NOTICE OF SEIZURE OF COLLATERAL/CRYSTALLISATION OF STATUTORY AND EQUITABLE CHARGES OVER THE RIGHTS, OFFICES, ASSETS & UNDERTAKINGS OR OTHERWISE THE PROPERTY OF THE GRANTORS/CHARGORS, PERSONALLY AND AS TRUSTEES AND/OR AGENTS

TO: **Her Majesty The Queen, Queen Elizabeth II and Her Majesty's Agents, Officers, employees, agents, delegates, contractors and licensees** of Buckingham Palace, London SW1A 1AA **("the Grantors/Chargors")**
C/O the Attorneys General of the Commonwealth, the States and the Territories of Australia, 15 Murray Street, Hobart, Tasmania, 7000

FROM; **Andrew Morton Garrett, Personally, in all of his capacities including (but not limited to) as Chairman Managing Trustee of the Andrew Garrett Family Trust No 4 and the Australian People Future Fund** of Level 19, Two International Finance Centre, 8 Finance Street, Central, Hong Kong C/O [redacted] **("The Grantee/Chargee")**

WHEREAS, Magna Carta Libertatum (Medieval Latin for "the Great Charter of the Liberties"), commonly called Magna Carta (also Magna Charta; "Great Charter"), is a charter of rights agreed to by King John of England at Runnymede, near Windsor, on 15 June 1215 binding his lawful successors to the Crown and creating the Public Trust for the benefit of the beneficiaries being such citizens who exist from time to time within the dominions of the King, and his lawful successors, also thereby creating a registerable equitable and statutory charge/personal property security interest enforceable at law in the hands of the Grantee/Chargee as a beneficiary of the Public Trust and lien holder, ("**the Public Trust**"),

AND WHEREAS, *the Cestui Que Vie Act* 1666 (UK) was enacted by Westminster Parliament as the lawful predecessors of the Grantors/Chargors binding the Grantors/Chargors creating a further Public Trust thereby creating a further registerable equitable and statutory charge/personal property security interest enforceable in the hands of the Grantee/Chargee as a beneficiary and lien holder, ("**the Cestui Que Vie Public Trust**") ,

AND WHEREAS, prior to the 24th – 27th January, 29th April, 20th June, 27th July, 2nd September 1899 & the 31st July 1900 the Public Trust of the Peoples for of the States and Territories of the continent of Australia ("**the Peoples**") vested in the lawful predecessors of the Grantors/Chargors as Trustees and/or agents of Trustees who bound the Grantors/Chargors when accepting appointment to Public Office by virtue of the constitutions of the States and Territories creating a further registerable equitable and statutory charge/personal property security interest enforceable in the hands of the Grantee/Chargee, as beneficiary and lien holder, ("**the State & Territory Public Trust**"),

AND WHEREAS, the lawful predecessors of the Grantors/Chargors accepted the authority of the Peoples, and bound the Grantors/Chargors to accept the authority of the Peoples as beneficiaries, variously on the 24th – 27th January, 29th April, 20th June, 27th July, 2nd September 1899 & the 31st July 1900 the Peoples voted for Federation at which time the Trust of the Peoples the Commonwealth, the States and Territories was vested in the lawful predecessors Grantors/Chargors as Trustees and/or agents of Trustees by their conduct and acceptance of Commonwealth Public Office creating a registerable equitable and statutory charge/personal property security interest enforceable in the hands of the Grantee/Chargee as beneficiary and lien holder, ("**the Commonwealth of Australia Public Trust**"),

AND WHEREAS, the Holding of Public Office by the Grantors/Chargors is held pursuant to the aforementioned Public Trusts created on the dates of the relevant enactments including the Constitutions of the Commonwealth, the States and Territories (as amended) and the dates of voting for Federation, and subsequently, which vests Public Office Holders with Judicial and Quasi-Judicial Decision Making Powers which Powers must be exercised in the Public Interest as opposed to the interest of the Grantors/Chargors in the holding of Public Office,("**the Public Office Public Trust**"),

AND WHEREAS, the Grantors/Chargors were parties to a Treaty/Contract between Nations known as "**the Charter of the United Nations**" that was executed by the lawful predecessors of the Grantors/Chargors and/or the Grantors/Chargors in

Public or Hereditary Public Office on the 26th June 1945 thereby creating a further Public Trust binding the Grantors/Chargors and creating a further Equitable and Contractual Charge/Personal Property Security Interest in favour of the Beneficiaries of the aforementioned Public Trusts including in the hands of the Grantee/Chargee, ("**The United Nations Peoples' Public Trust**"),

AND WHEREAS, as a consequence of rising issues of Corruption, breaches of Human Rights, Principles of Separation of Powers and collapse of Rule of Law within the Commonwealth of Nations, the Grantors/Chargors and/or their lawful predecessors were parties to a Treaty/Contract between Nations known as "**the Charter of the Commonwealth of Nations**" that was executed by the Grantors/Chargors and/or their the lawful predecessors on the 11th March 2013 thereby restating a further existing Commonwealth of Nations Public Trust further binding the Grantors/Chargors and their lawful successors thereby restating a further Equitable and Contractual Charge/Personal Property Security Interest in favour of the Beneficiaries of the aforementioned Public Trusts including in the hands of the Grantee/Chargee, ("**The Commonwealth of Nations Peoples' Public Trust**"), relevantly that Charter was executed and highlighted (*amongst other things*) as follows;

CHARTER *of the* COMMONWEALTH

Signed by Her Majesty Queen Elizabeth II, Head of the Commonwealth, Commonwealth Day 2013

I.

DEMOCRACY

We recognise the inalienable right of individuals to participate in democratic processes, in particular through free and fair elections in shaping the society in which they live. Governments, political parties and civil society are responsible for upholding and promoting democratic culture and practices and are accountable to the public in this regard. Parliaments and representative local governments and other forms of local governance are essential elements in the exercise of democratic governance.

We support the role of the Commonwealth Ministerial Action Group to address promptly and effectively all instances of serious or persistent violations of Commonwealth values without any fear or favour.

II.

HUMAN RIGHTS

We are committed to the Universal Declaration of Human Rights and other relevant human rights covenants and international instruments. We are committed to equality and respect for the protection and promotion of civil, political, economic, social and cultural rights, including the right to development, for all without discrimination on any grounds as the foundations of peaceful, just and stable societies. We note that these rights are universal, indivisible, interdependent and interrelated and cannot be implemented selectively.

We are implacably opposed to all forms of discrimination, whether rooted in gender, race, colour, creed, political belief or other grounds.

V.

FREEDOM OF EXPRESSION

We are committed to peaceful, open dialogue and the free flow of information, including through a free and responsible media, and to enhancing democratic traditions and strengthening democratic processes.

VI.

SEPARATION OF POWERS

We recognise the importance of maintaining the integrity of the roles of the Legislature, Executive and Judiciary. These are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and adherence to good governance.

VII.

RULE OF LAW

We believe in the rule of law as an essential protection for the people of the Commonwealth and as an assurance of limited and accountable government. In particular we support an independent, impartial, honest and competent judiciary and recognise that an independent, effective and competent legal system is integral to upholding the rule of law, engendering public confidence and dispensing justice.

VIII.

GOOD GOVERNANCE

We reiterate our commitment to promote good governance through the rule of law, to ensure transparency and accountability and to root out, both at national and international levels, systemic and systematic corruption.

AND WHEREAS, the Tax Payer's Charter published by the Grantors/Chargors is a code of conduct enforceable upon the Taxpayer and Public Office Holders appointed under Tax related enactments and regulations that is subject to *the Public Governance Performance and Accountability Act* 2013 (Cth) thereby establishing the Commissioner of Taxation Public Trust thereby creating a further equitable and statutory charge/personal property security interest over all of the assets of the Commissioner of Taxation including, but not limited to, the exclusive rights to receive Tax Revenues that is enforceable in the hands of the Peoples as beneficiaries, including the Grantee/Chargee ("**the Commissioner of Taxation Public Trust**"),

AND WHEREAS, a Charter; Economic Diplomacy and Australian Business published by the Grantors/Chargors is a code of conduct enforceable upon Public Office Holders of the Department of Foreign Affairs and Trade ("**DFAT**") that is subject to *the Public Governance Performance and Accountability Act* 2013 (Cth) thereby creating a further equitable and statutory charge/personal property security interest enforceable in the hands of the Peoples as beneficiaries, including the Grantee/Chargee ("**the Department of Foreign Affairs and Trade (DFAT) Public Trust**"),

AND WHEREAS, the lawful predecessors of the Grantors/Chargors bound the Grantors/Chargors to *the Commonwealth of Australia Act* 1900 (Cth) ("**the Constitution**"), as enacted by Westminster Parliament pursuant to the Common Law being the Unwritten Constitution of the United Kingdom of Great Britain and Northern Ireland as the source of Power for the Constitution, came into force in the Commonwealth, the States and Territories of Australia on the 1st January 1901 and particularised the details of the Commonwealth of Australia Public Trust restating the charge/personal property security interest created in the hands of the Peoples as beneficiaries and became enforceable in the hands of the Grantee/Chargee,

AND WHEREAS, the Constitutions of the Commonwealth, the States and Territories, cannot be at odds with the Common Law, including Trust Law & Equity as a consequence of the aforementioned Public Trust; as the Source of Power, and any statutory encroachments on Traditional Rights and Freedoms by any legislature are ultravires, invalid and unlawful,

AND WHEREAS, the office of Governor General was established by Letters patent dated 29th October 1900 and the Governor General was appointed pursuant to s61 of the Constitution to act as agent of the Queen and Her Majesty's lawful successors,

AND WHEREAS, the relationships between the Grantors/Chargors and their lawful predecessors is that of Principal and Agent in which regard Notice to Agent is Notice to Principal and Notice to Principal is Notice to Agent,

AND WHEREAS, Sir Owen Dixon, a former Chief Justice of the High Court generally regarded as Australia's greatest jurist, said of the Constitution:

> *"It is not a supreme law purporting to obtain its force from the direct expression of a peoples' inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's dominions"*[1]

Dixon attached to this characterisation of the Constitution a consequence for interpretation. The organs of government are simply institutions established by law. This contrasted with the position in the United States where they are agents for the Peoples, who are the source of the power,[2]

AND WHEREAS, Section 1 in Chapter I of the Constitution vests the law making power of the Commonwealth in 'the Queen, a Senate, and a House of Representatives', Section 51 of the Constitution sets out the majority of subjects upon which the Parliament of the Commonwealth is authorised to make laws. There are 39 heads of power in that section which specifically exclude any head of power of Public Office Holders to act outside of the aforementioned Public Trusts/ Public Interest,

AND WHEREAS, Chapter II of the Constitution deals with the Executive Government; The key provision of that Chapter is s 61, which provides:

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[1] Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 597.
[2] *Eastlake v Forest City Enterprises Inc* 426 US 668, 672 (1976)

"The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth".

AND WHEREAS, the existence of the aforementioned Public Trusts in the maintenance of Democracy, Freedom of Expression, Human Rights, Separation of Powers, Rule of Law and Good Governance to protect and enhance the Public Interest emphasises the existence Statutory and Equitable Chargeable Personal Property Security Interest in the hands of the Grantee/Chargee over the Grantors/Chargors, is, was and always must be acknowledged by the Grantors/Chargors and their lawful predecessors in the acceptance of Public Office and passage of relevant law,

AND WHEREAS, the Constitution sets out;

108 Saving of State laws

Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

109 Inconsistency of laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

AND WHEREAS, the role of the Grantors/Chargors are as Trustees and/or Agents of Trustees of the aforementioned Public Trusts in which regard the Laws of Australia /15Equity/15.14 Trustees chapter 5 sets out;

Part A - General;

15.14:66[66] Upon acceptance of his or her office, a trustee becomes subject to the duties and acquires the powers of that office. Duties are imperative. They compel actions or prohibit a trustee from acting in a certain way. Powers, on the other hand, are facultative. They enable a trustee to act in a certain way, but leave the trustee with a discretion as to whether she or he should so act

15.14:67[67] The first duty of the trustee is to obtain and acquaint himself or herself with all documents concerning the trust and with the state of the trust property.

