort of negligence. Negligence occurs in many different social contexts, including on the roads, in the workplace, or through negligent medical care or professional services. The common law tort of defamation has long protected personal reputation from untruthful attacks.

16.26 While not all consequences of tortious conduct result in an award of damages, generally people have a right to legal redress if they can prove, on the balance of probabilities, that they have been the victim of a tort. In some cases, the affected person may seek an injunction from the courts to prevent the tort happening or continuing.[40]

Protections from statutory encroachment

Australian Constitution

16.27 As noted above, s 75(iii) of the *Australian Constitution* may be taken to impliedly extinguish common law Crown immunity. It provides that in all matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party, the High Court shall have original jurisdiction.

16.28 Further, Crown immunity is removed by s 64 of the *Judiciary Act*:

> In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.[41]

16.29 However, this provision may be superseded or overridden by legislation providing for a specific immunity to a person or entity.

16.30 The *Constitution* does not create rights in tort, however, as discussed throughout this Report, it does to some extent protect many traditional rights from statutory encroachment.

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provide limitation periods, cap or exclude awards of damages, and provide for survival of actions. The Uniform Defamation Acts in all states and territories modify the common law action of defamation.

39 B Creighton and Others, *Submission 24*. 'In a series of decisions between 1880 and 1901 the English courts identified a range of tort liabilities, which cumulatively had the effect of fixing any worker who engaged in industrial action, or any union official who organised such action, with responsibility for any losses that the action inflicted upon another party (most obviously, the employer)': Ibid.

40 For example, to prevent a trespass or a nuisance: Sappideen and Vines, above n 10, 58; 522–3.

41 See also *Judiciary Act 1903* (Cth) s 56; *Australian Constitution* s 78.

Principle of legality

16.31 The principle of legality provides some protection for the principle that executive immunities should be only as wide as necessary to achieve the legislative purpose, and should not unduly derogate from individual rights.[42] When interpreting a statute, courts will presume that Parliament did not intend to grant the executive a wide immunity from liability or authorise what would otherwise be a tort, unless this intention was made unambiguously clear.[43] In the absence of clear language, courts will narrowly construe any legislative provision to this effect.

16.32 The application of the principle of legality to particular rights and freedoms is discussed throughout this report. A few cases that apply the principle in interpreting immunity and authorisation provisions are noted below.

16.33 The High Court case, *Board of Fire Commissioners v Ardouin*,[44] concerned a claim in negligence—an infant riding his bike in the street was injured when hit by a fire truck that was racing towards the scene of a fire. The Court considered a section of the *Fire Brigades Act 1909* (NSW) that gave immunity from liability to the Board of Fire Commissioners where damage was caused by a bona fide exercise of statutory authority under that Act. Kitto J expressed the principle of interpretation which arose:

> Section 46 operates to derogate, in a manner potentially most serious, from the rights of individuals; and a presumption therefore arises that the Legislature, in enacting it, has chosen its words with complete precision, not intending that such an immunity, granted in the general interest but at the cost of individuals, should be carried further than a jealous interpretation will allow.[45]

16.34 In the same case, Dixon J pointed out that the immunity in that case was confined to aspects of the executive's operations that justified special protection from liability:

> It was not, however, expressed in terms which make it applicable to the doing of things in the course of performing the functions of the Board, which are of an ordinary character involving no invasion of private rights and requiring no special authority.[46]

16.35 Further High Court authority may be found in *Puntoriero v Water Administration Ministerial Corporation*.[47] Mr and Mrs Puntoriero had irrigated their potato crop using water supplied by a statutory corporation, and the water was contaminated. Could the corporation defend a claim of negligence by relying on a statutory provision that provided, in part, that 'an action does not lie against' the

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42 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 2.

43 *Board of Fire Commissioners v Ardouin* (1961) 109 CLR 105, 116; *Coco v The Queen* (1994) 179 CLR 427; *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575.

44 *Board of Fire Commissioners v Ardouin* (1961) 109 CLR 105.

45 Ibid.

46 Ibid 110.

47 *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575.

corporation 'with respect to loss or damage suffered as a consequence of the exercise of a function' of the corporation? The High Court held that it could not. Kirby J said:

> It has been stated in a series of decisions in this Court that immunity provisions, such as the one in question here, will be construed jealously or strictly so as to confine the scope of the immunity conferred. [The reason for this] … is to ascertain the true purpose of the provision upon an hypothesis, attributed by the courts to Parliament, that legislators would not deprive a person of legal rights otherwise enjoyed against a statutory body, except by the use of clear language.[48]

16.36 Courts are similarly reluctant to hold that a statute authorises the commission of what would otherwise be a tort. In *Puntoriero,* McHugh J said:

> In principle, there is no reason for construing a statutory provision limiting liability for government action differently from a statutory provision authorising government action. The reasons which require provisions of the latter kind to be read narrowly apply to provisions of the former kind. For that reason, provisions taking away a right of action for damages of the citizen are construed 'strictly', even jealously.[49]

16.37 In *Coco v The Queen*,[50] the High Court considered whether a statute that conferred authority on a judge to authorise a police officer to install a listening device extended to authorising the police officer to enter onto private premises to install the device. The Court held that the statute did not authorise this trespass. The majority said that statutory authority to 'engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language'.

> Every unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right. In accordance with that principle, a police officer who enters or remains on private property without the leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorized or excused by law.[51]

International law

16.38 International covenants typically do not refer to the right of an individual not to be subject to tortious conduct in such terms, nor do they explicitly prohibit broad executive immunities. But they do set out fundamental rights which might be infringed by tortious conduct. Imprisoning a person without lawful authority, for example, would constitute the tort of false imprisonment and may breach art 9 of the *International Covenant on Civil and Political Rights*. Defaming a person would constitute the tort of defamation and breach art 17. Torture would constitute the torts of assault or battery and breach art 7. While there is no settled tort of invasion of privacy in Australian common law, the equitable action of breach of confidence protects correspondence from some interferences, and invasions of privacy may breach art 17.[52]

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48 Ibid [59].
49 Ibid [34] (McHugh J).
50 *Coco v The Queen* (1994) 179 CLR 427.
51 Ibid [8] (Mason CJ, Brennan, Gaudron and McHugh JJ) (citations omitted).
52 See Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014) ch 13.

Justifications for encroachments

16.39 The executive performs unique functions, and may need special powers and privileges to discharge those functions, particularly when pursuing a broader public good. Exposure to some types of liability might make a government agency's task very difficult, or prohibitively costly, to perform.[53] It is therefore generally accepted that executive immunities from civil liability will at least sometimes be justified.

16.40 Perfect equality before the law between government and citizen is not possible, Gleeson CJ suggested in *Graham Barclay Oysters Pty Ltd v Ryan.* The formula that in proceedings against the government, rights should be *as nearly as possible* the same as in an ordinary case between subject and subject,

> reflects an aspiration to equality before the law, embracing governments and citizens, and also a recognition that perfect equality is not attainable. Although the first principle is that the tortious liability of governments is, as completely as possible, assimilated to that of citizens, there are limits to the extent to which that is possible. They arise from the nature and responsibilities of governments. In determining the existence and content of a duty of care, there are differences between the concerns and obligations of governments, and those of citizens.[54]

16.41 However, as Emeritus Professor Mark Aronson has written, discussing government liability in negligence, the 'trouble is that while most people have a sense that governments occasionally warrant different treatment, the commentators have difficulty agreeing on a set of principles to determine when that is the case'.[55] Moreover, at least in regard to negligence, the common law may provide only limited assistance if, as Aronson states, the 'common law on the liability of government authorities in negligence is remarkably confused'.[56] Where a statute provides an immunity to a claim in negligence, the statute may amount to a 'permission to be careless'.[57] Concerning government liability in negligence, Aronson concludes:

> it is never a good reason to deny a duty of care simply because the defendant is the government, or because it is a statutory authority, or because it has statutory powers or statutory duties. Each of those reasons is both far too general and far too narrow. They are too general because not all government entities are the same, and nor are their functions. They are too narrow because they imply that the private sector has no

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53 An example is the immunity given to the Commonwealth against liability for defamation where access is given to records required to be made available for public purposes: *Archives Act 1983* (Cth) s 57.

54 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, [12]. Although Gleeson CJ was here discussing a NSW provision, the words are similar to those in the *Judiciary Act 1903* (Cth) s 64, quoted above.

55 Mark Aronson, 'Government Liability in Negligence' (2008) 32 *Melbourne University Law Review* 44, 46.

56 Ibid. This problem is not limited to Australia. See, eg, Bruce Feldhusen, 'Public Immunity from Negligence: Uncertain, Unnecessary and Unjustified' (2013) 92 *Canadian Bar Review* 211. The UK Supreme Court considered the liability of police officers in negligence in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2.

57 Aronson writes that it is 'difficult to understand what possessed the Parliaments to grant government entities generic permissions to be careless, or careless to a degree not permissible to their private sector analogues': Aronson, above n 55, 82.

> analogues equally deserving of special consideration. The search for categorical exemptions from government liability has proved elusive.[58]

16.42 The same caution may be applied to government immunities more broadly, for example with respect to other torts.

16.43 Where immunities from civil liabilities affect people's rights—including their liberty, property and freedom of speech—such immunities are presumably only justified when strictly necessary. This may often be assessed by applying a structured proportionality analysis, of the sort widely used in international law, countries with bills of rights and human rights Acts, and by the Australian Parliamentary Joint Committee on Human Rights.[59]

16.44 The executive performs unique functions, but it also carries unique responsibilities. Governments may seek to enact laws that authorise their own agencies and officials to act in a way that would normally create legal liability, and to exclude or limit that liability. This may also suggest the need for some caution in giving executive immunities.

16.45 It may be less difficult to justify immunities given to people who make complaints or provide evidence to government regulators, and immunities given to public officials who disclose illegal, corrupt or other such conduct.

Laws that give immunity from civil liability

16.46 A statute may restrict a person's right to sue in tort in several ways, for example: by authorising conduct that would otherwise be a tort; by providing a defence of statutory authority to conduct that may constitute a tort, particularly if reasonable care is not taken;[60] and by giving a person an exemption or immunity from civil liability in tort.

16.47 Many examples of such laws are discussed in other chapters of this report, in the context of the individual right the law interferes with. For example, laws that authorise or provide an immunity from:

- the tort of defamation are discussed in the freedom of speech chapter;[61]
- the torts of trespass to person and false imprisonment are discussed in the freedom of movement chapter;[62] and
- the tort of trespass to property is discussed in the chapters about property rights.[63]

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58 Ibid 81.
59 Proportionality is discussed in Ch 2. Parliamentary committee scrutiny is discussed in Ch 3.
60 For example, a nuisance. See, eg, *Allen v Gulf Oil Refinery Ltd* [1980] AC 1001; *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660, [16]; *Benning v Wong* (1969) 122 CLR 249, 324–337 (Owen J); Barker et al, above n 37, [4.1.6.3]; *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* (2012) 42 WAR 287, [121]–[123].
61 Ch 4.
62 Ch 7.
63 Chs 18–20.

16.48 Some of these laws are also noted briefly below, although most are examples of more general statutory immunities from civil liability.

Authorising torts—police, customs and tax office powers

16.49 There are many examples of Commonwealth statutes that give authority to a Commonwealth officer or agency to do what would otherwise be a tort. For example, statutes give authority to federal police officers and customs officers to arrest or detain a person, to search a person, to enter and search property, or to seize or retain seized property. As long as the officer acts within the lawful authority given by the statute or common law, such conduct will not constitute a tort. Without such lawful authority, these types of conduct would amount to trespass to the person, trespass to land, or trespass or conversion of goods.

16.50 For example, powers to arrest without a warrant are found in the *Australian Federal Police Act 1979* (Cth) s 14A and the *Crimes Act 1914* (Cth) ss 3W, 3WA, 3X, 3Y and 3Z. Powers of arrest without a warrant are also provided at common law, and provided a justification in an action in tort.[64]

16.51 The *Customs Act 1901* (Cth) s 210(1) authorises an officer of customs or the police to arrest a person, in some circumstances, without a warrant, if the officer believes on reasonable grounds that the person has committed certain offences. This provision authorises what would otherwise be a tort.

16.52 Statutes may also authorise an arresting officer to search a person to find hidden weapons or prevent the loss of evidence[65] and to use some limited level of force when arresting a person.[66] Without such authority—whether at common law or in statute—such physical interference might amount to the tort of trespass to the person.

16.53 The Australian Taxation Office has statutory access and information-gathering powers. For example, the access power in the *Taxation Administration Act 1953* (Cth) provides that a tax official, for the purposes of a taxation law, 'may at all reasonable times enter and remain on any land, premises or place' and 'is entitled to full and free access at all reasonable times to any documents, goods or other property'.[67] This authorises what would otherwise be the tort of trespass to property.[68]

Other public authorities

16.54 Section 246 of the *Australian Securities and Investments Commission Act 2001* (Cth) is typical of the immunity from civil suit (for example, for the torts of negligence or breach of statutory duty) that is given to various public authorities. It provides that the Minister, ASIC, a member of ASIC, and a number of other persons listed in the provision, are not

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64 See, eg, *Holgate-Mohammed v Duke* (1984) AC 437.
65 See, eg, *Australian Federal Police Act 1979* (Cth) s 14D.
66 Eg, Ibid s 14B.
67 *Taxation Administration Act 1953* (Cth) sch 1, s 353–15.
68 This provision 'makes lawful that which otherwise would be unlawful, eg entry upon premises, the examination of a document': *Federal Commissioner of Taxation v Smorgon* (1979) 143 CLR 499, 535 [14] (Mason J).

> liable to an action or other proceeding for damages for or in relation to an act done or omitted in good faith in performance or purported performance of any function, or in exercise or purported exercise of any power, conferred or expressed to be conferred by or under the corporations legislation, or a prescribed law of the Commonwealth, a State or a Territory.[69]

16.55 Similar provisions may be found in the following Commonwealth Acts, among others:

- *Age Discrimination Act 2004* (Cth) s 58;
- *Australian Information Commissioner Act 2010* (Cth) s 35;
- *Australian Sports Anti-Doping Authority Act 2006* (Cth) s 78;
- *Australian Sports Commission Act 1989* (Cth) s 57;
- *Imported Food Control Act 1992* (Cth) s 38;
- *Inspector-General of Intelligence and Security Act 1986* (Cth) s 33;
- *National Health Act 1953* (Cth) s 99ZR;
- *Navigation Act 2012* (Cth) s 324;
- *Ombudsman Act 1976* (Cth) s 33; and
- *Product Stewardship (Oil) Act 2000* (Cth) s 31.

16.56 Many of these provisions contain an explicit 'good faith' proviso, but others do not. For example, s 34(1) of the *Australian Postal Corporation Act 1989* (Cth) provides:

> An action or proceeding does not lie against Australia Post or any other person in relation to any loss or damage suffered, or that may be suffered, by a person because of any act or omission (whether negligent or otherwise) by or on behalf of Australia Post in relation to the carriage of a letter or other article by means of the letter service.

16.57 In *Little v Commonwealth,*[70] the High Court considered an immunity provision that was silent on the notion of 'good faith'. Dixon J held that the provision removed liability from the arresting police for all actions, except those not done in good faith.[71]

16.58 The above provision from the *Australian Postal Corporation Act* also highlights that executive immunities are sometimes extended to government business enterprises, such as Australia Post.[72]

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69 *Australian Securities and Investments Commission Act 2001* (Cth) s 246(1).

70 *Little v Commonwealth* (1947) 75 CLR 94.

71 More recently, the High Court has suggested that remedies would always be available where officials acted in bad faith or according to other corrupt motives: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [82] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

72 Other government business enterprises include: Defence Housing Australia; ASC Pty Limited (formally known as Australian Submarine Corporation); Australian Rail Track Corporation Limited, Moorebank Intermodal Company Limited; and NBN Co Limited: *Public Governance, Performance and Accountability Rule 2014* (Cth) r 5.

16.59 Some statutes expressly give an immunity not only from civil proceedings, but from criminal proceedings, For example, the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) provides:

> Criminal or civil proceedings do not lie against [certain prescribed people] in relation to anything done, or omitted to be done, in good faith by the person in connection with the performance or purported performance of functions or duties, or the exercise or purported exercise of powers, conferred by this Act.[73]

16.60 Other provisions giving an immunity from both civil and criminal proceedings include:

- *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ss 75P, 235;
- *Australian Security Intelligence Organisation Act 1979* (Cth) s 35K;
- *Broadcasting Services Act 1992* (Cth) s 203 (in relation to defamation); and
- *Trade Marks Act 1995* (Cth) s 226B.

16.61 Some statutes set out limitations on the immunity more fully. For example, the immunity for those participating in a special intelligence operation, in s 35K of the *Australian Security Intelligence Organisation Act 1979* (Cth), does not extend to conduct that causes death or serious injury, constitutes torture, or causes significant loss of, or serious damage to, property. It also only applies to authorised conduct that is engaged in as part of a special intelligence operation under div 4, pt III of the *Australian Security Intelligence Organisation Act 1979* (Cth). Nevertheless, the Law Council submitted that the immunity 'may not contain adequate safeguards' and compared the provision to those related to the Australian Federal Police's controlled operations scheme in the *Crimes Act*.[74]

16.62 Other immunity provisions apply not just to a particular government agency, but to the executive government more broadly. For example, s 2A(3) of the *Competition and Consumer Act 2010* (Cth) provides:

> Nothing in this Act makes the Crown in right of the Commonwealth liable to a pecuniary penalty or to be prosecuted for an offence.

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73 *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 86.

74 *Crimes Act 1914* (Cth) pt 1AB. The Law Council also criticised the provision in relation to its effect on property rights: see Ch 19 and Law Council of Australia, *Submission 75*. The Law Council submitted that the immunity should be reviewed by the Independent National Security Legislation Monitor 'with particular focus on whether immunity from civil liability is appropriate in light of the need for an effective remedy under international law': Law Council of Australia, *Submission 140*. The NSW Bar Association has called the provision 'quite extraordinary' and said it 'leaves considerable room for violence to be lawfully inflicted': New South Wales Bar Association, Submission 28 to the Independent National Security Legislation Monitor, *Inquiry into Section 35P of the ASIO Act*, 2014. The Explanatory Memorandum for the relevant Bill states that the provision was 'necessary and appropriate'; 'does not deem lawful special intelligence conduct which would otherwise be unlawful'; and has a number of conditions and safeguards: Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).

16.63 Sections 494AA and 494AB of the *Migration Act 1958* (Cth) also bar certain legal proceedings against the Commonwealth, including 'proceedings relating to an unauthorised entry by an unauthorised maritime arrival' and proceedings related to the exercise of powers to bring a 'transitory person' to Australia from a country or place outside Australia. The latter type of power is said to include restraining a person on a vessel and using such force as is necessary,[75] the exercise of which, without authority, may amount to a tort.

16.64 It is by no means certain or likely that a public authority would be held liable in tort for negligence in the performance of its powers, due to the difficulty of establishing either a duty of care in negligence arising out of the creation of a statutory power,[76] or a civil right of action for breach of statutory duty. However, there are cases where a public authority has been held liable for negligent misstatement[77] or negligent conduct in operational matters.[78]

Giving evidence and making complaints

16.65 Some statutes provide an immunity to people who make complaints or give evidence to certain government agencies, particularly regulators. For example, s 37 of the *Ombudsman Act 1976* (Cth) provides that civil proceedings 'do not lie against a person in respect of loss, damage or injury of any kind suffered by another person' because they made a complaint or a statement or gave a document or information to the Ombudsman or a member of the Ombudsman's staff, for the purposes of the Act.[79]

16.66 Examples of similar provisions include:

- *Enhancing Online Safety for Children Act 2015* (Cth) s 89;
- *Freedom of Information Act 1982* (Cth) ss 55Z, 84; and
- *Interactive Gambling Act 2001* (Cth) s 23.

Public interest disclosures

16.67 The *Public Interest Disclosure Act 2013* (Cth) features a more detailed immunity scheme for public officials who make a 'public interest disclosure' in relation to certain types of conduct, such as illegal conduct, or conduct that perverts the course of justice, or constitutes maladministration, or is an abuse of public trust.[80]

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75 *Migration Act 1958* (Cth) s 198B.