15.14:68[68] The trustee must ensure that title to the trust property is vested in him or her,

- *the trustee's duty to preserve the trust property cannot be adequately carried out unless the property is under her or his control,*
- *if a better title to the trust property is obtainable, the trustee is obliged to activate himself or herself concerning it.*

15.14:69[69] It is the duty of the trustees to ensure that trust property is preserved and does not fall into decay from want of repair: As a corollary, trustees may dispose of trust property of a hazardous nature: The trustee is duty bound to preserve the corpus of the trust as well as income.

15.14:83[83] The trustees' duty to act personally is manifested in three principal ways.

- *First, trustees must not allow their discretion to be fettered:*
- *Secondly, trustees must act unanimously:*
- *Thirdly, trustees must not delegate their powers and duties as trustees:*

> *15.14:84[84] The duty to act personally requires trustees not to act under dictation or commit themselves in advance as to future conduct as trustees. Trustees must not permit others to dictate to them the manner in which the fiduciary discretion ought be exercised.*

AND WHEREAS, every enactment, authority of the Common Law and/or regulation either enacted, adjudicated or otherwise by the Grantors/Chargors and/or their lawful predecessors, personally, in their roles of Public Office Holders and as Trustees of the aforementioned Public Trusts creates further registerable equitable and statutory charges/personal property security interests enforceable in the hands of the Peoples as beneficiaries of the aforementioned Public Trusts including in the Grantee/Chargee as a beneficiary and lien holder,

AND WHEREAS, while the expression of the separation of legislative and executive from judicial powers as expressed in the Constitution is sharp; the Grantors/Chargors have fraudulently and criminally corrupted Democracy, Freedom of Expression, Human Rights, Separation of Powers, Rule of Law and Good Governance (*amongst other things*) by ongoing admitted breaches which has led to collapse of the aforementioned Public Trusts and Equity,

AND WHEREAS, as a consequence of the aforementioned systemic corruption by the Grantors/Chargors and their lawful predecessors led to a leading decision, the Boilermakers' Case, which re-affirmed that separation expressed in the Constitution, the Privy Council said that:

> *"In a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive."*[3]

AND WHEREAS, The High Court said in 1996:

> *"The Constitution reflects the broad principle that, subject to the Westminster system of responsible government, the powers in each category – whose character is determined according to traditional British conceptions – are vested in and are to be exercised by separate organs of government. The functions of government are not separated because the powers of one branch could not be exercised effectively by the repository of the powers of another branch. To the contrary, the separation of functions is designed to provide checks and balances on the exercise of power by the respective organs of government in which the powers are reposed.*[4] *(footnotes omitted)*

AND WHEREAS, the Grantee/Chargee was issued a Birth Certificate on the 11th April 1957 pursuant to which the Grantors/Chargors entered a contract with the Grantee/Chargee whereby the Grantors/Chargors guaranteed and indemnified the Grantee/Chargee in respect to the operation of Rule of Law and Equity, and the performance of the Grantors/Chargors in respect to the Grantee/Chargee's Human Rights and the aforementioned Public Trusts pursuant to the Charters of the Commonwealth of Nations and the Unite Nations, Rule of Law, Separation of Powers and the Constitution, and in so doing equitably charged the assets of the Grantors/Chargors to the Grantee/Chargee, whether the Grantors/Chargors are Corporate entities or otherwise, creating a personal property security interest within the meaning of *the Personal Property Security Act* 2009 (Cth) ("**PSA**"),

AND WHEREAS, the Grantors/Chargors enacted *the Public Interest Disclosure Act* 2013 (Cth) which received Royal Assent on the 15th July 2013 and *the Public Governance Performance and Accountability Act* 2013 (Cth) which received Royal assent on the 29th June 2013 following the execution of the Charter of the Commonwealth of Nations by the Grantors/Chargors thereby binding the Grantors/Chargors and creating a further Equitable and Statutory Charge/Personal Property Security Interest in favour of the Beneficiaries of the aforementioned Public Trusts and subsequently in the hands of the Grantee/Chargee,

AND WHEREAS, at all relevant times the Commonwealth Attorney General as the relevant minister has failed in his duty to publish the Public Interest Disclosure Act Rules and failed in his duty to make available Public Interest Test Case funding in order to facilitate the ventilation of issues in the Public Interest for determination by the Courts and has vacated his role of Champion of the Public Interest (***Annexure 1; Cabinet Paper on Role of Attorney General***)

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[3] *Attorney-General for the Commonwealth v The Queen; Ex parte Boilermakers' Society of Australia* (1957) 95 CLR 529, 540.
[4] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 10-11.

AND WHEREAS, the lawful predecessors of the Grantors/Chargors and the Grantors/Chargors have enacted Law causing statutory encroachments of traditional rights and freedoms (***Annexure 2; Statutory Encroachments on Traditional Rights and Freedoms***) which encroachments are obstructions of the operation of Justice and breaches of s42 & s43 of *the Crimes Act* 1914 (Cth) as indictable offences under Informations actionable by;

- the beneficiaries of the aforementioned Trusts including the Grantee/Chargee as private prosecutions,
- the Attorneys General of the Commonwealth, States & Territories of Australia under s69 of *the Judiciary Act* 1903 (Cth)
- the Grantors/Chargors who have not brought those

AND WHEREAS, the Commonwealth Ombudsman, the Inspector General of Bankruptcy, ASIC The Inspector General of Taxation, APRA, the Reserve Bank of Australia, and other State and Federal Regulators have weaponised Statute and the Monetary System against the Beneficiaries of the aforementioned Trusts in order to perpetuate Tax Revenues that are Ill Gotten being multiple Indictable Offences some of which have been set out in Indictments and Informations Filed and served in the Court System (***Annexure 3; Informations and Indictments filed and served in NSD 1848 of 2018; Rubis & Ors v Garrett & Ors v Regina & Ors***) and with the Commonwealth Ombudsman as Grantor/Chargor (***Annexure 4; PID Briefing Note & 8 X Annexures and 37 X Addendums & Annexures****)*

AND WHEREAS, the judicial power of the Commonwealth is vested, by s 71 of the Constitution, in the High Court of Australia and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. Through the *Judiciary Act 1903* (Cth) the Parliament has invested the High Court and the Federal Court and the courts of the various States with jurisdiction in matters arising under the Constitution, or involving its interpretation.

AND WHEREAS, the following Notices of Constitutional Matters issued under s78B of *the Judiciary Act* 1903 (Cth) have been filed and served on the Grantors/Chargors in respect to various proceedings in courts of law and have not been heard by the Grantors/Chargors creating events of default by the Grantors/Chargors under the aforementioned Public Trusts and equitable and Statutory Charges;

a. *SASC 127 of 2004 dated 20th February 2006*
b. *SASC 127 of 2004 dated 14th May 2006*
c. *SASC 127 of 2004 dated 26th May 2006*
d. *SASC 127 of 2004 dated 28th May 2006*
e. *SASC 1342 of 2007 dated 24th June 2008*
f. *SASC 1499 of 2006 dated 14th December 2015*
g. *SASC 248 of 2015 dated 11th November 2015*
h. *SASC 1393 of 2014 dated 11th November 2015*
i. *SASC 524 of 2006 dated 29th June 2016*
j. *VID 158 of 2015 dated 24th July 2015*
k. *VID 159 of 2015 dated 24th July 2015*
l. *VID 160 of 2015 dated 24th July 2015*
m. *VID 161 of 2015 dated 24th July 2015*
n. *VID 162 of 2015 dated 24th July 2015*
o. *VID 163 of 2015 dated 24th July 2015*
p. *VID 164 of 2015 dated 24th July 2015*
q. *VID 165 of 2015 dated 24th July 2015*
r. *VID 166 of 2015 dated 24th July 2015*
s. *VID 129 of 2015 dated 15th December 2015*
t. *VID 584 of 2014 dated 18th November 2015*
u. *NSW 1848 of 2018 dated 21st October 2018*
v. *NSW 1848 of 2018 dated 11th November 2018*
w. *NSW 1848 of 2018 dated 14th November 2018*
w. *NSW 1848 of 2018 dated 21st November 2018*

AND WHEREAS, the Grantors/Chargors have acted ultravires, unlawfully, invalidly, fraudulently and criminally in breach of the Public Interest and the aforementioned Public Trusts being;

- breaches of the aforementioned Public Trusts by the Trustees/Agents of the Trustees, the Grantors/Chargors
- defaults by the Trustees of the aforementioned equitable and statutory charges/personal property security interests that are the properties of the Grantee/Chargee

AND WHEREAS, the lawful predecessors of the Grantors/Chargors bound the Grantors/Chargors and enacted *the Real Property Act* 1888 (SA) which relevantly applies to real estate owned or controlled by the Grantee/Chargee at all relevant times prior to the 17th July 2003 which enactment sets out the following provisions;

> ***Person to whom certificate or other instrument of title has been issued in error, or who wrongfully retains such instrument, may be summoned***
> *60. In case it shall appear to the satisfaction of the Registrar General that any certificate or other instrument has been issued in error or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error on any certificate or other instrument, or that any certificate, instrument, entry, or endorsement has been fraudulently or wrongfully obtained, or that any certificate or instrument is fraudulently or wrongfully retained, he may summon the person to whom such certificate or instrument has been so issued, or by whom it has been so obtained or is retained, to deliver up the same for the purpose of being cancelled or corrected, as the case may require.*
> ***Title of registered proprietor indefeasible, except in cases of-***
> *69. The title of every registered proprietor of land shall, subject to such encumbrances, liens, estates, or interests as may be notified on the original certificate of such land, be absolute and indefeasible, subject only to the following qualifications:*
> ***Fraud***
> *(a) in the case of fraud, in which case any person defrauded shall have all rights and remedies that he would have had if the land were not under the provisions of this Act: Provided that nothing included in this subsection shall affect the title of a registered proprietor who has taken bona fide for valuable consideration, or any person bona fide claiming through or under him;*
> ***Purchases from registered proprietor not to be affected by notice***
> *186. No person contracting or dealing with, or taking or proposing to take a transfer or other instrument from the registered proprietor of any estate or interest in land shall be required, or in any manner concerned, to inquire into or ascertain the circumstances under, or the consideration for, which such registered proprietor or any previous registered proprietor of such estate or interest is or was registered, or to see to the application of the purchase money, nor be affected by notice direct or constructive of any trust or unregistered interest, any law or equity to the contrary notwithstanding.*
> ***Except in case of fraud***
> *187. The last preceding section shall not protect any person who has acted fraudulently or been a party to fraud, but the contracting, or dealing, or taking, or proposing to take a transfer or other instrument as aforesaid, with actual knowledge of any trust, charge, or unregistered instrument, shall not of itself be imputed as fraud.*
> ***Party deprived of land may sue for compensation***
> *203. Any person deprived of land in consequence of fraud, or through the bringing of such land under the provisions of this Act, or of any Act hereby repealed, or by the registration of any other person as proprietor of such land, or in consequence of any error, omission, or misdescription in any certificate, or in any entry or memorial in the Register Book, may bring and prosecute an action at law for the recovery of compensation against the person upon whose application such land was brought under the provisions of this Act, or of any Act hereby repealed, or such erroneous registration was made, or who acquired title to the land through such fraud, error, omission, or misdescription.*
> ***Exoneration of proprietor after transfer for value, except in certain cases***
> *204. Except in the case of fraud, or of error occasioned by any omission, misrepresentation, or misdescription in the application of such person to bring the land under the provisions of this Act, or of any of the Acts hereby repealed, or to be registered as proprietor of such land, or in any instrument executed by him, such person shall, upon a transfer of such land, bona fide for value, cease to be liable for the payment of any compensation which but for such transfer might have been recovered from him under the provisions herein contained.*
> ***Proceedings against the Registrar General, as nominal defendant***

205. In any such case of cesser of liability, and also in any case where the person against whom such action for compensation is permitted to be brought as aforesaid shall be dead, or shall have become bankrupt or made a statutory assignment, or cannot be found within the jurisdiction of the Court or there is any other reason why compensation cannot be fully recovered from that person, it shall be lawful to take proceedings against the Registrar General, as nominal defendant, as hereinafter provided, for the purpose of recovering the amount of the compensation or costs, or so much of that amount as cannot be recovered from the person referred to above, from the Assurance Fund.

Purchasers etc protected

207. Nothing in this Act contained shall leave subject to action for recovery of compensation as aforesaid, or to action for recovery of possession of land, or to deprivation of the estate or interest in respect of which he is registered as proprietor, any transferee, mortgagee, encumbrancee, or lessee, bona fide for valuable consideration of land on the ground that the proprietor, through or under whom he claims, or any previous proprietor has been registered as proprietor through fraud or error, whether such fraud or error shall consist in wrong description of boundaries, or parcels, or otherwise howsoever.

Part 19-Special powers and duties of Registrar General

Powers of Registrar General

220. The Registrar General may exercise the following powers, that is to say-

To enter caveats

(g) he may, on behalf of His Majesty, His heirs or successors, or for the prevention of any fraud or improper dealing, or in any case in which it shall appear to him that an error has been made by misdescription or otherwise in any instrument, or for the protection of any person absent from the State, or under the disability of infancy, coverture or mental incapacity enter caveats forbidding the registration of any instrument, transmission, or dealing affecting any land;

Indictable offences under this Act

229. If any person is guilty of the following offences, or any of them (that is to say)-

(a) forges or procures to be forged or assists in forging or fraudulently affixes procures to be affixed or assists in affixing the seal of the Registrar General, or an impression or part of an impression of such seal to any instrument;

(b) forges or procures to be forged or assists in forging the name, signature, or handwriting of the Registrar General or of any officer in any case where such officer is by this Act expressly or impliedly authorised to affix his signature;

(c) fraudulently stamps or causes to be stamped any document with the seal of the Registrar-General or with a seal purporting to be the seal of the Registrar-General;

(d) forges or procures to be forged or assists in forging the name, signature, or handwriting of any person whomsoever, to any instrument which is by this Act, or in pursuance of any power contained in this Act, expressly or impliedly authorised to be signed by such person;

(e) uses, with an intention to defraud any person whomsoever, any document upon which any impression or part of the impression of any seal of the Registrar General has been forged, or fraudulently affixed knowing the same to be fraudulently affixed, or any document the signature to which has been forged knowing the same to have been forged,

such person shall be guilty of an indictable offence.

Penalty: Imprisonment for 14 years.

Other Offences

233. A person who-

(a) wilfully and fraudulently makes any false statement in any application to bring land under the provisions of this Act, or in any application to be registered as proprietor, whether in possession, reversion, remainder, or otherwise on a transmission, or in any other application to be registered under this Act as proprietor of any land, or any estate or interest in any land;

(b) wilfully and fraudulently suppresses, withholds, or conceals, or assists, or joins in, or is privy to the suppressing, withholding, or concealing from the Registrar General, the Acting Registrar General, or any Deputy Registrar General any material document, fact, or matter of information;

(c) wilfully and fraudulently gives false evidence, or makes a false statement in his examination before the Registrar General, the Acting Registrar General, or any Deputy Registrar General;

(d) without lawful authority and knowing that no such authority exists intentionally alters or causes to be altered-

(i) an original certificate of title filed in the Register Book or the duplicate of such a certificate; or

(ii) records made by the Registrar-General by an electronic, electromagnetic, optical or photographic process under Division 2 of Part 5 or a certificate of title issued under that Division; or

(iii) any instrument comprising part of the Register Book; or

(iv) any instrument or form issued by the Registrar-General;

(e) fraudulently uses, assists in fraudulently using, or is privy to the fraudulent using of any form purporting to be issued or sanctioned by the Registrar General;

(f) knowingly misleads or deceives any person hereinbefore authorised to demand explanation or information in respect of any land, or the title to any land, which is the subject of any application to bring the same under the provisions of this Act, or in respect of which any instrument or dealing is proposed to be registered or recorded,

is guilty of an indictable offence.

Penalty: $40 000 or imprisonment for 10 years.

Certificate etc procured by fraud to be void

234. Any certificate, instrument, entry, erasure, or alteration procured, or made by fraud as in the last preceding section mentioned shall, whether there shall be a conviction under such section or not, be void as regards all parties or privies to such fraud.

Equities not abolished

249. (1) Nothing contained in this Act shall affect the jurisdiction of the Courts of law and equity in cases of actual fraud or over contracts or agreements for the sale or other disposition of land or over equities generally.

AND WHEREAS, the lawful predecessors of the Grantors/Chargors bound the Grantors/Chargors and enacted *the Registration of Deeds Act* 1935 (SA) which received Royal Assent on the 21st November 1935 thereby creating a further Equitable & Statutory Charge/Personal Property Security Interest over the assets of the Grantors/Chargors in favour of Peoples of State of South Australia and the Commonwealth of Australia including the Grantee/Chargee which relevantly sets out;

8—Neglect of duty by registrar

If the registrar wilfully neglects his duty in the execution of his office according to the provisions of this Act or wilfully commits or suffers to be committed any undue or fraudulent practice in the execution of his office, he shall pay treble damages with full costs of suit to every person injured thereby, to be recovered by action of debt in the Supreme Court.

25—Effect of certificate of discharge

(1) The entry, on the memorial of a mortgage, that that mortgage is satisfied, shall be sufficient evidence that the estate of the mortgagee in the land comprised in the mortgage is vested in the person entitled to the equity of redemption thereof, as from the day of the date of such entry, freed and discharged from the mortgage, and from the sum of money thereby secured: Provided that it shall nevertheless be lawful to impeach such entry by showing that the certificate to which the same refers has been obtained by fraud

10—Instruments to be registered and the effect of registration

(1) Every deed, conveyance, or contract in writing, other than a lease for a term not exceeding three years, and every will and every judgment (other than a judgment or recognizance entered into in the name and on account of His Majesty) whereby land may be in any way affected in law or equity may be registered under this Act.

(2) Every such deed, conveyance, contract, or judgment shall, if executed, made, or obtained after the first of March, 1842, be fraudulent and void at law and in equity against any subsequent registered purchaser, mortgagee, or party for or upon valuable consideration unless a memorial thereof is registered under this Act before the registration of the memorial of the deed or conveyance, contract, or judgment under which the subsequent purchaser, mortgagee, or party claims.

(3) Every devise by will shall, if the testator died or dies after the first of March, 1842, be fraudulent and void against any subsequent registered purchaser or mortgagee for or upon valuable consideration and

against any bona fide registered party having subsequent judgment unless a memorial of the will is registered in accordance with this Part.
(4) This section applies notwithstanding that before or at the time of the making of the subsequent deed, conveyance, or contract or of the entering or acknowledging of the subsequent judgment, the subsequent purchaser or mortgagee had notice of the prior deed, conveyance, contract, judgment, or devise.
44—Evidentiary effect of registrar's certificate
(2) When any instrument, memorial, or office copy is produced under subsection (1) of this section the party against whom it is produced may give notice by his pleading or otherwise to the satisfaction of the court that he intends to dispute the execution of the instrument or the truth of the memorial, copy, or certificate on the ground of fraud, forgery, or other cause of a like nature, for example, insanity, imbecility, or duress of the person whose execution of or signature to a document is disputed; and the onus of proving such fraud, forgery, or other cause shall in the first instance lie on the party giving the notice

AND WHEREAS, the Registrar of Deeds and the Registrar General have wilfully and fraudulently neglected their public duty to act in the public interest under the aforementioned trusts and are, were and always have been (*as with every person holding Public Office*) indemnified by the Grantors/Chargors in respect to loss, costs and damages to the Peoples arising from the Registrar's conduct which statute and indemnity creates registerable statutory and equitable charges/personal property security interests in the hands of the Grantee/Chargee over the assets of the Grantorts/Chargors,

AND WHEREAS, Christopher Kourakis acting in his capacity as;

(a) Crown Solicitor, did knowingly and wilfully;
   a. cause false affidavit materials to be sworn and served in SASC-422-2005 & SACS-423-2005 and has at all relevant times breached the principles of Rule of Law and Separation of Powers in order to conceal his corrupt conduct and the corrupt conduct of the Attorney General and Premier of South Australia the Breaches of the First and Second Contracts of Finance and corrupt conduct of National Australia Bank Limited (NAB), Counsel instructed by NAB and by the Grantee/Chargee and the Decision makers listed in an interlocutory application dated 21st October 2018 filed and served in NSD-1848-2018; Rubis & Ors v Garrett & Ors v Regina & Ors under the aforementioned Trusts for which the Grantors/Chargors are and always have been criminally and civilly vicariously liable.
   b. instruct justices of the Adelaide Federal Magistrates Court, Adelaide Magistrates Court, the District Court of South Australia, the Supreme Court of South Australia, the Federal Court of Australia and the High Court of Australia to avoid the evidence and misstate the facts as the ultimate injustice in proceedings in those courts involving the Grantee/Chargee
(b) Chief Justice of the Supreme Court of South Australia, did knowingly and wilfully instruct justices of the District Court of South Australia and the Supreme Court of South Australia to avoid the evidence and misstate the facts as the ultimate injustice in proceedings in those courts involving the Grantee/Chargee

AND WHEREAS, *the Supreme Court of South Australia Act* 1935 (SA) creates a statutory and equitable charge in favour of the Peoples over the Chief Justice of that Court in which regard the Grantee/Chargee registered the aforementioned charge/ personal property security interest over Chris Kourakis on the Personal Property Security Register **("PPSR")** which was given PPSR Registration Number; 201610250009815;

The Chief Justice
9A. *(1) The Chief Justice is the principal judicial officer of the court.*
(2) The Chief Justice is responsible for the administration of the court.

AND WHEREAS, *the Federal Court of Australia Act* 1976 (Cth) creates a statutory and equitable charge in favour of the Peoples over the Chief Justice of that Court in which regard the Grantee/Chargee registered the aforementioned charge/ personal property security interest over Chief Justice Anthony Baines Alsop on PPSR which was given PPSR Registration Number; 201611200001961;

4A Application of the Criminal Code
Chapter 2 of the Criminal Code applies to all offences against this Act.

Note: Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.

15 Arrangement of business of Court

Responsibility of Chief Justice

(1) *The Chief Justice is responsible for ensuring the effective, orderly and expeditious discharge of the business of the Court.*

(1AC) Despite section 39B of the Judiciary Act 1903, the Court does not have jurisdiction with respect to a matter relating to the exercise by the Chief Justice of the functions or powers mentioned in subsection (1AA), (1AAA) or (1AAB).

18A Management of administrative affairs of Court

(1) The Chief Justice is responsible for managing the administrative affairs of the Court.

(2) For that purpose, the Chief Justice has power to do all things that are necessary or convenient to be done, including, on behalf of the Commonwealth:

(a) entering into contracts; and

(b) acquiring or disposing of personal property.