76 See, eg, *Graham Barclays Oysters v Ryan* (2002) 211 CLR 540; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1.

77 *Shaddock & Associates v Parramatta City Council (No 1)* (1981) 150 CLR 225.

78 *Pyrenees Shire Council v Day* (1998) 192 CLR 330.

79 The Commonwealth Ombudsman plays an important role in dealing with complaints about the misuse of government power—a role that may be all the more important where limits are placed on the availability of remedies in the courts.

80 For the immunity provisions, see in particular *Public Interest Disclosure Act 2013* (Cth) pt 2 div 1.

Consular and diplomatic immunities

16.68 It is less common for a statute to provide immunity to a non-government person or entity. An example is the immunity given to members of a foreign consular or diplomatic service by the *Consular Privileges and Immunities Act 1972* (Cth) and the *Diplomatic Privileges and Immunities Act 1967* (Cth).

Industrial action

16.69 Statutes protect industrial action that might otherwise amount to a tort. The limited immunity provided to 'protected industrial action' is unusual in that it applies to individuals or non-government groups such as employee or employer associations.

16.70 So far as the common law is concerned, Professors Breen Creighton and Andrew Stewart write, 'virtually all industrial action would be unlawful as a tort, a breach of contract and, frequently, a crime'.[81] Relevant torts might include trespass, private nuisance, conspiracy and intentional interference with a contract.

16.71 Creighton and Stewart note that, unlike the United Kingdom, Australia has 'little history of legislative protection against common law liability for industrial action'.[82] However, there is now some protection. An immunity provision for protected industrial action, subject to prescribed limitations, is in s 415 of the *Fair Work Act 2009* (Cth). It is not a 'blanket' immunity and it applies to those taking or organising industrial action in relation to a new single-enterprise agreement.[83] Section 415 provides:

> (1) No action lies under any law (whether written or unwritten) in force in a State or Territory in relation to any industrial action that is protected industrial action unless the industrial action has involved or is likely to involve:
>
> (a) personal injury; or
>
> (b) wilful or reckless destruction of, or damage to, property; or
>
> (c) the unlawful taking, keeping or use of property.
>
> (2) However, subsection (1) does not prevent an action for defamation being brought in relation to anything that occurred in the course of industrial action.

16.72 The immunity in Australia originally had the object of encouraging parties to bring their disputes within the industrial relations and dispute resolution framework of 1993. This new framework represented a 'shift away from conciliation and arbitration in favour of formalised enterprise bargaining',[84] an essential element of which is said to be 'the capacity of the participants in the process to elect to take industrial action in

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81 Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) [22.08].

82 Ibid [23.01]. Rather, 'both State and federal parliaments have adopted a quite extraordinary range of legislative provisions against industrial action, the operation of which is additional to that of the common law. The end result is that for all practical purposes it was impossible, at least before 1993, for any group of Australian workers lawfully to take industrial action to protect or promote their occupational interests': Ibid [22.08].

83 B Creighton and Others, *Submission 24*.

84 Ibid.

order to exert pressure upon the other parties'.[85] This in turn called for legislative protection against common law liability.[86] The overall object of the scheme was that disputes proceed in an orderly, safe and fair way, without duress; that parties be properly and efficiently represented; and that risks to those caught up in the dispute be minimised.[87]

16.73 The appropriate scope of the immunity is the subject of considerable debate. The statutory limitations on this immunity affect other rights, particularly freedom of association.[88]

16.74 The justification of immunities for protected industrial action should be considered in the broader context of industrial relations law and in light of other important rights, including freedom of association.

Vicarious immunity

16.75 Executive liability is limited by the operation of the 'independent discretion rule', also known as the *Enever* principle,[89] which limits the vicarious liability of government for certain wrongs committed by government employees.

> The basic idea behind this rule is that, if powers are conferred by law directly upon an employee, such a person is considered to be executing an independent discretion or original authority for the consequences of which the employer is not vicariously responsible. Of course, the corollary of this rule is that the individual officer may bear a personal liability.[90]

16.76 This principle has been abrogated by statute in New South Wales[91] and, to the extent that it applies to police officers, in other jurisdictions, including the Commonwealth.[92]

16.77 The independent discretion rule has been widely criticised and in 2001, despite finding the rule had relatively little practical effect, the ALRC recommended it be abolished.[93]

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85 Ibid.
86 Ibid. See also Australian Council of Trade Unions, *Submission 44*.
87 See, for example, *Industrial Relations Reform Act 1993* (Cth) s 4.
88 See Ch 6.
89 *Enever v The King* (1906) 3 CLR 969.
90 *Cubillo v Commonwealth (No 2)* (2000) 174 ALR 97, [1089] (O'Loughlin J). The independent discretion rule therefore limits the basic principle in tort law that 'an employer is liable for the damage caused by the negligent acts or omissions of its servants when they are acting within the scope of their employment': Ibid [1088].
91 *Law Reform (Vicarious Liability) Act* 1983 (NSW) s 8.
92 See, eg, *Australian Federal Police Act 1979* (Cth) s 64B(1). 'The Commonwealth is liable in respect of a tort committed by a member or a protective service officer in the performance or purported performance of his or her duties … in like manner as a person is liable in respect of a tort committed by his or her employee in the course of his or her employment'.
93 'The principle in *Enever v The King* (1906) 3 CLR 969, namely, that the Commonwealth is not vicariously liable for the tortious conduct of Commonwealth officers who act with independent discretion pursuant to statute, should be expressly abolished in relation to the Commonwealth': Australian Law Reform Commission, *The Judicial Power of the Commonwealth—A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) rec 25–1.

New cause of action for public law wrongs

16.78 Some have called for the creation of a new cause of action for so-called public law wrongs. Aronson explains that because 'government's tort liability is usually judged by private law principles, there is no generalised common law right of action for damages for loss caused by invalid administrative action'.[94] Discussing non-judicial review remedies in the UK, Maurice Sunkin concluded:

> The absence of a right of damages for losses sustained as a consequence of public law wrongs is widely recognized as being one of the most serious of the remaining gaps in our remedial system. It is a gap that does not exist in more developed systems. This gap has been widely criticised over the years by judges, by legal commentators, and by the Law Commission. This is an issue that now cries out for reform.[95]

16.79 This chapter is largely about statutes that limit executive liability to private law torts. It is another question whether a new cause of action might be needed to allow for the recovery of damages for certain wrongful government conduct for which there is no private law action. Although some have called for the introduction of such an action, others have been critical of the idea.[96]

16.80 In 2001, the ALRC recommended that there be a review of the law relating to claims for compensation for loss arising from wrongful federal administrative action.[97]

Conclusion

16.81 As noted above, many of the issues discussed in this chapter were reviewed more fully in the ALRC's 2001 report, *The Judicial Power of the Commonwealth*. Although in this current Inquiry few stakeholders commented on the matters discussed in this chapter, the ALRC's 2001 report contains a number of recommendations broadly aimed at, among other things, ensuring that executive immunities from civil liability are only available when justified. These recommendations may warrant further consideration.

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94 Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1, 2.

95 Maurice Sunkin, 'Remedies Available in Judicial Review Proceedings' in David Feldman (ed), *English Public Law* (Oxford University Press, 2nd ed, 2009) 820.

96 The UK Law Commission said the response to its proposed reforms in this area was 'almost universally negative' and the Government in particular was 'firmly opposed' to its proposals: The Law Commission, *Administrative Redress: Public Bodies and Citizen* (The Stationery Office, 2010).

97 Australian Law Reform Commission, *The Judicial Power of the Commonwealth—A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) rec 25–2.

17. Delegating Legislative Power

Contents

Summary

17.1 Under the constitutional doctrine of the separation of powers, parliaments make law, the executive administers and enforces the law, and the judiciary adjudicates disputes about the law. The doctrine is reflected in the structure of the *Australian Constitution*.[1] But the separation between legislative and executive power is not as clear as some might imagine. For one thing, in Australia, members of the executive (the Cabinet and other government ministers) are also members of the legislature.

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

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

17.4 Delegating legislative power to the executive is now commonplace and is said to be essential for an efficient and effective government.[2] Parliament delegates such power not only to government ministers, but also government agencies such as the Australian Taxation Office and the Australian Securities and Investments Commission (ASIC).

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1 Chapter I of the *Constitution* is entitled 'The Parliament'; Chapter II, 'The Executive Government'; and Chapter III, 'The Judicature'.

2 There are many types of delegated legislation, including regulations, ordinances, rules, public notices, proclamations, local authority by-laws and specific decrees.

17.5 Given the quantity of delegated law in Australia, careful and ongoing scrutiny—built into the law making process—may be the most suitable way to limit inappropriate delegations of legislative power. This chapter includes various examples of delegations of legislative power, but does not single out particular delegations as inappropriate.

17.6 There are various guides and processes in place to remind law makers about when laws should be in primary rather than delegated legislation. There is guidance in the *Legislation Handbook* and scrutiny by parliamentary committees.[3] There are also procedures that enable either House of Parliament to 'disallow' (repeal) most delegated legislation soon after it has been passed.

17.7 This chapter is concerned with laws that delegate *legislative* power, rather than with laws that give ministers and government agencies *executive* power. There may be no bright line between legislative and executive power, but the distinction is 'essentially between the creation or formulation of new rules of law having general application and the application of those general rules to particular cases'.[4] Creating new rules of law of general application is traditionally the role of Parliament.

Constitutional limits

17.8 The *Australian Constitution* does not expressly authorise the Commonwealth Parliament to delegate power to make laws, nor is it expressly prohibited. The High Court's decisions in *Baxter v Ah Way*[5] and *Roche v Kronheimer*[6] are authority for Parliament's power to delegate certain legislative powers to the executive. In *Victorian Stevedoring and General Contracting Company v Dignan* ('*Dignan's case*'), Dixon J said that *Roche v Kronheimer* decided that

> a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the distribution of legislative, executive and judicial powers in the *Constitution* does not operate to restrain the power of the Parliament to make such a law.[7]

17.9 Dixon J noted the 'logical difficulties of defining the power of each organ of government, and the practical and political consequences of an inflexible application of their delimitation'.[8]

17.10 However, there are two constitutional limits on the power to delegate legislative power. First, Dixon J said that in some cases, there may be 'such a width or such an

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3 See Ch 3.