18BA Arrangements with agencies or organisations

(1) The Chief Justice may arrange with the chief executive officer (however described) of:

(a) an agency of the Commonwealth, a State or a Territory; or

(b) another organisation;

for an employee or employees of the agency or organisation to:

(c) receive, on behalf of the Court, documents to be lodged with or filed in the Court; or

(d) perform, on behalf of the Court, other non judicial functions of the Court.

(2) If an arrangement under subsection (1) is in force in relation to the performance by an employee of an agency or organisation of a function on behalf of the Court, the employee may perform that function despite any other provision of this Act or any other law of the Commonwealth.

(3) A function performed on behalf of the Court in accordance with an arrangement under subsection (1) has effect as if the function had been performed by the Court.

(4) Copies of an arrangement under subsection (1) are to be made available for inspection by members of the public.

18W Delegation of administrative powers of Chief Justice

The Chief Justice may, in writing, delegate all or any of his or her powers under section 18A to any one or more of the Judges.

18X Proceedings arising out of administration of Court

Any judicial or other proceeding relating to a matter arising out of the management of the administrative affairs of the Court under this Part, including any proceeding relating to anything done by the Registrar under this Part, may be instituted by or against the Commonwealth, as the case requires.

18XA Protection of persons involved in handling etc. complaints

(1) In exercising powers or performing functions under paragraph 15(1AA)(c) and subsection 15(1AAA), or assisting in exercising those powers or performing those functions, a complaint handler has the same protection and immunity as a Justice of the High Court.

(2) In authorising a person or body under subsection 15(1AAB), the Chief Justice has the same protection and immunity as a Justice of the High Court.

(3) A witness requested to attend, or appearing, before a complaint handler handling a complaint has the same protection, and is subject to the same liabilities in a proceeding, as a witness in a case tried by the High Court.

(4) A lawyer assisting, or appearing on behalf of a person before, a complaint handler handling a complaint has the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court.

AND WHEREAS , the duties of the Grantors/Chargors to cause the operation of an open and transparent system of Responsible Government are in breach being multiple indictable offences under the aforementioned law and breaches/defaults of the aforementioned Public Trusts and the Aforementioned Statutory and Equitable Charges/Personal Property Security Interests held by the Grantee/Chargee and the Peoples including failure to provide access to personal information of the Grantee/Chargee in which regard ALRC 77 sets out as follows;

2. Government information in a democratic society

Introduction

2.1 Since the development of the system of democratic government, tension has existed between the elected and the electorate as to how much the former should tell the latter.[5] *The enactment of the FOI Act in 1982 brought about a fundamental change in the law in Australia relating to access to government-held information and challenged the boundaries of government secrecy.*[6] *It had particular significance because it was the first national FOI legislation in a country with a Westminster style of responsible government. This chapter outlines the objectives of the FOI Act, explains why access to government information is important and identifies a number of deficiencies in the Act and its current administration.*

The importance of government information being accessible

The objectives of the FOI Act

2.2 The FOI Act provides a right of access to information in the possession of government departments and agencies. The fundamental reason for providing this right is to ensure open and accountable government. In 1979 the Senate Standing Committee on Legal and Constitutional Affairs identified three objectives of FOI legislation: to increase public scrutiny and accountability of government, to increase the level of public participation in the processes of policy making and government and to provide access to personal information.[7] *The objectives cited in the first annual FOI report include*

- *to improve the quality of agency decision making*
- *to enable citizens to be kept informed of the functioning of the decision making process as it affects them and to know the criteria that will be applied in making these decisions and*
- *to develop the quality of political democracy by giving all Australians the opportunity to participate fully in the political process.* [8]

It is clear that access to information is closely related to the notion of a healthy democracy.

Information and representative democracy

2.3 Australia is a representative democracy. The Constitution gives the people ultimate control over the government, exercised through the election of the members of Parliament. The effective operation of representative democracy depends on the people being able to scrutinise, discuss and contribute to government decision making. To do this, they need information. While much material about government operations is provided voluntarily and legislation must be published, the FOI Act has an important role to play in enhancing the proper working of our representative democracy by giving individuals the right to demand that specific documents be disclosed. Such access to information permits the government to be assessed and enables people to participate more effectively in the policy and decision making processes of the government.[9]

> *"Citizens in a representative democracy have the right to seek to participate in and influence the processes of government decision-making and policy formulation on any issue of concern to them ... The importance of FOI legislation is that it provides the*

[5] *T Riley 'Accountability of government: an international perspective'* (1987) 11 FOI Review 54.
[6] *Ch 3 provides a brief history of the events leading to the passage of the Act in 1982.*
[7] Senate Standing Committee on Constitutional and Legal Affairs Freedom of Information. Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978 AGPS Canberra 1979, 21-22. (Senate Standing Committee 1979 Report.)
[8] Attorney-General's Dept FOI Annual Report 1982-83 AGPS Canberra 1983, xi.
[9] The demand for accountability often goes beyond the government and beyond Ministers to the bureaucracy. This is due to an increasing perception that the Executive is not sufficiently responsible to Parliament (because the two party political system means that in reality the Executive has significant control over Parliament, or at least the House of Representatives) and from a more general demand for better service stemming from the consumer movement

> *means for a person to have access to the knowledge and information that will assist a more meaningful and effective exercise of that right."* [10]

Without information, people cannot adequately exercise their rights and responsibilities as citizens or make informed choices. [11] *Government information is a national resource. Its availability and dissemination are important for the economic and social well-being of society generally.*

> *"Information is the currency that we all require to participate in the life and governance of our society. The greater the access we have to information, the greater will be the responsiveness of our governments to community needs, wants, ideas and creativity. Alternatively, the greater the restrictions that are placed on access, the greater the feeling of 'powerlessness' and alienation."* [12]

Information enhances the accountability of government. It ensures that members of Parliament are aware of the activities of the Executive, which is especially important in light of the imbalance in power between them. [13] *Information is an important defence against corruption.*

> *"Freedom of information is but one important weapon in exposing potentially corrupt activity."*[14]

Access to one's own personal information not only promotes government accountability but also enables individuals to protect their privacy. [15] *Some commentators regard such access as particularly important in light of developments in information technology, which have significantly increased the volume of information government can collect and the ease with which it can be transferred and manipulated.*

The High Court on representative democracy

2.4 The High Court in the 'free speech cases' demonstrated the importance it places on ensuring the proper working of representative democracy. [16] *The Court determined that freedom of public discussion of government (including the institutions and agencies of government) is not merely a desirable political privilege, but inherent in the idea of a representative democracy. It held that the Constitution contains an implied freedom of political speech and communications. Although the High Court did not go so far as to suggest that a right of access to government information is constitutionally guaranteed, the view of the Court indirectly supports FOI objectives and suggests that it is important for Australia that the FOI Act functions properly and is interpreted in a way that promotes the disclosure of information.*

> *"The reasoning in the political speech cases is very relevant for FOI and requires that the democratic rationale of the Act be given more weight than in the past. The AAT must now err more on the side of disclosure to ensure that the important values identified in the political speech cases are complemented by the right conferred by the Act."* [17]

The Constitutional implication of free speech identified by the High Court also casts doubt on the appropriateness of those legislative provisions founded on the exaggerated notion that executive secrecy is in the public interest.[18]

International covenants and FOI

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[10] *Re Eccleston and Dept of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60, 86. The democratic basis of the FOI Act has been accepted by the AAT: see, eg, Cleary and Dept of the Treasury (1993) 31 ALD 214, 217-18.

[11] For detailed discussion of the importance of information in enabling Australians to participate fully in society and to access services and entitlements and the need to increase the community's use of information see House of Representatives Standing Committee for Long Term Strategies *Australia as an information society*: grasping new paradigms AGPS Canberra 1991.

[12] Cth Ombudsman Annual Report 1994-95 AGPS Canberra 1995, 33.

[13] Opposition members usually use the FOI Act but there is no reason in theory why a government backbencher may not also need to rely on the Act to obtain information. L Tsaknis claims that the new managerialism in the public sector demands increased scrutiny for which access to information is essential: *'Commonwealth secrecy provisions: time for reform*' (1994) 18 Criminal Law Journal 254.

[14] L Stirling Submission 3.

[15] See further at para 4.10

[16] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; Nationwide News Pty Ltd v Wills (1992) 177 CLR 1; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104. Note also the decisions of the High Court in the 1970s dealing with representative democracy. In what are known as the electoral cases, the High Court acknowledged that the Constitution establishes a system of representative democracy and determined that Parliament must enact laws consistent with the existence of representative democracy as the chosen mode of government: see *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; A*ttorney-General (NSW); Ex rel McKellar v Commonwealth* (1977) 139 CLR 527.

[17] D Murphy Submission 120. See also Cleary and Dept of the Treasury (1993) 31 ALD 214, Peter Bayne, now a member of the AAT, argued that the right of access to government documents under the FOI Act is premised on the same considerations of democracy and representative government which underpin the implied constitutional right of free speech. For a discussion of FOI and democracy see *P Bayne & K Rubenstein 'Freedom of information and democracy: a return to the basics?*' (1994) 1 AJAL 107.

[18] See discussion at para 4.22.

2.5 Australia's accession to the International Covenant on Civil and Political Rights (ICCPR) may also be relevant to the interpretation of the FOI Act. Article 17 supports the right to have access to one's own personal information and to have it amended if it is incorrect. Article 19(2) of the ICCPR guarantees a right to freedom of expression, which expressly includes freedom to seek information. It is not clear, however, whether the right to seek information obliges States to guarantee access to State-held information. For jurisdictions like Australia that already have FOI legislation the question whether a right of access is guaranteed by the ICCPR is, as a practical matter, relevant only from the point of view of interpretation. If the right of access provided by the FOI Act were to be recognised as a fundamental human right, it is possible that the content of that right may influence the interpretation of the Act.

AND WHEREAS , between today's date and the 19th January 1994 the Grantors/Chargors have admitted facts, liability and indebtedness to the Grantee/Chargee that have been the subject of numerous Common Law Notices to Admit Facts and Letters of Demand for Payment of admitted Debts and Liabilities including, but not limited to, those shown at annexure 5 (***Annexure 5; Notices of Admissions of Facts, Debts and Liability dated the 30th September 2018, 17th December2018, 9th January 2019, 21st February 2019, 9th April 2019, 3rd May 2019 and 29th May 2019***)

AND WHEREAS, liquidity is communication and monetisation of value that is the property of the Peoples, including the Grantee/Chargee, by Bankers, domestically and abroad that is subject to Democracy, Freedom of Expression, Human Rights, Right to Remedy, Separation of Powers, Rule of Law and Good Governance (amongst other things) and maintenance of Reputation, Property, Intellectual Property, Right to a Fair Hearing, Rights of Privacy and otherwise (***Annexure 6; Commonwealth Attorney General Webpages relating to the International Covenant of Civil and Political Rights***) in order to cause monetisation of value the property of the Peoples in the hands of Bankers (***which relationship between Customer and Bank is respectively that of Creditor and Debtor***), licensed by the Grantors/Chargors as agents for the Grantors/Chargors or otherwise, which decisions by Bankers to accept Charges/Security Interests over Value belonging to the Peoples, including the value of the Grantee/Chargee as set out in the preceding paragraph, and subsequently to Monetise, must be made in the Public Interest, and not in of the Grantors/Chargors in order to conceal the systemic corruption of the Grantors/Chargors and their Lawful Predecessors that is the subject of the various annexures to this Notice by holding the Peoples and/or the Grantee/Chargee impecunious and unable to engage counsel without Public Interest Test Case Funding Support granted by the Attorney Generals of the Commonwealth, the States and Territories,

AND WHEREAS, Banker licensees authorised by the Grantors/Chargors and/or their lawful predecessors, other licensees/agents of the Grantors/Chargors and their lawful predecessors in the Aged Care Sector, Child Care Sector, Financial Sector, Regulatory Sector, Insurance Sector, Healthcare Sector, Insurance Sector are systemically corrupt and act in their own interests are in breach of their Public Duties to make decisions in the Public Interest as found by various Royal Commissioners and published in reports.