4 *Minister of Industry and Commerce v Tooheys Ltd* (1982) 60 FLR 325, 331. In the *Legislative Instruments Act 2003* (Cth), an instrument is taken to be of a 'legislative character' if: '(a) it determines the law or alters the content of the law, *rather than applying the law in a particular case*; and (b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right': *Legislative Instruments Act 2003* (Cth) s 5(2) (emphasis added).

5 *Baxter v Ah Way* (1910) 8 CLR 626, 637–8.

6 *Roche v Kronheimer* (1921) 29 CLR 329.

7 *The Victorian Stevedoring and General Contracting Company Proprietary Limited v Dignan* (1931) 46 CLR 73, 101.

8 Ibid 91.

uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power'.[9]

17.11 Second, Parliament cannot entirely abdicate its legislative power, for example, by delegating an entire head of legislative power. Evatt J offered an example of such a law: 'The Executive Government may make regulations having the force of law upon the subject of trade and commerce with other countries or among the States'.[10] Abdication is more likely to be found where the legislative power is delegated to a person or body that is not subject to ministerial responsibility or is not a public authority created by Parliament.[11] The rule that a sovereign legislature cannot abdicate its legislative power has also been recognised at common law in Canada and Australia.[12]

17.12 In many countries, enforceable bills of rights create grounds for challenging the validity of delegated legislation that in Australia are unavailable.

17.13 As discussed below, whether constitutionally valid or not, a wide and uncertain delegation of legislative power may not be appropriate.

Justifications for delegating legislative power

17.14 Parliaments have been delegating powers to the executive for some time—in England, possibly for as long as 650 years.[13] In Australia, delegated legislation has been a major part of the law since colonisation.[14] Today, far more laws are made under delegation than directly by parliaments.[15]

17.15 Practical necessity is perhaps the overriding justification for delegated legislation. The 'modern state depends on reams of delegated legislation'[16] and therefore the ability of a legislature to empower others to make legislation has been

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9 Ibid 101.

10 Ibid 119. This limitation does not seem to apply in wartime in respect of defence regulations. In *Wishart v Fraser*, the High Court approved *National Security Act 1939* (Cth) s 5, transferring in wartime virtually all the legislative power on defence to the Governor-General in Council: *Wishart v Fraser* (1941) 64 CLR 470.

11 The fact that 'the grant of power is made to the Executive Government rather than to an authority which is not responsible to Parliament' was treated by Evatt J as a 'circumstance which assists the validity of the legislation': Ibid 120.

12 In *Hodge v The Queen* (1883) 9 App Cas 117, the Privy Council, while upholding the Ontario legislature's power to delegate law making power to the executive, was careful not to authorise the abdication of legislative power. In the legislation considered in *Commonwealth Aluminium Corporation Pty Ltd v Attorney-General (Qld) (Comalco Case)* [1976] Qd R 231 and *West Lakes Ltd v South Australia* (1980) 25 SASR 389, the State legislatures granted concessions to private companies that, according to the Acts, could not be withdrawn without the agreement of the beneficiary companies. In each case, the State Supreme Court considered the reservations as ineffective for being abdications of legislative power. See discussion of these cases in Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 3rd ed, 2012) 448–49.

13 See Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4th ed, 2012) 5; VCRAC Crabbe, *Legislative Drafting* (Routledge, 2012) 213.

14 Pearce and Argument, above n 13, 5.

15 Ibid.

16 George Winterton, *Winterton's Australian Federal Constitutional Law: Commentary and Materials* (Lawbook Company, 2013) [3.500].

described as 'an essential adjunct to the practice of government'.[17] The Public Interest Advocacy Centre (PIAC) submitted that, given 'the breadth and depth of areas now regulated by government, the ability to flesh out primary legislation in subordinate legislation is a necessary and expedient tool of government'.[18]

17.16 Pearce and Argument write that the delegation of legislative power is 'generally considered to be both legitimate and desirable' in three situations:

- to save pressure on parliamentary time;
- when the legislation would be too technical or detailed; and
- where the legislation must deal with rapidly changing or uncertain situations.[19]

17.17 Sir Stanley de Smith notes several related reasons to delegate legislative power. 'Torturous and cumbersome legislation, bulging with minutiae, disfigures the statute book and tends to detract from the prestige of Parliament'.[20] Where the changes to the law require administrative reorganisation and detailed consultations with affected sectors of the community, the commencement of particular parts of the Act may have to be postponed and left to executive discretion.[21] Furthermore, it is sensible to allow the responsible minister to amplify the Act by regulations when it is 'reasonable to suppose that new contingencies (such as special hardship or technological developments) will arise although their exact form cannot be predicted at the date of enactment'.[22]

17.18 ASIC highlighted the need for delegated legislation in the regulation of corporations and financial services. These sectors are 'complex and subject to constant innovation', ASIC submitted, and without delegated legislation, 'primary legislation would be unable to anticipate and respond in a timely way'.[23]

17.19 Pearce and Argument write that 'one of the fundamental justifications for putting something into delegated legislation is that it is something that parliament need not be too concerned about but, rather, is something that the parliament can be relatively comfortable merely keeping a watchful eye over'.[24] In other words,

> 'important' things—including the intrinsically 'political' things—are to be kept to the primary legislation. The delegated legislation is for the detail, for the machinery.[25]

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17 Pearce and Argument, above n 13, 170.
18 Public Interest Advocacy Centre, *Submission 55*.
19 Pearce and Argument, above n 9, [1.9]. Similar and other reasons justifying delegated legislation were set out in: United Kingdom Parliament, *Report of the Committee on Ministers' Powers'* ('Donoughmore Report'), Cmd 4060 (1936). See also Caroline Morris and Ryan Malone, 'Regulations Review in the New Zealand Parliament' (2004) 4 *Macquarie Law Journal* 7, 9.
20 Stanley de Smith, *Constitutional and Administrative Law* (Penguin Books, 3rd ed, 1977) 325.
21 Ibid.
22 Ibid 326.
23 Australian Securities and Investments Commission, *Submission 74*.
24 Pearce and Argument, above n 13, 118.
25 Ibid 119.

17.20 It might also be argued that parliamentary sovereignty would be limited to some degree if Parliament could not choose to delegate part of its legislative power.

17.21 In practice, members of Parliament rely heavily on the executive to prepare, draft and scrutinise new laws. The quantity of law made each year alone makes it impossible for individual members of Parliament to read and scrutinise every bill, much less every draft legislative instrument. Discussing delegated legislation in the United Kingdom, Professor P S Atiyah wrote:

> For practical purposes statutory instruments are an example of law made by civil servants subject to ministerial control, in much the same way that Acts of Parliament are laws largely made by civil servants subject to parliamentary control.[26]

17.22 The proportionality principle, which is useful to test limits on many rights, may be less helpful in determining whether a delegation of legislative power is appropriate. For one thing, applied here, the proportionality principle would suggest that delegations of legislative power should be rare and only made when strictly necessary. However, delegating legislative power to the executive is very common and is a widely accepted method of law making, particularly if subject to parliamentary control.

Criticisms

17.23 Despite the fact that Parliament commonly delegates legislative power to the executive, some laws are more properly made by Parliament. Pearce and Argument summarise the primary arguments directed against the use of delegated legislation as:

> First, that if the executive has power to make laws, the supremacy or sovereignty of parliament will be seriously impaired and the balance of the *Constitution* altered. Second, if laws are made affecting the subjects, it can be argued that they must be submitted to the elected representatives of the people for consideration and approval.[27]

17.24 Professor Denise Meyerson has written that although some delegated legislation is clearly necessary in practice, there is a danger:

> if we allow the unlimited transfer of legislative power to the executive we run the risk of subverting the rule of law ideal, fundamental to the control of government, that those who carry out the law should be restrained by those who make it.[28]

17.25 The rule against wide delegations of legislative power has been called a major component of the separation of powers doctrine:

> When officials can legislate, interpret and execute their legislation, they have the potential to place themselves above the law—for the law becomes in effect whatever they say is the law in the particular case.[29]

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26 PS Atiyah, *Law and Modern Society* (Oxford University Press, 1983) 130.
27 Pearce and Argument, above n 13, 11.
28 Denise Meyerson, 'Rethinking the Constitutionality of Delegated Legislation' (2003) 11 *Australian Journal of Administrative Law* 45, 52.
29 Ratnapala and Crowe, above n 12, 124.

17.26 This can threaten many individual rights, freedoms and privileges, such as those considered in this Report. The separation of powers doctrine has been said to be 'essential for the establishment and maintenance of political liberty'.[30]

17.27 The Law Council of Australia (Law Council) submitted that it should not be 'left to the executive to determine for itself what powers it has and when and how they may be used'.[31] The rule of law requires that

> the law must be readily known, available, certain and clear; and where legislation allows for the Executive to issue regulations, the scope of that delegated authority should be carefully confined and subject to Parliamentary supervision.[32]

17.28 The executive has been said to 'lack the democratic credentials of Parliament'.[33] The framers of the *Constitution* vested the legislative power in the Australian Parliament 'because they thought the people's elected representatives particularly well-suited to the exercise of the "open-ended discretion to choose ends" which is the essence of the legislative task'.[34]

17.29 The process of executive law making also 'lacks the transparency and publicity of the parliamentary process'.[35] Delegation therefore 'reduces the accountability of the exercise of legislative power'.[36]

17.30 In the United States Supreme Court, Rehnquist J explained three functions of the rule against excessive delegation as follows:

> First and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent that Congress finds it necessary to delegate authority, it provides the recipient of that authority with an 'intelligible principle' to guide the exercise of the delegated discretion. Third, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.[37]

17.31 Justice Rehnquist's third point is that wide delegation diminishes the capacity of courts to limit the misuse of power.

17.32 Some criticism of delegated legislation appears to concern the quality and quantity and law of regulation more broadly, rather than the narrower question of whether such laws belong in primary legislation.[38] David Hamer, for example, has said that delegated legislation is a 'fertile field for government despotism and bossy

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30 MJC Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, 1998) 14.
31 Law Council of Australia, *Submission 140*.
32 Ibid.
33 Meyerson, above n 28, 53.
34 Ibid.
35 Judith Bannister et al, *Government Accountability* (Cambridge University Press, 2014) 112.
36 Ibid.
37 *Industrial Union Department, AFL-CIO v American Petroleum Institute* 448 US 607 at 685–686 (1980). See also *Panama Refining Co v Ryan* 293 US 388 at 418, *ALA Schechter Poultry Corp v United States* 295 US 495 at 537 (1935) and *Opp Cotton Mills Inc v Administrator* 312 US 126 at 144 (1941).
38 The 'proliferation' of delegated legislation is discussed in Pearce and Argument, above n 13, 16.

interference by bureaucrats'.[39] In any event, this chapter is not about the quality or quantity of regulation, but rather about whether particular types of delegated law should more properly be made directly by Parliament.

17.33 Some of the types of delegation considered less appropriate are highlighted among the examples that follow.

Examples of laws that delegate legislative power

17.34 There are thousands of legislative instruments currently in force in Australia, covering a wide range of subject matter, including laws about food standards, fisheries, civil aviation, corporations, superannuation, taxation and migration, to name only a few.

17.35 Acts that include delegations of legislative power often do so in terms similar to this provision, from the *Atomic Energy Act 1953* (Cth):

> The Governor-General may make regulations, not inconsistent with this Act, prescribing matters:
>
> (a) required or permitted by this Act to be prescribed; or
>
> (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.[40]

17.36 Some provisions like this will set out more fully the types of regulations that may be made. For example, there is considerable detail about what the relevant regulations may do in s 63 of the *Therapeutic Goods Act 1989* (Cth).

17.37 Sometimes a provision in an Act delegating legislative power is expressed broadly and there is little substantive law in the primary legislation. This is sometimes called 'skeleton' legislation—the bare bones are in the primary legislation, but most of the law is in the delegated legislation.[41] This arrangement has often been criticised.[42] Pearce and Argument cite the *Carbon Credits (Carbon Framing Initiative) Act 2011* (Cth) and related Acts as an example, although there are many other such Acts.[43] The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) said in 2012 that 'framework' bills were becoming increasingly prevalent[44] and that 'important information' should be included in the primary legislation, 'unless there is a principled reason for including it in delegated legislation'.[45]

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39 David Hamer, 'Can Responsible Government Survive in Australia?' (Department of the Senate, 2001) 148.

40 *Atomic Energy Act 1953* (Cth) s 65.

41 This is also called 'coat-hanger' or 'framework' legislation.

42 See Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Final Report—Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee* (May 2012) ch 5; Pearce and Argument, above n 13, 121–123.

43 Pearce and Argument, above n 13, 122.

44 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Final Report—Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee* (May 2012) 35.

45 Ibid 34.

17.38 Important questions of policy, particularly when they affect individual rights, are often considered inappropriate subject matter for delegated legislation. The Law Council expressed concern about a new provision to be inserted into the *Migration Act 1958* (Cth), under which a person may be required to provide 'personal identifiers' for any purposes under the Act or the *Migration Regulations 1994* (Cth).[46] The Law Council said that significant matters such as this should instead be set out in primary legislation, not in regulations:

> the power to prescribe both a purpose for which personal identifiers may be collected and the collection of biometric data via regulation raises the potential for the scheme to go beyond the initial intention of the Bill and the Migration Act, without adequate parliamentary scrutiny. Permitting changes to the purposes of collection of biometric data by regulation can result in significant incursions into privacy, while escaping general public awareness.[47]

17.39 Offence provisions generally belong in primary legislation, particularly where the penalties for infringement are high. For example, s 30B of the *National Credit Code* allows for the making of certain regulations concerning credit card contracts, including for offences and civil penalties against the regulations.[48] Although there are limits in the Act on the offences and penalties, the Scrutiny of Bills Committee said the 'penalties which may be imposed by regulation are significant and it is unclear why the offences and requirements cannot adequately be specified in the legislation which will be considered in detail by Parliament'.[49]

17.40 'Henry VIII clauses' are another type of delegation of legislative power that is considered inappropriate.[50] These allow delegated legislation to amend the primary legislation. The Scrutiny of Bills Committee often comments on such provisions. In 2009, for example, the Committee noted the large number of Henry VIII clauses in the National Consumer Credit Protection Bill 2009—so many in fact that it was 'not possible to provide commentary in relation to all of them'.[51] The relevant Minister defended the arrangement, telling the Committee that the Government needed to ensure that there was 'adequate flexibility in the new arrangements to ensure the smooth

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46 The *Migration Amendment (Strengthening Biometrics Integrity) Act 2015* (Cth) inserts s 257A into the *Migration Act 1958* (Cth). At November 2015, the relevant provision of the amending Act had not commenced.

47 Law Council of Australia, *Submission 140*.

48 *National Consumer Credit Protection Act 2009* (Cth) sch 1 s 30B(2).

49 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest* No 4 of 2011 47.

50 The first Henry VIII clause was in the *Statute of Proclamations 1539*: 'The King for the Time being, with the advice of his Council, or the more Part of them, may set forth Proclamations under such Penalties and Pains as to him and them shall seem necessary, which shall be observed as though they were made by Act of Parliament.' This in effect authorised the King to make law on any subject by proclamation without the consent of Parliament. Legislation by proclamation was one of the main issues of contention that led to the Revolution of 1688 and the enactment of the Bill of Rights 1689, which denied the remaining royal claims to legislative prerogatives to suspend laws, grant dispensation from law and to impose taxes.

51 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *10th Report of 2009* (September 2009) 370.

transition to a national credit regime'.[52] Section 35A of the *Fair Work Act 2009* (Cth), which relates to the geographical application of the Act, is another example.[53]

17.41 Government agencies and regulators will sometimes be given the power to make delegated legislation. The Commissioner of Taxation and ASIC, for example, both have statutory powers to make certain rules and regulations. For example, under the *Income Tax Assessment Act 1936* (Cth), the Commissioner of Taxation may determine by legislative instrument which taxpayers are required to lodge an income tax return.[54] Under *A New Tax System (Goods and Services Tax) Act 1999* (Cth), the Commissioner of Taxation may make certain determinations in relation to how much Goods and Services Tax is payable on taxable importations.[55]

17.42 ASIC also has the power to make delegated legislation, and this includes the power to modify certain provisions in the *Corporations Act 2001* (Cth), including as they apply to specified classes of people—until recently, called 'Class Orders'.[56] Although these are not strictly speaking Henry VIII clauses, it has been said that ASIC can essentially re-write parts of the Act.[57] Professor Stephen Bottomley has noted that corporate regulators need discretionary powers, given that the 'financial and commercial context in which corporations operate is complex and fast-changing',[58] and statutory modifications via Class Orders are 'beneficial to the flexible regulation of the corporate and finance sector'.[59]

17.43 However, ASIC's law making powers may be unique among Australian federal regulatory agencies and corporate regulatory agencies elsewhere.[60] One danger of giving ASIC powers to modify the law, with relatively little specific legislative guidance, Bottomley writes, is that it may reinforce 'the appearance of a system in which the regulator can make rules of wide application that bypass the process of substantive public scrutiny and accountability that can be applied to statutory rules'.[61] For example, there appears to be no legal requirement that ASIC must consult stakeholders before making a Class Order.[62] Bottomley discusses these dangers and proposes some improvements to the way laws can be changed by ASIC Class Orders.[63] The principle underlying these proposals is that 'legislative change should be done by

52 Ibid 371.
53 Bannister et al, above n 35, 116.
54 *Income Tax Assessment Act 1936* (Cth) s 161.
55 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ss 13–20(3).
56 See, eg, *Corporations Act 2001* (Cth) ss 283GA(1)(b), 601QA(1)(b), 601YAA(1)(b). For a complete list, see Stephen Bottomley, 'The Notional Legislator: The Australian Securities and Investments Commission's Role as a Law-Maker' (2011) 39 *Federal Law Review* 1, 6. Not all Class Orders modify the Act.
57 Bottomley, above n 56, 2.
58 Ibid 1.
59 Ibid 31.
60 Ibid 2.
61 Ibid 8.
62 Ibid 25.
63 Ibid 28–30.

and through Parliament', largely because Parliament is 'visible and publicly accountable'.[64]

Safeguards

17.44 Some concerns about delegated legislation may be addressed by the procedures that must be followed in making the legislation, particularly since the enactment of the *Legislative Instruments Act 2003* (Cth). These safeguards are designed to allow Parliament to oversee the making of delegated legislation, to scrutinise it through committees, and to repeal laws that Parliament considers should not have been made.[65]

17.45 The requirement that legislative instruments be published on a public register was a major development introduced by the *Legislative Instruments Act*, and helps make the process of making delegated legislation more open and accountable.[66] Another important safeguard is the automatic repeal or 'sunsetting' of legislative instruments, usually after ten years.[67]

17.46 There are also limits on incorporating other instruments or writings in delegated legislation, although this is subject to a contrary intention in the enabling Act.[68]

17.47 Parliamentary scrutiny, particularly by committees, is also an important safeguard.[69] The Scrutiny of Bills Committee and the Senate Standing Committee on Regulations and Ordinances (Regulations and Ordinances Committee) both consider whether an Act of Parliament inappropriately delegates legislative power to the executive.[70] Established in 1932, the Regulations and Ordinances Committee in particular scrutinises delegated legislation to ensure 'that it does not contain matter more appropriate for parliamentary enactment'.[71] The legislative scrutiny process and the role of the parliamentary committees have been called the 'key mechanisms for ensuring that the Executive does the right thing'.[72]

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64 Ibid 30.

65 See *Legislative Instruments Act 2003* (Cth); Office of Parliamentary Counsel, *Legislative Instruments Handbook* (2014). These safeguards are in addition to the judicial review of delegated legislation, which essentially considers whether the legislation was validly made and within power. There are different standards by which the superior courts may determine the validity of statutory instruments. For example, a local authority by-law may be invalidated on the ground that it is unreasonable whereas a regulation within power cannot be so challenged. Different judicial considerations will also apply to a general rule enacted by regulation and a specific order that affects the rights and duties of parties in the particular case. On judicial review more broadly, see Ch 15.

66 *Legislative Instruments Act 2003* (Cth) pt 4.