AND WHEREAS, The Royal Commissioner Reports are Reports tailored to ensure that the Grantors/Chargors, and their lawful predecessors, are not held to account and never face the full force of the law including Informations and Indictments that are the Public Duty of the Attorney Generals to bring, but are not brought, in the public interest,

AND WHEREAS, the Grantors/Chargors have attached the reputation of the Grantee/Chargee by bringing Criminal Charges as an abuse of process/breaches of the aforementioned Public Trusts, s39B of *the Judiciary Act* 1903 (Cth), s75(v) of *the Constitution*, treaties and is obstruction of Justice being Criminal Indictable Offences by the Grantors/ Chargors pursuant to the principles of Civil and criminal vicarious liability under s42 & s43 of *the Crimes Act* 1914 (Cth) as set out in Annexure 5 to this Notice; Letter of Demand for Payment dated 29th May 2019 and by corrupt manipulation of journalists engaged by News Limited and Media Channels related to Rupert Murdoch,

AND WHEREAS, in order to frustrate the monetisation of secured value, the property of the Grantee/Chargee, by Bankers, Domestically and Abroad the Grantors/Chargors have unlawfully, invalidly, wilfully and criminally neglected their public duty and have;

1. by the actions the Australian Government Solicitors Office/the Commonwealth Attorney General/Department Home Affairs/ Commissioner of Taxation/ASIC/APRA/Financial Ombudsman/ Financial Services Complaints Authority/Inspector General of Taxation/ Inspector General of Bankruptcy/AFSA/Reserve Bank of

Australia/Administrative Appeals Tribunal/Federal Circuit Court of Australia/Federal Court of Australia/High Court of Australia/Supreme Courts of South Australia and Victoria/District Court of South Australia/Parliament of Australia (Senate & House of Representatives) amongst other Grantors/Chargors;

a. failing to pass resolutions in the House of Representatives and the Senate to establish a Parliamentary Judicial Enquiry Committee pursuant to the provisions of *the Judiciary (Incapacity and Misbehaviour) Act* 2012 (Cth)
b. failing to enact in the Public Interest as a matter of urgency;
    i. *Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017*
    ii. *Crimes Legislation Amendment (Combatting Corporate Crime) Bill* 2017
    iii. *Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill* 2018
    iv. *the National Integrity Commission Bill* 2018
    v. *Treasury Laws Amendment (APRA Governance) Bill* 2018
    vi. *Banking System Reform (Separation of Banks) Bill* 2018 not proceeding before the House of Representatives
    vii. *Banking System Reform (Separation of Banks) Bill* 2019 before the Senate
    viii. *Treasury Laws Amendment (Combating Illegal Phoenixing) Bill* 2019 [Provisions]
c. Failing to complete the following inquiries;
    i. Review of the Four Major Banks
    ii. Resolution of disputes with financial service providers within the justice system
d. by the actions of Trevor Coulter, Neville Thomas, other employees of the Commissioner of Taxation and the Commissioner of Taxation;
    i. criminally, unlawfully, fraudulently and invalidly approaching business associates of the Grantee/Chargee and defaming the Grantee/Chargee alleging the business activities of the Grantee/Charge were a Fraud thereby damaging the reputation of the Grantee/Chargee and yet failing to bring any such Informations to the attention of the Commonwealth Director of Public Prosecutions/the Attorneys General,
    ii. Prior to the 24th April 2018 garnishing accounts of entities related to the Grantee/Chargee without any lawful entitlement including $58,000 removed (stolen) from the account of Island Bio Energy Australia,
    iii. On the 24th April 2018 telephoning the vendors of the issued capital of Progressive People Australia Pty Ltd and defaming the Grantee/Chargee so that the Vendors withdrew from Heads of Agreement to sell that issued capital dated the same day as the commencement of AMC-18-5575; *Regina v Andrew Garrett*
    iv. Fraudulently removing of at least $34,000 (Theft) from the Tax Account of Grain Master Pty Ltd as an entity related to the Grantee/Chargee
    v. Breaching the Human Rights of the Grantee/Chargee to reputation, privacy, property. intellectual property, freedom of speech, freedom of travel amongst other things
    vi. Harassing business associates related to the Grantee/Chargee
    vii. Publishing audits in respect to the Grantee/Chargee and related entities that were false misleading and deceptive and were at all relevant times a Fraud on the Courts and Tribunals of Australia,
    viii. Frustrating the rights of the Grantee/Chargee to receive payment from the Grantors/Chargors in respect to admitted facts and liabilities ,
    ix. Frustrating the rights of the Grantee/Chargee to the equitable right of set off,
    x. Variously failing to exercise their powers and Public Trust to act in the Public Interest,
    xi. Failing to consent to orders to set aside the default judgment in DCCIV-1666-2003; Deputy Commissioner of Taxation v Andrew Garrett as Trustee for the Andrew Garrett Family Trust
e. Interfering with the Intellectual Property and other Human Rights the property of the Grantee/Chargee by allowing;
    i. Treasury Wine Estates Vintners Limited (“TWEV”) to file and serve 24 False affidavits and refusing the Grantee/Chargee permission to cross examine the deponents of the False Affidavits thereby prompting Perjury of officers of the Crown

ii. Make Wine Pty Ltd to trade with the Reputation and Name of the Grantee/Chargee in circumstances where TWEV was in breach of a Deed of Settlement dated 26th July 2000 between the Grantee/Chargee and TWEV thereby frustrating the Grantee's/Chargee's rights under the resultant equitable/contractual Charge/Personal Property Security Interest over TWEV and the parent entities of TWEV at various times

iii. The Grantors/Chargors to frustrate interfere and delay the development of 40 years of experience expressed as OenoViva Global, OenoViva Business Systems, OenoViva Artisans, OenoViva Hand Crafting, OenoViva Capital Resources, OenoViva Digital Coin and otherwise.

f. Avoiding the facts set out in Freedom of Information Act releases from the Australian Taxation Office variously dated June 2014 – March 2015 that has been the subject of affidavits and submissions to courts and tribunal on no less than 32 separate occasions including most recently during the lawful exercise of Search Warrants dated February 2017,

g. Unlawfully and invalidly cancelling amending activity statements of the Trustee of the Andrew Garrett Family Trust lodged by the Grantee/Chargee in accordance with the instructions of the Commissioner of Taxation in order to avoid paying compensation for a sequestration order that was wrongfully obtained and the trespasses of Peter Ivan Macks and Stephen James Duncan on the Banrupt Estate of the Grantee/Chargee

h. following, menacing and confronting Amit Shilotri, as agent for the Grantee/ Chargee, in Kuala Lumpur during the period 16th-23rd September 2016 when negotiating valid Financial Instruments/UNCITRAL International Bills of Exchange drawn by the Grantee/Chargee while communicating value in paper format

i. acting under information obtained unlawfully by the Grantors/Chargors, more particularly officers of the Commissioner of Taxation including Trevor Coulter and Neville Thomas (but not limited to), through criminal/ unlawful/invalid electronic surveillance of the email accounts and telecommunication platforms the property of the Grantee/Chargee in the period 25th June 2012 until today's date,

j. interfering with Judicial processes in proceedings set out as annexure 1 to Notice of Constitutional Matters filed and served in NSD 1848 of 2018; *Rubis & Ors v Garrett & Ors v Registrar of the SA v Regina & Ors* including making of sequestration orders on the 24th September 2004 and 15th May 2015 against the Grantee/Chargee in respect to alleged debts that could not and did not lawfully exist

k. Swearing false affidavit materials in respect to the aforementioned alleged debts

l. Breaching the Tribunal obligations to inquire and act in the Public Interest

m. interfering with Bankers, domestically and abroad in the monetisation of value arising from;

i. Debt Collection processes managed by the Grantee/Chargee arising from a Deed of Assignment of Debt and Security dated 27th June 2017 and subsequent Deed of Variation dated 1st February 2018 and subsequent Notices of Crystallisation of Charges/Seizure of Collateral issued against under Charges and Personal Guarantees,

ii. The purchase of Wood Pellet Production equipment and business trading as Island Bio Energy Australia,

iii. Land and buildings located at;

1. Duncan Street Montrose,
2. [redacted] Rawson Street, Croydon Park, NSW
3. Bothwell,
4. Osterley,
5. Westerway, Tasmania,
6. Relbia, Tasmania,
7. Mount Carey, Adelaide Hills,
8. Leawood Gardens, Adelaide,
9. Yarra Valley,
10. Langhorne Creek,
11. Southwharf, Melbourne
12. Cowper Wharf Road Woolloomooloo
13. [redacted] Powell Street, East Killara
14. Otherwise related to the Grantee/Chargee

n. Publishing International Notice and threat against the International Banking Community dated on or about November 2018 – January 2019
o. interfering with an executed arm's length commercial contract dated 4th December 2018
p. appointing three investigators purportedly representing the International Anti-Money Laundering Authority;
    i. interfering with Power of Attorney and other agents of the Grantee/Chargee in Riyadh, Saudi Arabia communicating value in respect to Financial Instruments Drawn by the Grantee/Chargee,
    ii. The aforementioned three agents seeking payment by 4 X Cash Bank Cheques in the amounts of AUD $250 Million to facilitate the monetisation of the aforementioned
    iii. Promoting and publishing AMC-18-5575; Regina v Garrett to representatives of the Grantee/Chargee and otherwise
q. Passage of *the Telecommunications Amendments (Access & Assistance) Act* 2018 on the 8th December 2018
r. Failing to establish and account in the Name of the Australian People Future Fund between the 30th April – 21st May 2018 in the public interest with the Reserve Bank of Australia
s. Otherwise the subject of the Model Litigant Obligations to fully disclose all material facts and otherwise comply with the obligations of open and transparent government.
t. Failing to obtain certification of Compliance with the Legal Services Directions 2017 and predecessor Directions from the Office of Legal Services Co-Ordination when bring and/or defending court proceedings
u. Making Vexatious Litigant orders/findings as a barrier to justice (obstruction) as indictable offences under s42 & s43 of *the Crimes Act* 1914 (Cth) in circumstances where the Grantors/Chargors are hopelessly conflicted as a consequence of pecuniary interests, which orders have been made on no less than 10 separate occasion against the Grantee/Chargee under;
    i. S39 of *the Supreme Court of South Australia Act* 1935 (SA)
    ii. S89K of the Freedom of Information Act 1982 (Cth) as a barrier to release of personal information in the possession and control of the Commissioner of Taxation, The Federal Court of Australia and the Federal Circuit Court of Australia
    iii. S37AO of *the Federal Court of Australia Act* 1976 (Cth)

2. caused the Registrar of the Personal Property Security Act to fraudulently and criminally remove registrations of the aforementioned Statutory and Equitable Charges/ Personal Property Security Interest in order to obstruct the operation of Justice by making alleged decision that are ultravires/invalid & unlawful dated as follows in respect to the registration Numbers set out below (but not limited to);

20th December 2018; Attachment 1 to Decision in respect to **ENQ-1106088-K9B4C2**; 201605190017490, 201605220000515, 201606020050311, 201607030000346, 201608020065495, 201608130013223, 201608130013299, 201608270013008, 201608290078334, 201609080095604, 201609080097303, 201609080121100, 201609120009201, 201611280081228, 201801290020993, 201805140023684, 201808290011555, 201809070096183, 201809170059490, 201812270025300