67 Ibid pt 6.

68 Ibid s 14.

69 For an overview of parliamentary scrutiny, see Ch 3.

70 Parliamentary committees are discussed in Ch 3.

71 Senate Standing Order 23(3)(d).

72 Stephen Argument, 'Delegated Legislation' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 142.

17.48 Common law principles may also provide additional safeguards. For example, unless the statute provides for the sub-delegation of legislative power,[73] a delegate generally cannot sub-delegate power.[74]

17.49 Further guidance on what are appropriate matters for primary and delegated legislation may be found in the *Legislation Handbook*.[75] It states that, while it is 'not possible or desirable to provide a prescriptive list', the following kinds of matters should be included in primary legislation:

(a) appropriations of money;

(b) significant questions of policy including significant new policy or fundamental changes to existing policy;

(c) rules which have a significant impact on individual rights and liberties;

(d) provisions imposing obligations on citizens or organisations to undertake certain activities (for example, to provide information or submit documentation, noting that the detail of the information or documents required should be included in subordinate legislation) or desist from activities (for example, to prohibit an activity and impose penalties or sanctions for engaging in an activity);

(e) provisions conferring enforceable rights on citizens or organisations;

(f) provisions creating offences which impose significant criminal penalties (imprisonment or fines equal to more than 50 penalty units for individuals or more than 250 penalty units for corporations);

(g) provisions imposing administrative penalties for regulatory offences (administrative penalties enable the executive to receive payment of a monetary sum without determination of the issues by a court);

(h) provisions imposing taxes or levies;

(i) provisions imposing significant fees and charges (equal to more than 50 penalty units consistent with (f) above);

(j) provisions authorising the borrowing of funds;

(k) procedural matters that go to the essence of the legislative scheme;

(l) provisions creating statutory authorities (noting that some details of the operations of a statutory authority would be appropriately dealt with in subordinate legislation); and

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73 Although a statute may validly provide for sub-delegation: 'I have found no reason for concluding that Parliament may not, in authorizing subordinate legislation, confer power to authorize the making of regulations or by-laws not inconsistent with the legislation which Parliament has directly authorized': *Esmonds Motors v Commonwealth* (1970) 120 CLR 463, 477 (Menzies J). See also Pearce and Argument, above n 19, [23.4].

74 'The broad principle that a person cannot, without authority, delegate legislative power that has been delegated has been accepted with only one or two minor expressions of doubt': Ibid [23.5]. Pearce and Argument discuss the question of sub-delegation of delegated legislative power in Ibid ch 23.

75 Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (1999). This is a guide to making legislation for government departments. See Ch 3.

(m) amendments to Acts of Parliament (noting that the continued inclusion of a measure in an Act should be examined against these criteria when an amendment is required).[76]

17.50 It will generally not be appropriate for such laws to be made in delegated legislation. Further, it may also not be appropriate for Parliament to authorise the making of regulations that impose liabilities with retroactive effect.[77] Parliament should also clearly identify the recipient of the delegated power and should generally not authorise sub-delegation.[78]

17.51 Grants of delegated power ought not to be so expressed that it becomes impossible in practice for courts to review the limits of the power. For example, provisions should not give ministers powers to do that which is, in their opinion, 'requisite or expedient for a broadly framed statutory purpose'.[79]

17.52 The tabling, disallowance, and committee scrutiny of delegated legislation are important safeguards and practical ways for Parliament to control executive law making. If it were thought that legislative power were being inappropriately delegated, consideration might be given to the adequacy of these safeguards, and perhaps to whether the safeguards are ever inappropriately avoided. For example, some statutes exempt legislative instruments from the disallowance or sunsetting provisions in the *Legislative Instruments Act 2003* (Cth).

17.53 Further measures designed to limit inappropriate delegations of legislative power were suggested by PIAC, which described parliamentary scrutiny of delegated legislation as, in practice, minimal.[80] For example, it recommended that the Regulations and Ordinances Committee should have a stronger role and that legislative instruments be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). It also suggested that the *Legislative Instruments Act* be amended to include a non-exhaustive list of powers and matters which should not be delegated, unless there is a public interest in doing so.[81]

Conclusion

17.54 Although delegating legislative power to the executive is necessary for an efficient and effective government, some laws are more properly made by Parliament—for example, laws that have a significant impact on individual rights and laws creating serious criminal offences. Given the quantity of delegated law in Australia, robust safeguards and ongoing scrutiny appear to be suitable ways to limit inappropriate delegations of legislative power.

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76 Ibid 3. See also de Smith, above n 20, 325–28.
77 de Smith, above n 20, 328. On retrospective laws, see Ch 13.
78 Ibid.
79 Ibid 327.
80 Public Interest Advocacy Centre, *Submission 55*. PIAC submitted that much depends on the 'individual will of parliamentarians to make themselves aware of the potential impact of tabled delegated legislation': Ibid.
81 For these and other recommendations, see Public Interest Advocacy Centre, *Submission 55*; Public Interest Advocacy Centre, *Submission 133*.

18. Property Rights

Contents

Summary

18.1 The common law has long regarded a person's property rights as fundamental. Jeremy Bentham said that '[p]roperty and law are born together, and die together'.[1] At common law, property rights could be encroached upon 'by the law of the land',[2] so long as any deprivation was not arbitrary and only where reasonable compensation was given.[3]

18.2 This chapter and Chapters 19 and 20 are about the common law protection of vested property rights. This chapter provides the foundation for the two chapters that follow. It considers what is comprised in the concept of 'property' rights and how vested property rights are protected from statutory encroachment. Chapter 19 focuses upon interferences with personal property rights. Chapter 20 considers interferences with real property and the rights of landowners.

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1 Jeremy Bentham, 'Principles of the Civil Code' in *The Works of Jeremy Bentham, Published under the Supervision of His Executor John Bowring* (1843) vol 1 pt I ch VIII 'Of Property', 309a.

2 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) vol I, bk I, ch 1, 134.

3 Ibid vol I, bk I, ch 1, 135. This passage is cited often in Australian courts, eg, *R & R Fazzolari Ltd v Parramatta City Council* (2009) 237 CLR 603, [41] (French CJ).

18.3 Property and possessory rights are explicitly protected by the law of torts and by criminal laws and are given further protection by rebuttable presumptions in the common law as to statutory interpretation, under the principle of legality. The *Australian Constitution* protects property from one type of interference: acquisitions by the Commonwealth other than 'on just terms'.[4] 'Interference' is a wider notion than 'acquisition' for this purpose: while actions through Commonwealth laws may not amount to an acquisition, so as to come within s 51(xxxi), they may nonetheless be regarded by property owners as an 'interference'.

The common law and private property

18.4 Blackstone observed, in 1773, that the 'right of property' was a deeply rooted idea.[5] In the national consultation on 'Rights and Responsibilities', conducted by the Australian Human Rights Commission (AHRC) in 2014, the recognition and protection of 'property rights' was one of the four areas identified as being of key concern.[6]

18.5 Almost a century before Blackstone wrote, conceptualisations of property were bound up in the struggle between parliamentary supremacy and the power of the monarch. This conflict resulted in the 'Glorious Revolution' of 1688.[7] John Locke (1632–1704) celebrated property as a 'natural' right, advocating the protection of a citizen in 'his Life, Health, Liberty, or Possessions'.[8] Jeremy Bentham (1748–1832) continued the philosophical argument about property, arguing that rights of 'property' are a matter of law:

> Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.[9]

18.6 Concern with protection of citizens from arbitrary interference by the Crown was reflected, in relation to property, as concerns about the taking of property by government.

18.7 By the period following World War II, the protection of private property rights from interference had become enshrined in the first international expression of human

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4 *Australian Constitution* s 51(xxxi).

5 Blackstone, above n 2, vol II, bk II, ch 1, 2.

6 Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015) 8.

7 The Roman Catholic king, James II, was overthrown in favour of his Protestant daughter, Mary, and her husband, William of Orange, Stadtholder of the Netherlands, as Mary II and William III.

8 John Locke, *Two Treatises of Government* (Cambridge University Press, First Published 1690, 2nd Ed, Peter Laslett Ed, 1967) 289. The timing of the publication relevant to the negotiation of the ascension of William and Mary is explained by Peter Laslett, in ch III of his introduction to the *Two Treatises*.

9 Jeremy Bentham, 'Principles of the Civil Code' in *The Works of Jeremy Bentham, Published under the Supervision of His Executor John Bowring* (1843) vol 1 pt I ch VIII 'Of Property', 309a. One of the main 17th century arguments about property was whether it was founded in 'natural' or 'positive' law. Bentham is representative of the positivist approach that was the foundation of modern thinking about property.

rights, the *Universal Declaration of Human Rights* (UDHR) in 1948,[10] which provided that '[n]o one shall be arbitrarily deprived of his property'.[11]

18.8 In his *Commentaries on the Laws of England,* while calling the right of property an absolute right,[12] Blackstone described the power of the legislature to encroach upon property rights in terms that are still reflected in laws today:

> The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land … The laws of England are … extremely watchful in ascertaining and protecting this right. Upon this principle the great charter has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land.[13]

18.9 Property rights could be encroached upon, in the sense of being taken away,[14] 'by the law of the land', but only when it was not done arbitrarily, and where reasonable compensation was given:

> But how does [the legislature] interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained … All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.[15]

18.10 Property rights could be affected by law, controlled or diminished by 'the laws of the land', but an 'alienation' or 'divesting' had to be exercised 'with caution', and in return for a 'reasonable price'. Within the modern parliamentary context, many laws have been made that interfere with property rights. The focus then is upon how far such interference can go, before it may be regarded as unjustified.

18.11 Some protections of property and possessory rights are found in the law of torts and criminal law and in principles of statutory construction, discussed below. The tort of trespass was the principal action against a person who came upon the land of another without authorisation. In the leading case of *Entick v Carrington*, Lord Camden LCJ said:

> By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable

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10 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948).

11 Ibid art 17(2).

12 Blackstone named two other absolute rights: the right of personal security and the right of personal liberty.

13 Blackstone, above n 2, vol I, bk I, ch 1, 134.

14 The quoted passage refers to the declaration of the *Magna Carta* ('great charter', as Blackstone named it) against a person's being 'disseised' or 'divested' of 'freehold', which implies a taking away—of the 'seisin', the evidence of ownership, or vested rights. See D Farrier, *Submission 126*.

15 Blackstone, above n 2, vol I, bk I, ch 1, 135. This passage is cited in, eg, *R & R Fazzolari Ltd v Parramatta City Council* (2009) 237 CLR 603, [41] (French CJ).