20th December 2018; Attachment 2 to Decision in respect to **ENQ-1106088-K9B4C2**; 201205250018230, 201205250050290, 201207200074409, 201207220000511, 201207280005469, 201207280005532, 201301240021266, 201301250066875, 201301250067273, 201301250067549, 201301250067679, 201305060012453, 201305060013997, 201305060014918, 201305060015421, 201305060016319, 201305060016927, 201305060022592, 201305060022851, 201305060023531, 201305060024116, 201305060025330, 201305210022141, 201305270023609, 201306100019425, 201306100020827, 201306190081371, 201306190082660, 201306190083168, 201306190083856, 201306190084189, 201306190084947, 201306190085103, 201306190085539, 201306190085732, 201306190086059, 201306190086253, 201306190086658, 201306190086777, 201306190086945, 201306190087013, 201306190087273, 201306190087468, 201306190087633, 201306200017897, 201306200018319, 201306200018678, 201306200019187, 201306200019636, 201306200060683, 201306200063508, 201306200064163, 201306200064775, 201306200065444, 201306200066713, 201306200067226, 201306200067836, 201306200068248, 201307290033368, 201307290041265, 201308040000875, 201308040000881, 201308250000288, 201309060058471, 201309060058812, 201309060059108, 201309060059858, 201309060060282, 201309060060474, 201311040034352, 201311150066898, 201408090007387, 201601190032959, 201605050023442, 201605100065092, 201607030000461, 201608170050697, 201702050001294, 201703240058831, 201808090046607

5th February 2019; Attachment A Statement of Reasons **ENQ-1106088-K9B4C2**; 201310200000960, 201611290014649, 201704160000221, 201707180029034, 201709170000781, 201712240000544, 201804220001047, 201810010034506

5th February 2019; Attachment B Statement of Reasons **ENQ-1106088-K9B4C2**; 201205250018230, 201205250050290, 201207200074409, 201207220000511, 201207280005469, 201207280005532, 201301240021266, 201301250066875, 201301250067273, 201301250067549, 201301250067679, 201305060012453, 201305060013997, 201305060014918, 201305060015421, 201305060016319, 201305060016927, 201305060022592, 201305060022851, 201305060023531, 201305060024116, 201305060025330, 201305210022141, 201305270023609, 201306100019425, 201306100020827, 201306190081371, 201306190082660, 201306190083168, 201306190083856, 201306190084189, 201306190084947, 201306190085103, 201306190085539, 201306190085732, 201306190086059, 201306190086253, 201306190086658, 201306190086777, 201306190086945, 201306190087013, 201306190087273, 201306190087468, 201306190087633, 201306200017897, 201306200018319, 201306200018678, 201306200019187, 201306200019636, 201306200060683, 201306200063508, 201306200064163, 201306200064775, 201306200065444, 201306200066713, 201306200067226, 201306200067836, 201306200068248, 201307290033368, 201307290041265, 201308040000875, 201308040000881, 201308250000288, 201309060058471, 201309060058812, 201309060059108, 201309060059858, 201309060060282, 201309060060474, 201311040034352, 201311150066898, 201408090007387, 201601190032959, 201605050023442, 201605100065092, 201607030000461, 201608170050697, 201702050001294, 201703240058831, 201808090046607, 201804220001047, 201810010034506

15th May 2019; Attachment A Statement of Reasons **ENQ-1106088-K9B4C2;** 201310200000960, 201611290014649, 201704160000221, 201707180029034, 201709170000781, 201712240000544, 201802120022445, 201802200022517, 201804220001047, 201810010034506

AND WHEREAS, the removal of the aforementioned PPSR Registrations by the Registrar was the subject of a further Notice of Indictable Offences dated the 11th February 2019 (***Annexure 7; Letter to Deputy Registrar Peter Edwards dated the 11th February 2019***) amongst others does not affect;

(1) The Facts admitted by the Grantors/Chargors over an extended period
(2) The Indebtedness and Liability admitted to be owed
(3) The Equitable and Statutory Charges/Personal Property Security Interests securing the aforementioned admitted Indebtedness and Liability
(4) The rate of escalation of the aforementioned Indebtedness and Liability

AND WHEREAS the Grantees/Chargees applied on the 6th September 2018 for a payment under the Act of Grace provisions of the Public Governance Performance & Accountability which was refused by the Department of Finance thereby exhausting the Grantees'/Chargees' Right of Remedy under Australian Treaty Series No 5, 23 and 39 & *the UNCITRAL Convention on Bills of Exchange and Promissory Notes* 1988 (UN) which treaties are also contracts executed by the Grantors/Chargors creating equitable and contractual Charges/ Personal Property Security Interests in the hands of the Grantee/Chargee,

AND WHEREAS at all relevant times Chris Jordan, Trevor Coulter, Neville Thomas, Siobhan Unwin, Vincent Tavolaro and Sue-Anne Thomson and others named in Annexure 7 (***Annexure 8; Amended Statement of Claim; VID 600 of 2014; Andrew Garrett v Chris Jordan & Ors.***)

AND WHEREAS the aforementioned Indebtedness and Liabilities have been demanded of the Grantors/Chargors to be paid, remains due, has not been paid and is in default,

AND WHEREAS s123 of PSA allows for the secured party to seize collateral assets including intellectual property and/or anything of value in accordance with this Notice of Seizure of Collateral, the provisions of *the Corporations Act* 2001 (Cth) and the Common Law in respect to equity allows for the aforementioned equitable and statutory charges to be crystallised and for the appointment of a Managing Controller and/or Liquidator to the assets of the Grantors/Chargors

AND WHEREAS the Grantee/Chargee hereby appoints himself by the powers vested in him as the Grantee/Chargee to be the Managing Controller of the assets of the Grantors/Chargors as set out in Schedule 1

NOW TAKE NOTICE that the Collateral set out in Schedule 1 and otherwise held for the benefit of the Grantors/Chargors are hereby seized with immediate effect by the Grantee/Chargee such that the Collateral is under the Control of the Grantee/Chargee as Managing Controller appointed which Control is perfected in accordance with the aforementioned applicable law;

Dated Saturday, 1 June 2019; Signed on behalf of the Grantee/Chargee personally and in all of his capacities as Trustee, Managing Controller of Entities and otherwise;

____

Andrew Morton Garrett, in all his capacities including (but Not Limited to)
Managing Controller of Entities & Grantors/Chargors
Chairman/Managing Trustee of OenoViva Capital Resources
Chairman/Managing Trustee of OenoViva Capital Resources
Grantee/Chargee

SCHEDULE 1

PROPERTY SUBJECT TO FIXED CHARGE.

All of the assets and undertakings belonging to **the Grantors/Chargors and/or to which the Grantors/Chargors holds a beneficial interest and/or to which the Chargors/Grantors hold a lien or charge wither by the aforementioned Public Trusts/ Letters Patent or otherwise** which are not otherwise subject to a fixed charge including ,without limitation;

- The Grantors'/Chargors' and/or the rights of the Chargors'/Grantors' related entities' entitlement to receive money from accounts held by the Grantors/Chargors and the Grantors'/Chargors' related entities, including Bank Accounts held with any Bank and money of any currency held therein,
- The Grantors'/Chargors' entitlement to receivables/payable by any person or entity and any loan accounts made to any other entities (*related or unrelated*) by the Grantors'/Chargors' and the Grantors'/Chargors' related entities including Financial Institutions in respect to the Committed Liquidity Facilities provided by the Reserve Bank of Australia,
- All assets including Plant & Equipment, Customers, Books and Records belonging, or beneficially belonging to the Grantors/Chargors and the Grantors'/Chargors' related entities.
- the Grantors'/Chargors' and the Grantors'/Chargors' related entities entitlement to be paid money in respect to invoices raised by them including money owed and./or payable under engagement/salary agreements and any other invoices outstanding as owed to the Grantors/Chargors and the Grantors'/Chargors' related entities at the date of this Notice and subsequently
- Intellectual Property
- Assets and Undertakings
- Shares in other Public Companies listed on the Australian Stock Exchange and otherwise, within and without the jurisdiction of the Commonwealth of Australia
- Shares in Private Companies, within and without the jurisdiction of the Commonwealth of Australia
- Interests in Real Estate/Real Property, within and without the jurisdiction of the Commonwealth of Australia
- Stock, within and without the jurisdiction of the Commonwealth of Australia
- Chattels, within and without the jurisdiction of the Commonwealth of Australia
- Office Plant & Equipment, Fixtures and Fittings within and without the jurisdiction of the Commonwealth of Australia
- Choses in Action against any person, within and without the jurisdiction of the Commonwealth of Australia
- Any other thing of value within and without the jurisdiction of the Commonwealth of Australia owned or beneficially owned by the Grantors/Chargors not referred to in the Schedule
- Rights and Powers of any kind, whether hereditary or otherwise
- The Grantors'/Chargors' Public Office/Position of any kind and the right to appoint to persons Public Office
- The Role of Champion of the Public Interest in the Grantees'/Chargees' capacity as Chairman/Managing Trustee of the Australian People Future Fund
- Any thing not otherwise covered by the Schedule
- Any document or thing related to the Grantee
- Power of Attorney of the Grantors/Chargors
- Agency of the Grantors/Chargors
- Rights to determine law in the Public Interest

Annexure 1; Cabinet Paper on Role of Attorney General

SECTION 2

OVERVIEW OF MINISTERIAL RESPONSIBILITIES

Government Decision Making

Role of the Attorney-General

Role of the Minister for Emergency Management

Machinery of Government Changes

Legal Services to the Commonwealth

Provision of Legal Assistance to Ministers and their Staff

Ministerial Councils

GOVERNMENT DECISION MAKING

This sets out briefly the legal context in which Australian Government decision-making takes place.

Sources of Commonwealth power

The Australian Government exercises:

- **Executive power** which is vested in the Queen and is exercisable by the Governor-General (Constitution: s.61), the Ministers responsible for the Departments of State established by the Governor-General in Council (Constitution: s.64) and to a more limited extent by public servants. The Constitution also confers other specific executive powers on the Governor-General or on the Governor-General in Council.
- the traditional and non-statutory **prerogative power** of the Crown, such as the power to conduct foreign affairs (the negotiation, conclusion and ratification of treaties), to make war and peace and to grant mercy. This is now generally seen to be part of the executive power vested by s.61 of the Constitution.
- **Statutory power** which may be conferred by legislation on the Governor-General, a Minister, the Secretary to a Department of State or other persons.

The administrative decisions of the Australian Government, which include the decisions of the Governor-General, Ministers and others who act for the Commonwealth, must:

- be made within the limits of the powers outlined above
- comply with any specific limitations imposed on particular powers, and
- satisfy general administrative law requirements.

Exercise of decision-making powers

In most cases the holder of the office in which the Parliament vests a power, such as the Minister, Attorney-General or Secretary of a Department, may arrange for that power to be exercised by another person through operation of:

- an express statutory power to delegate to another person
- a statutory or implied power to authorise an official to exercise the power on that person's behalf, or
- a statutory or implied power to authorise an official to carry out duties that form part of the process of making a decision.

Generally, a change in office-holder, or the designation of an office, does not affect delegations. As a matter of good practice, delegations are reviewed where there is such a change and remade. Authorisations must be reviewed and remade where there is such a change.

General administrative law requirements

In addition to any specific requirements, general administrative law principles apply to the exercise of decision-making powers by ministers and public servants. The requirements for the exercise of decision-making powers are set out by the courts. In general, Ministers or public servants exercising a decision-making power should:

- afford a person affected by a decision procedural fairness. In general, the minimum requirements of procedural fairness are satisfied if the decision-maker is not biased and if the person affected by the decision is given a reasonable opportunity to comment on any relevant material adverse to the person
- exercise their decision in the terms of the decision-making power, for example the terms of the statute conferring a power, and
- make the decision themselves, and not under 'dictation' from another person.

Accountability mechanisms for decision-making

There are a variety of mechanisms for keeping government accountable for its decisions. In addition to judicial review, merits review and the Ombudsman, there are other subject specific agencies such as the Australian Human Rights Commission, the Information Commissioner and the Auditor-General.

Judicial review

Under the Constitution, the High Court can review decisions of Commonwealth officers, including Ministers. The Federal Court has a parallel jurisdiction under s 39B of the *Judiciary Act 1903*. The Federal Court can review decisions of an administrative character made under an enactment (eg legislation, regulations, and legislative instruments) under the *Administrative Decisions (Judicial Review) Act 1977*.

In general, any person whose rights or interests are adversely affected by a government decision, conduct or failure to make a decision can seek judicial review. Judicial review is only available for procedural errors or errors of law. The court does not look at the merits of a particular decision.

The grounds on which an order of review may be sought under the ADJR Act are codified in that Act. These grounds effectively cover failure to comply with the specific requirements of legislation or other decision-making power, and general administrative law principles. Important grounds include failure to afford a person procedural fairness, acting under dictation, failure to follow required procedures, lack of jurisdiction, acting on the basis of a rule or policy without regard to the merits of the case and abuse of power.

Judicial review remedies typically involve either a declaration that a decision was invalid, in which case the government makes the decision again, or an order quashing the decision and remitting the decision to the original decision maker to make again.

Merits Review

Unlike judicial review, merits review involves a reconsideration of the entire decision on the facts. The Administrative Appeals Tribunal's function can review the merits of decisions of Ministers, officers and authorities where there is a law which specifically provides for that review. The AAT can decide that, while a particular decision may be legally correct, it is not the preferable decision, and can substitute its decision for that of the Minister, officer or authority. There are also separate specialised merits review tribunals for social security, migration and veteran's entitlements decisions. The AAT is in the Attorney-General's portfolio, but is an independent agency.

The Ombudsman

The Ombudsman has broad powers to investigate complaints about administrative action and to make recommendations to the department or authority concerned and to the responsible Minister.

In some circumstances, the Ombudsman may inform the Prime Minister of matters, and make special reports to Parliament. The Ombudsman has considerable powers under the *Ombudsman Act 1976* to obtain information and may investigate administrative action of his/her own motion. The Ombudsman is in the Prime Minister's portfolio, but is an independent agency.

Information Commissioner

The Australian Information Commissioner was established on 1 November 2010. The Information Commissioner has functions relating to Australian Government information policy, freedom of information and privacy and is supported by two statutory officers: the Privacy Commissioner and the FOI Commissioner.

The object of the Commonwealth *Freedom of Information Act 1982* (FOI Act) is to give the Australian community access to information held by the Australian Government. The FOI Act imposes on agencies a legal duty to provide members of the public with access to government information, including official documents of Ministers, unless those documents fall within defined classes of exempt documents. Since 1 November 2010, the Australian Information Commissioner, supported by the FOI Commissioner, has exercised wide ranging functions related to the oversight of the FOI Act. This includes the functions of reviewing FOI decisions and investigating complaints about the handling of FOI applications. A right of review to the AAT lies from a review decision made by the Commissioners.

The *Privacy Act 1988* is the principal legislation governing the protection of personal information in the federal public sector and in the private sector. The Act includes Information Privacy Principles (for the public sector) and National Privacy Principles (for the private sector) addressing the collection, use, disclosure, quality and security of personal information as well as access to personal information. A breach of the privacy principles in relation to an individual's information is taken to be an interference with the privacy of that individual. An individual may complain to the Privacy Commissioner about certain interferences with his or her privacy. Since 1 November 2010, the Australian Information Commissioner, supported by the Privacy Commissioner, has exercised the Commissioner functions under the Privacy Act.

Reasons and Documents

The ADJR Act and AAT Act confer on persons able to seek review of a decision, the right to obtain a written statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving reasons for the decision for a decision (subject to certain exceptions).

The *Freedom of Information Act 1982* imposes a legal duty to provide to members of the public access to government information, including official documents of Ministers, unless those documents fall within defined classes of exempt documents.

Further information

The Legislation Handbook requires the Attorney-General's Department to be consulted on legislative proposals for:

- the conferral of new jurisdiction on courts and tribunals
- the conferral of administrative discretions
- the review of administrative decision-making powers, and
- the creation or amendment of criminal offences and penalties.

ROLE OF THE ATTORNEY-GENERAL

ROLE OF THE ATTORNEY-GENERAL

Background

The Attorney-General is the First Law Officer of the Commonwealth. The Second Law Officer, under the *Law Officers Act 1964*, is the Solicitor-General.

The Attorney-General has three types of responsibility:

- The Attorney-General, and any other Ministers appointed to administer the Portfolio, are responsible for the administration of the Portfolio policy areas, and Commonwealth Acts, set out in the Administrative Arrangements Order.
- As First Law Officer of the Commonwealth, the Attorney-General also has general legal policy responsibility for all Commonwealth laws. The Attorney-General is the legal adviser to the Commonwealth Government. The Department receives a copy of all Cabinet submissions related to the Department and facilitates input from the Australian Government Solicitor.
- Third, the Attorney-General traditionally has had a special independent responsibility within government to act in the public interest. The principal areas where this responsibility arises are in litigation and prosecution processes.

The Attorney-General's role in the Cabinet and on Cabinet committees

Traditionally, the Attorney-General has been a member of the Cabinet, representing the interests of the whole portfolio. Under successive governments, the Attorney-General has also been a member of the National Security Committee (NSC) and the Parliamentary Business Committee (PBC). Under current arrangements, the Attorney-General can be co-opted to other committees (such as the Expenditure Review Committee) for specific items.

NSC focuses on major international security issues of strategic importance to Australia, national responses to developing situations (either domestic or international) and classified matters relating to aspects of operations and activities of the Australian Intelligence Community. PBC considers priorities for the Australian Government's legislation program.

The Cabinet Handbook requires ministers to take full responsibility for the proposals they bring forward, even where detailed development or drafting may have been done on their behalf by officials. As well as representing your own portfolio interests in Cabinet, the Attorney-General is at times asked to provide legal advice in relation to proposals put forward by other Ministers.

Policy and Legislation

The Attorney-General and the Department provide advice to all Ministers and agencies as part of the development by those Ministers of policy proposals.

The Legislation Handbook requires all Cabinet Submissions proposing legislative action to include a statement whether the Attorney-General's Department considers any proposed legislation necessary.

The Office of Parliamentary Counsel, which drafts all Commonwealth legislation, is also part of the Attorney-General's portfolio. The Office of Parliamentary Counsel prepares the Attorney-General's certificate, in accordance with section 58 of the Constitution, advising the Governor-General whether she should recommend any amendments to the Bill or whether it should be reserved for the Queen's pleasure.

Litigation

The Attorney-General is the first representative of the Crown in the courts.

Proceedings may be brought in the name of the Commonwealth by the Attorney-General or by any person appointed by him for that purpose (*Judiciary Act 1903*: s.61).

Where the Commonwealth is party to proceedings, all process required to be served on the Commonwealth is required to be served on the Attorney-General or a person appointed by the Attorney-General to accept service (*Judiciary Act 1903*: s.63).

Attorneys-General since 1999 have issued Legal Services Directions (Directions) under section 55ZF of the *Judiciary Act 1903*, which set out the requirements for the conduct of legal affairs by the Commonwealth and its agencies (see **Legal Services Directions** for comprehensive brief). The Directions are made as a statutory instrument and have the force of law. They include, amongst other things, obligations in relation to the sharing of advice within the Commonwealth, the Commonwealth's obligation to act as a model litigant, the settlement of claims against the Commonwealth, procurement of legal services including the engagement of counsel on behalf of the Commonwealth. There are also a number of reporting requirements including on significant issues arising in the provision of legal services, legal services expenditure, and annual compliance with the Directions.

Under the Directions, legal work in relation to key strategic areas of the law is tied to certain providers of legal services. This is to ensure a consistent approach by the Commonwealth in these areas of the law; namely, advice to Cabinet, national security, Constitutional law, public international law, and legislative drafting. Generally, this work is tied to the Australian Government Solicitor, the Attorney-General's Department, and in relation to public international law, the Department of Foreign Affairs and Trade.

All cases involving a matter arising under the Constitution or involving its interpretation are required to be brought to the attention of the Attorney-General (*Judiciary Act 1903*: s.78B). The Attorney-General has a right to intervene in any proceedings that relate to a constitutional issue (*Judiciary Act 1903*: s.78A).

The Attorney-General has other specific rights of intervention, and is able to seek to intervene in judicial proceedings in the public interest. The certificate or fiat of the Attorney-General is necessary before proceedings seeking to enforce a public right can be instituted by a private person. This process has generally been overtaken by the use of administrative law procedures, and the relaxed attitude of the courts to standing.

Prosecution Process

Under the *Director of Public Prosecutions Act 1983* (DPP Act) and the *Judiciary Act 1903*, the Attorney-General has the legal authority to:

- initiate or discontinue a prosecution, or
- issue directions to the Commonwealth Director of Public Prosecutions (CDPP) which must be tabled in Parliament, including directions as to the handling of a particular case.

These powers have rarely been exercised since the DPP Act came into force. It has been a longstanding practice to leave prosecution decisions to the independent judgment of the CDPP and avoid the appearance of political interference.

The Attorney-General does have an active role in determining whether to consent to certain prosecutions. There is a range of offences that require the Attorney-General's consent to prosecute, generally because there is some issue of international relations or national security that must be weighed against the desirability of proceeding with a prosecution. You will be fully briefed on each of these matters, which typically arise once or twice a year.

ROLE OF THE MINISTER FOR EMERGENCY MANAGEMENT

Attorney-General Roles and Responsibilities during Crises

The *Australian Government Crisis Management Arrangements – A Guide for Ministers* (**Attachment A**) provides general guidance to assist ministers and their staff during a crisis by providing a high level overview of the Australian Government's crisis management arrangements.

The framework is owned by the Prime Minister and administered by the Department of Prime Minister and Cabinet and the governance arrangements require the biannual update of the framework. The framework was updated in December 2012 and distributed to Ministerial offices.

The **Attorney-General's** specific ministerial responsibilities during a crisis are outlined below:

1. Natural and other civil disasters within Australia

Key Responsibilities

- Approve the provision of Australian Government physical assistance under COMDISPLAN
  - COMDISPLAN is a set of coordination arrangements and does not contain legal linkages.
  - DGEMA is authorised to activate the Plan. DGEMA can activate COMDISPLAN when satisfied that a request, either received or imminent, from a Jurisdiction meets the required pre-requisites
  - Approval is based on the requesting state or territory not being able to reasonably cope during an emergency
- Be the primary source of media comment from the Australian Government -
  - AGD Strategic Communications Branch will coordinate public information activities with the Attorney-General's media adviser.
- Alone or together with the state or territory, announce assistance available under the Natural Disaster Relief and Recovery Arrangements (NDRRA)
  - Category A (personal hardship assistance) and Category B (restoration of essential public assets, freight subsidies and concessional loans) are activated by the state or territory
  - Category C (clean up and recovery grants) are requested by the state or territory and considered by the Prime Minister
  - Category D (exceptional circumstances assistance for otherwise ineligible measures) is decided by you, in consultation with the Prime Minister or Cabinet.
  - NDRRA payments can be made in advance but are usually by way of reimbursement for state or territory costs. They are administered by AGD but paid by Treasury pursuant to the intergovernmental agreement on federal financial relations given effect to by the *COAG Reform Fund Act.*

- AGD makes the payments to states and territories relating to the costs of providing Category B loans at a concessional interest rate to small business, primary producers, needy individuals or voluntary not for profit bodies. The annual Appropriation Act to AGD authorises the making of these payments.