> to an action, though the damage be nothing … If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him.[16]

18.12 The tort of nuisance may avail one landowner against another in relation to some enjoyment of land, which in turn may restrict what another may do with neighbouring land.[17]

18.13 Similarly, the common law provides protection against unauthorised interference or detention of chattels. *Entick v Carrington* concerned not just an unauthorised search but also a seizure of private papers. *Wilkes v Wood*[18] set out enduring common law principles against unauthorised search and seizure, later reflected in the Fourth Amendment to the *United States Constitution.*

18.14 Unauthorised interferences with chattels may be a trespass or conversion of the chattels, while unauthorised detention, even if initially authorised by statute, may give rise to tort actions in conversion or detinue once that authority has lapsed. For example, in *National Crime Authority v Flack,* the plaintiff, Mrs Flack, successfully sued the National Crime Authority and the Commonwealth for the return of money found in her house and seized by the Authority. Heerey J noted a common law restriction on the seizure of property under warrant:

> at common law an article seized under warrant cannot be kept for any longer than is reasonably necessary for police to complete their investigations or preserve it for evidence. As Lord Denning MR said in *Ghani v Jones* [1970] 1 QB 693 at 709: 'As soon as the case is over, or it is decided not to go on with it, the article should be returned'.[19]

Definitions of property

What is 'property'?

18.15 The idea of property is multi-faceted. The term 'property' is commonly used to describe types of property, both real and personal. 'Real' property encompasses interests in land and fixtures or structures upon the land. 'Personal' property encompasses tangible or 'corporeal' things—chattels or goods, like a car or a table. It also includes certain intangible or 'incorporeal' legal rights, 'choses in action', such as copyright and other intellectual property rights, shares in a corporation, beneficial rights in trust property, rights in superannuation[20] and some contractual rights, including, for example, many debts.[21] Intangible rights are *created* by law. Tangible

16 *Entick v Carrington* (1765) 19 St Tr 1029. The version of the report included in the English Reports, 95 ER 807, is an abbreviated form and does not include this precise quote.
17 Interferences with real property are considered in Ch 20.
18 *Wilkes v Wood* [1763] 2 Wilson 203; 98 ER 489.
19 *National Crime Authority v Flack* (1998) 86 FCR 16, 27. Heerey J continued: 'Section 3ZV of the *Crimes Act* … did not come into force until after the issue and execution of the warrant in the present case. However it would appear to be not relevantly different from the common law'. For the current law, see *Crimes Act 1914* (Cth) ss 3ZQX–3ZQZB.
20 *Greville v Williams* (1906) 4 CLR 694.
21 *City of Swan v Lehman Bros Australia Ltd* (2009) 179 FCR 243.

things exist independently of law, but law governs rights of ownership and possession in them—including whether they can be 'owned' at all.[22]

Bundle of rights

18.16 In law, the term 'property' is used to describe types of rights—and rights in relation to things. In *Yanner v Eaton*, the High Court of Australia said:

> The word 'property' is often used to refer to something that belongs to another. But … 'property' does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of 'property' may be elusive. Usually it is treated as a 'bundle of rights'.[23]

18.17 The 'bundle of rights' that property involves, acknowledges that rights in things can be split: for example, between rights recognised at common law ('legal' interests) and those recognised in equity ('equitable' or 'beneficial' interests); and between an owner as lessor and a tenant as lessee. Equitable interests may further be subdivided to include 'mere equities'.[24]

18.18 In *Yanner v Eaton*, Gummow J summarised this complexity:

> Property is used in the law in various senses to describe a range of legal and equitable estates and interests, corporeal and incorporeal. Distinct corporeal and incorporeal property rights in relation to the one object may exist concurrently and be held by different parties. Ownership may be divorced from possession. At common law, wrongful possession of land might give rise to an estate in fee simple with the rightful owner having but a right of re-entry. Property need not necessarily be susceptible of transfer. A common law debt, albeit not assignable, was nonetheless property. Equity brings particular sophistications to the subject. The degree of protection afforded by equity to confidential information makes it appropriate to describe it as having a proprietary character, but that is not because property is the basis upon which protection is given; rather this is because of the effect of that protection. Hohfeld identified the term 'property' as a striking example of the inherent ambiguity and looseness in legal terminology.[25]

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22 In *Yanner v Eaton*, the High Court cited the common law example of wild animals, or *ferae naturae*: 'At common law, wild animals were the subject of only the most limited property rights. … An action for trespass or conversion would lie against a person taking wild animals that had been tamed, or a person taking young wild animals born on the land and not yet old enough to fly or run away, and a land owner had the exclusive right to hunt, take and kill wild animals on his own land. Otherwise no person had property in a wild animal': *Yanner v Eaton* (1999) 201 CLR 351, 366 (Gleeson CJ, Gaudron, Kirby and Hayne JJ); 80–1 (Gummow J). See also Blackstone, above n 2, vol II, bk II, ch 1, 14.

23 *Yanner v Eaton* (1999) 201 CLR 351, 365–6 (Gleeson CJ, Gaudron, Kirby and Hayne JJ). Citations omitted. 'Property, in relation to land, is a bundle of rights exercisable with respect to the land. The tenant of an unencumbered estate in fee simple in possession has the largest possible bundle': *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 284 (Rich J). O'Connor traces the theoretical development of the 'bundle of rights' approach: Pamela O'Connor, 'The Changing Paradigm of Property and the Framing of Regulation as a Taking' (2011) 36 *Monash University Law Review* 50, 54–6.

24 See, eg, the discussion of the 'enforceability of equities' in Brendan Edgeworth et al, *Sackville & Neave Australian Property Law* (LexisNexis Butterworths, 9th ed, 2013) 401–16.

25 *Yanner v Eaton* (1999) 201 CLR 351, 388–9. Gummow J referred to Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16.

18.19 As Gummow J suggests in this passage, 'possession' is a distinct and complex concept. Its most obvious sense is a physical holding (of tangible things), or occupation (of land). An example is when goods are in the custody of another, where things are possessed on account of another.[26]

18.20 A 'property right' may take different forms depending on the type of property. When the term 'property' appears in legislation, without further definition, its content 'then becomes a question of statutory or constitutional interpretation'.[27] Implicit in a property right, generally, are all or some of the following characteristics: the right to use or enjoy the property, the right to exclude others, and the right to sell or give away.[28]

18.21 For land and goods, property rights in the sense of ownership must be distinguished from mere possession, even though the latter may give rise to qualified legal rights, and from mere contractual rights affecting the property. The particular right may be regarded as 'proprietary' even though it is subject to certain rights of others in respect of the same property: a tenancy of land, for example, gives the tenant rights that are proprietary in nature as well as possessory.

18.22 The 'bundle of rights' approach has presented some contemporary challenges, particularly in relation to land holding—and in the context of native title.[29] Laws that limit what a landowner can do, for example by creating rights in others in the same land, may give rise to arguments about compensability, expressed in the question, when does regulating what someone may do with land become a 'taking' or 'acquisition' of that land in constitutional terms? This is considered later and in Chapters 19 and 20.

Recognising new forms of property

18.23 What may amount to a property right is of ongoing philosophical and practical interest. One clear historical example is the recognition of copyright from the 18th century as a new form of intangible personal property created by statute. Trade marks and registered designs have a similar genesis, as statutory creations.[30]

18.24 Understandings about what amounts to property reveal a certain fluidity when viewed historically. As one stakeholder commented:

> The rights that attach to different objects, be they land, personal or intellectual property are not frozen in time. Just as for all legal rights, the nature and content of property rights will evolve and potentially change quite significantly over time.[31]

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26 See, eg, Edgeworth et al, above n 24, 94–110.
27 *Yanner v Eaton* (1999) 201 CLR 351, 339.
28 *Milirrpum v Nabalco* (1971) 17 FLR 141, 171 (Blackburn J). See discussion in Edgeworth et al, above n 24. See also Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252. Some property rights may however be unassignable: see Edgeworth et al, above n 24, 6.
29 See, eg, *Western Australia v Ward* (2002) 213 CLR 1, [95].
30 Patent rights were held to be property rights that attracted the presumption against divesting by legislation or delegated regulations: *University of Western Australia v Gray (No 20)* (2008) 246 ALR 603, [89].
31 Environmental Justice Australia, *Submission 65*.

18.25 Arguments concerning rights over one's person, for example claims over bodies and body parts, including reproductive material, often involve lively contests over the recognition of new forms of intangible property.[32] There is also the assertion of a new wave of property rights generated by information technology.[33]

18.26 Similarly, with respect to land, Professor Peter Butt noted that the 'categories of interests in land are not closed' and they 'change and develop as society changes and develops'.[34]

18.27 The recognition and classification of Aboriginal and Torres Strait Islander rights and interests in land and waters has proved a challenge for the common law of Australia. In the first claim for customary rights to land, the 1971 case of *Milirrpum v Nabalco*, Blackburn J found that 'there is so little resemblance between property, as our law … understands that term, and the claims of the plaintiffs for their clans, that I must hold that these claims are not in the nature of proprietary interests'.[35]

18.28 However, in *Mabo v Queensland [No 2]*, the High Court found that pre-existing rights and interests in land held by Aboriginal and Torres Strait Islander peoples—native title—survived the assertion of sovereignty by the Crown.[36] Such rights and interests were not of the common law, but could be recognised by it. In *Fejo v Northern Territory*, the High Court stated:

> Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title. Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law.[37]

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32 See, eg, Margaret Davies and Ngaire Naffine, *Are Persons Property?* (Ashgate, 2001); Rosalind Croucher, 'Disposing of the Dead: Objectivity, Subjectivity and Identity' in Ian Freckelton and Kerry Peterson (eds), *Disputes and Dilemmas in Health Law* (Federation Press, 2006) 324; Donna Dickenson, *Property in the Body: Feminist Perspectives* (Cambridge University Press, 2007); Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Hart Publishing, 2007); Muireann Quigley, 'Property in Human Biomaterials—Separating Persons and Things' (2012) 32 *Oxford Journal of Legal Studies* 659; Muireann Quigley, 'Propertisation and Commercialisation: On Controlling the Uses of Human Biomaterials' (2014) 77 *Modern Law Review* 677. The issue was tested, for example, in *Roblin v Public Trustee for the Australian Capital Territory* [2015] ACTSC 100. The case concerned whether cryogenically stored semen constitutes property which, upon the death of the person, constitutes property in his estate. See also *D'Arcy v Myriad Genetics Inc* (2015) 89 ALJR 924. In this case, the High Court considered whether the genetic coding for the BRCA1 protein was patentable.

33 Philip Catania and Sarah Lenthall, 'Facebook: Emerging Intellectual Property Issues' (2011) 87 *Journal of the Intellectual Property Society of Australia and New Zealand* 39, [35].

34 Peter Butt, 'Carbon Sequestration Rights—A New Interest in Land?' (1999) 73 *Australian Law Journal* 235. The particular example Butt cited was of 'the slow emergence of an interest not previously known to the law, the "carbon sequestration right"', which has been given statutory force: in New South Wales within the well-known common law interest in land, the profit à prendre; in Victoria within a specific legislative framework, the *Forestry Rights Act 1996* (Vic).

35 *Milirrpum v Nabalco* (1971) 17 FLR 141, 273. See Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) Chs 4, 6.

36 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 57, 69 (Brennan J, Mason CJ, McHugh J agreeing); 100–01 (Deane and Gaudron JJ); 184 (Toohey J). The history of the recognition of native title in Australia is discussed in Ch 2.

37 *Fejo v Northern Territory* (1998) 195 CLR 96, [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

18.29 Because its content is defined by the traditional laws and customs of the relevant Aboriginal or Torres Strait Islander peoples, native title rights and interests 'may not, and often will not, correspond with rights and interests in land familiar to the Anglo-Australian property lawyer'.[38]

18.30 Some have argued that the 'traditional knowledge and traditional cultural expressions' of Aboriginal and Torres Strait Islander people should be recognised as a form of intellectual property. In this Inquiry, the Arts Law Centre argued for recognition of cultural knowledge as intellectual property and subject to appropriate protection, noting that the *Native Title Act 1993* (Cth) did not do so.[39] Similar intellectual property issues were raised in the AHRC Rights and Responsibilities consultation.[40]

18.31 The significance of acknowledging cultural knowledge was identified by the ALRC in the report, *Connection to Country: Review of the Native Title Act 1993 (Cth)*. While this issue lay outside the Terms of Reference for that Inquiry, the ALRC concluded that

> the question of how cultural knowledge may be protected and any potential rights to its exercise and economic utilisation governed by the Australian legal system would be best addressed by a separate review. An independent inquiry could bring to fruition the wide-ranging and valuable work that has already been undertaken but which still incompletely addresses the protection of Aboriginal and Torres Strait Islander peoples' cultural knowledge.[41]

'Vested' property rights

18.32 The ALRC's Terms of Reference refer to 'vested property rights'. In property law 'vested' is primarily a technical legal term used to differentiate a presently existing interest from a contingent interest.[42] In this Inquiry the ALRC uses the phrase 'vested property rights' in a broad sense, not a technical one.[43]

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38 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [40] (Gleeson CJ, Gummow and Hayne JJ). For further discussion, see Ch 20.

39 Arts Law Centre of Australia, *Submission 50*.

40 Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015) 44–5.

41 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) [8.176]–[8.177]. The ALRC noted extensive work on the topic: eg, IP Australia, *Australia's Indigenous Knowledge Consultation* <www.ipaustralia.gov.au>; World Intellectual Property Organization, *Protection of Traditional Cultural Expressions and Traditional Knowledge–Gap Analyses* <http://www.wipo.int/tk/en/igc/gap-analyses.html>.

42 That is, contingent on any other person's exercising their rights: 'an immediate right of present or future enjoyment': *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490, 496, 501. See also *Planning Commission (WA) v Temwood Holdings Pty Ltd* (2004) 221 CLR 30. The term 'vested' has been used to refer to personal property, including a presently existing and complete cause of action: *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

43 For example: 'vested in interest', 'vested in possession'. See, eg, Peter Butt, *Land Law* (Lawbook Co, 5th ed, 2006) [612]. In the United States, the term has acquired rhetorical force in reinforcing the right of the owner not to be deprived of the property arbitrarily or unjustly by the state or, in disputes over land use, to reflect the confrontation between the public interest in regulating land use and the private interest of the owner—including a developer—in making such lawful use of the land as they desire: Walter Witt, 'Vested Rights in Land Uses—A View from the Practitioner's Perspective' (1986) 21 *Real Property, Probate and Trust Journal* 317. A right is described as immutable and therefore 'vested' when the owner

The reach of property rights

Priorities

18.33 Complex interactions of property rights of different forms fill chapters of books on property law under the generic heading of 'priorities', where rules of law and equity, including statute law, have over the centuries established what property interest takes priority over another in given circumstances, regulating competing property interests. Each circumstance may involve a 'loser' in the sense of someone losing out in a contest of proprietary rights (rights *in rem*), and being relegated in such circumstances to whatever rights may be pursued against the individuals concerned (rights *in personam*). Some examples, expressed in very general terms, suffice to illustrate:

- the priority of the bona fide purchaser of a legal estate for value without notice of a prior equitable interest;[44]
- the indefeasibility of registered interests under Torrens title land systems;[45]
- the effect of registration on priority of registered security interests in personal property;[46] and
- the doctrine of fixtures, in which items of personal property—chattels—may lose their quality as personal property and become part of the land.[47]

Limitations

18.34 A further illustration of property rights being lost may come through the operation of statutory limitation over time. So, for example, a person may be held to acquire title to land by long 'adverse' possession. The adage 'possession is nine-tenths of the law' is reflected in the acquisition of title by possession in the limitation of actions legislation.[48] Under such legislation, the claim of a person may be barred after a designated period, generally between 12 and 15 years.[49] There is authority that even under Torrens title systems, title may be gained by adverse possession.[50] In the context

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has made 'substantial expenditures or commitments in good faith reliance on a validly issued permit': Terry Morgan, 'Vested Rights Legislation' (2002) 34 *Urban Lawyer* 131.

44 See, eg, Edgeworth et al, above n 24, ch 4.

45 See, eg, Ibid ch 5.

46 Under the *Personal Property Securities Act 2009* (Cth). The system is explained on the website of the Australian Financial Security Authority, which administers the legislation: <https://www.afsa.gov.au/>.

47 See, eg, Edgeworth et al, above n 24, [1.79].

48 See, eg, Ibid 139–72. Gummow J noted that '[o]wnership may be divorced from possession', giving the example that, '[a]t common law, wrongful possession of land might give rise to an estate in fee simple with the rightful owner having but a right of re-entry': *Yanner v Eaton* (1999) 201 CLR 351, 388. Actual possession may give the possessor better rights than others whose interest does not derive from the true owner: see *Newington v Windeyer* (1985) 3 NSWLR 555 (land) or *National Crime Authority v Flack* (1998) 86 FCR 16 (goods). Possession may, in effect, give the possessor rights akin to proprietary rights. It has been noted that, 'Not only is a right to possession a right of property but where the object of proprietary rights is a tangible thing it is the most characteristic and essential of those rights': *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 284 (Rich J).

49 See, eg, Edgeworth et al, above n 24, 144–5.

50 See, eg, Ibid 517–20.

of personal property, the right of the possessor may be defended against all but the rightful owner—expressed in the adage, 'finders keepers'.[51]

Airspace and subterranean rights

18.35 The extent of property rights of a landowner includes how far the title extends in the air above and the earth below. The early common law doctrine is expressed in the maxim '*cujus est solum ejus est usque ad coelum et ad inferos*': 'to whom belongs the soil, his is also that which is above it to heaven and below it to hell'.[52] As Sir William Blackstone explained:

> no man may erect any building, or the like, to overhang another's land: and downwards, whatever is in a direct line between the surface of any land, and the center of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word 'land' includes not only the face of the earth, but every thing under it, or over it.[53]

18.36 If a landowner 'owned' land in this extended sense, intrusions upon it may amount to a trespass. Such a simplified approach was readily modified in the modern era, where cases involving scaffolding, overflying and cranes, have tested airspace rights.[54] Professor Adrian Bradbrook commented that, '[w]hile the maxim correctly indicates that the ownership of land is not confined to the land surface; its accuracy beyond this is highly questionable';[55] and Young CJ in Eq stated that 'the old adage … is not to be taken literally'.[56]

18.37 The modern common law doctrine is expressed in the principle that the rights of a land owner in the air space above the land are limited 'to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it'.[57] Cases involving intrusions on privacy have also raised questions concerning the extent of land owners' rights: for example concerning unmanned surveillance devices flying over land and cameras overlooking land.[58]

18.38 Cases involving subterranean caves, treasures and minerals have tested the limits below the surface of land.[59] In *Di Napoli v New Beach Apartments Pty Ltd*, a case involving whether rock anchors projecting into the plaintiff's land constituted a

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51 This is expressed as the defence of *jus tertii*. See, eg, Ibid [2.3]–[2.45].

52 Adrian Bradbrook suggests that the origin of the maxim may be in Roman or Jewish law. Its earliest appearance in English law was in *Bury v Pope* in 1586: Adrian J Bradbrook, 'Relevance of the Cujus Est Solum Doctrine to the Surface Landowner's Claims to Natural Resources Located Above and Beneath the Land' (1987) 11 *Adelaide Law Review* 462, 462.

53 Blackstone, above n 2, vol II, bk II, ch 2, 18.

54 See, eg, Edgeworth et al, above n 24, 66–7. See also LexisNexis, *Halsbury's Laws of Australia*, Vol 22 (at 2 December 2013) 355 Real Property, '14115 Trespass to Airspace'.

55 Bradbrook, above n 52, 462.

56 *Di Napoli v New Beach Apartments Pty Ltd* (2004) 11 BPR 21,493, [17].

57 *Baron Bernstein of Leigh v Skyviews & General Ltd* [1978] QB 479, 488; [1977] 2 All ER 902, 907 (Griffiths J).

58 The ALRC touched on some of these issues in: Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014) [3.39]–[3.44], [3.49]. Ch 14 of that report, for example, considers surveillance devices.

59 See eg, *Bulli Coal Mining Co v Osborne* [1899] AC 351; *Edwards v Sims* (1929) 24 SW 2D 619; *Elwes v Brigg Gas Co* (1883) Ch D 33 562. See also Bradbrook, above n 52.