- Activate AGDRP by making two Determinations under the *Social Security Act* and seek the Prime Minister's agreement to make an equivalent payment to eligible New Zealand special category visa holders.
- The payment to New Zealand SCV holders is an ex-gratia payment. Following the decision in Williams, the legal authority to make the payment was secured by way of Regulation under the *Financial Management and Accountability Act.*
- The Prime Minister's response to the first request of the disaster season to make the ex-gratia payment has previously been a blanket agreement to you making the ex-gratia payment available for all subsequent activations of AGDRP.

2. Terrorism and other security-related crises within Australia

Key ministerial responsibilities

- Advise the Prime Minister whether to initiate a declaration of a National Terrorist Situation (NTS).
  - An NTS is an administrative arrangement that includes States/Territories having primary operational responsibility but the Commonwealth determining policy and broad strategies.
  - The basis for the advice to the Prime Minister is taken from ASIO's National Threat Assessment Centre in relation to specific people, places, events, sections and interests and jurisdictional situational updates.
  - The information is provided by ASIO through established channels which exist within EMA and the AGO. Jurisdictions are consulted individually by nominated officers or as a group via a NCC.
  - EMA work with ASIO and other AGD divisions to produce a brief for the AG clearly outlining the justification for making a recommendation.

- The Handbook includes a list of likely factors that would impact a recommendation:
  - Scale and nature of incident, including the use of chemical, biological, radiological or nuclear materials;
  - Involvement of multiple jurisdictions;
  - Involvement of Commonwealth Government interests;
  - Significance of the threat;
  - Impact of a threat involving civil aviation or maritime operations;
  - Involvement of national vital infrastructure; and
  - Involvement of foreign or international interests.
- Be the primary source of media comment from the Australian Government - the AGD Strategic Communications Branch will coordinate public information activities with the Attorney-General's media adviser.
- Approve the provision of Australian Government physical assistance under COMDISPLAN.

- In the event of actual or likely domestic violence, under Part IIIAAA of the *Defence Act 1903* either:
  - Make a recommendation jointly with the other authorising Ministers (the Prime Minister and the Minister for Defence) that the Governor-General make a call out order, or
  - If a sudden or extraordinary emergency arises and it is not possible to follow the normal processes, jointly (with the Minister for Defence), make a call out order of the type the Governor-General is otherwise authorised to make.

3. Off-Shore Requests for Assistance

- The **Attorney-General** may also be asked to approve assistance for off-shore emergency events. In these instances, the **Attorney-General** will be briefed by the DGEMA on a case-by-case basis but the Minister for Foreign Affairs retains overall responsibility.
- Overseas requests are divided into Overseas Development Aid Eligible (ODA) countries and Non-ODA;
  - ODA countries typically have AusAID as the lead agency with EMA managing activities under the auspices of the Australian Government Overseas Assistance Plan (AUSASSISTPLAN). ODA responses are paid for under the Development Budget managed by AusAID.
  - Non-ODA countries typically have DFAT as the lead agency. Non ODA responses require a special appropriation from Treasury to be obtained to fund the response. Depending on which department initiates the response, usually determines who requests the appropriation.

4. Whole-of- Government Coordination Mechanisms

- The Prime Minister may convene one of the following committees: the *National Security Committee of Cabinet* or the *Disaster Response and Recovery Committee of Cabinet*.
- Senior officials support through the *Australian Government Crisis Committee* as the Australian Government coordination mechanism (for a cyber incident this may also include the *Cyber Security Operations Board chaired by Secretary AGD)*. The *National Crisis Committee (AGCC plus states and territories)* is the National Coordination mechanism. These are coordinated by AGD.

AGD Support to the Attorney-General:

Emergency Management Australia

- The Crisis Coordination Centre (CCC) stands ready to accept notification of disaster events 24/7 including updates from Geoscience Australia for seismic related disasters; the Bureau of Meteorology for weather related disasters and updates from affected jurisdictions (including damage assessments and response efforts). The CCC monitors open source as well as social media to gain an appreciation of rapidly developing events.

- Once an emergency is imminent (i.e. fire/cyclone/severe storm) or once a rapid-onset disaster has occurred (i.e. earthquake/tsunami), designated state or territory emergency management personnel will contact the CCC to provide information and discuss possible assistance requirements.

COMDISPLAN

- Where an emergency is likely to result in Australian Government provided or organised assistance being required, DGEMA will activate COMDISPLAN. The activation of COMDISPLAN provides an indication of the serious nature of the event and warns non-affected jurisdictions or Australian Government Agencies that EMA will be starting to plan to provide assistance.

  DGEMA will advise the Attorney that COMDISPLAN has been activated

  Requests must not detail the specific nature of the assistance, instead must request a capability to achieve an outcome.

- Once there is an indication that a formal request for assistance is forthcoming or has been received by EMA, EMA determine in conjunction with stakeholders the validity of the request (i.e. availability in private sector, availability within state, capability to manage the capability, availability elsewhere or at Australian Government/International level).

  If this identifies that the request is valid and can be actioned, then DGEMA will seek approval from the **Attorney-General** to commit Australian Government resources to fulfil the request.

  If the Attorney General agrees to commit Australian Government resources, then EMA organises those resources.

  The Attorney-General may choose to provide a blanket approval (across a disaster, say a flood), or require a separate authorisation for every separate resource request.

- Finance:
  - Australian Government agencies are expected to cover the cost of COMDISPLAN activities within their own budgets.
    The AGCMF refines the process to detail:
    - Spending within budget (existing appropriation) or beyond existing approvals under an existing Regulation 10 approval under the Financial Management and Accountability Act 1997 (FMA Act).;
    - Significant financial implications must be considered in consultation with PM&C, Finance and Treasury;
    - Where timing allows additional funding should be sought via the Cabinet process
    - Where regular processes are not feasible, then the relevant Minister may seek a special spending cap directly from the Prime Minister.
  - Reimbursement to the Australian Government from the jurisdictions is not usually sought for life/property protection activities. The Australian Government may (but rarely does) seek reimbursement for recovery based activities.
  - EMA is not funded to sustain support to a jurisdiction.

- Basis:
  - COMDISPLAN appears to have originally emerged from the original executive council minutes which formed the Natural Disasters Organisation (NDO) and appointed Maj-Gen Stretton as the first Director General in the 1970's.
  - COMDISPLAN is created as an agreement between participating agencies. Originally, as part of NDO and as Defence, the COMDISPLAN was backed by the resources of the Dept of Defence. At the time the Minister for Defence was possibly the original approving authority.
  - COMDISPLAN's strength is its cooperative nature. Several agencies who previously have tried to establish one-on-one plans and relationships, have indicated a more comprehensive COMDISPLAN would allow them to contribute to a whole of Government response.
- Development of COMDISPLAN
  - COMDISPLAN is currently under a complete review and will be put into effect for the next disaster season. COMDISPLAN is being made more inclusive so as to allow the Australian Government to more fully respond to assist the Australian jurisdictions.

Recovery Responsibilities

Strategic Communications Branch

- During a crisis such as a natural disaster or terrorist attack, Strategic Communications Branch will have overall responsibility for coordination of all Australian Government public information and media activity.
- The Strategic Communications Branch will coordinate public information activities with the Attorney-General's media adviser.

Defence Force Assistance to Civil Authorities (DFACA)

- Part IIIAAA of the *Defence Act 1903* (Cth) sets out the statutory process for calling out the ADF to deal with 'domestic violence' within Australia or with threats in the offshore area that would, or would be likely to, affect Commonwealth interests. Call out can be initiated by the Commonwealth or requested by a State or Territory.
- In the event of actual or likely domestic violence (such as domestic terrorism, which includes politically motivated attacks that kill, injure and damage property, including electronic systems), the **Attorney-General's** role would be either:
  - Making a recommendation jointly with the other authorising Ministers (the Prime Minister and the Minister for Defence) that the Governor-General make a call out order, or
  - If a sudden or extraordinary emergency arises and it is not possible to follow the normal processes, jointly (with the Minister for Defence), making a call out order of the type the Governor-General is otherwise authorised to make.

- If there is also a threat of damage or disruption to the operation of infrastructure that would directly or indirectly endanger life or cause serious injury, the **Attorney-General** and the other authorising Ministers can make a declaration in writing that the infrastructure is 'critical infrastructure' for the purposes of Part IIIAAA.
    - Significantly, in conjunction with a call out order, such a declaration authorises the ADF to take measures up to and including lethal force against those attacking the infrastructure, including in cases where the infrastructure is unmanned.

Cyber Security

Following the Machinery of Government changes in December 2011 PM&C now have coordination of cyber security policy. PM&C is currently reviewing the Cyber Incident Management Arrangements. We understand there will be three cyber incident response levels: low - business as usual; medium - cyber security event; and high/crisis - cyber security crisis.

Under the plan, the **Attorney-General** has the following roles and responsibilities:

- The Attorney-General is the Australian Government's primary public spokesperson in the event of a cyber-security incident. This is dependent on the nature and scale of the crisis; the Prime Minister or Minister for Defence may assume this role in some cases.
- The Attorney-General has the authority to activate the provision of assistance to States and Territories as detailed under the COMDISPLAN and NCTC Handbook in the event of a blended cyber security incident with physical impacts. This assistance can include available Commonwealth resources relevant to deal with the crisis.
- In the event of a Level 2 cyber security incident, the Prime Minister may convene Cabinet, the National Security Committee of Cabinet (NSC) or a Prime Ministerial Taskforce to lead the overall Government response. Should this occur the Attorney -General would be involved as a member of the Cabinet and NSC.

The AGD portfolio is responsible for the following functions:

- Depending on the nature of the incident, CERT Australia within AGD, the Australian Security Intelligence Organisation (ASIO), or the Australian Federal Police (AFP) will provide advice, material and assistance to organisations affected by cyber incidents under existing arrangements — mainly for Level 0 - BAU incidents. Level 1 & 2 operational responses required from the portfolio will be coordinated through the Cyber Security Operations Centre (CSOC).
- ASIO will identify and investigate cyber security incidents conducted for the purpose of espionage, foreign interference, sabotage, terrorism or other forms of politically motivated violence, attacks on the defence system and other matters that fall under the head of security.
- The AFP will conduct law enforcement cybercrime investigations to support the identification and prosecution of cyber crime, with the assistance of State or Territory police.
- CERT Australia within AGD will provide a single coordination point within the Australian Government for advice, material and other assistance on matters relevant to a cyber-incident for the community and owners and operators of critical infrastructure and other systems of national interest (SNI).

- Coordinated by the CSOC, CERT Australia, ASIO and the AFP will also collect operational material for the Situation Reports (SitReps) to assist with shared awareness of cyber incidents across Government.
- through the Australian Government Crisis Committee, the Agency Head or Deputy Secretary will participate in interagency coordination in the event of a Level 2 – cyber security crisis.

MACHINERY OF GOVERNMENT CHANGES

Section 19B and 19BA Orders under the Acts Interpretations Act

Machinery of government changes (such as the re-naming of the titles of Ministers or Departments, or where responsibility for a specific Act or function is transferred between portfolios) may follow after the ministerial reshuffle and are given effect by changes to the Administrative Arrangements Order (AAO).

Sections 19B and 19BA of the *Acts Interpretation Act 1901* allow the Governor-General to make orders that alter specific references to Departments, Ministers and Secretaries contained in Acts and instruments so that they continue to operate after the changes take effect.

The orders are time-critical (without them certain functions and powers under legislation may not be legitimately exercised), and will need to be prepared in time for the first Executive Council (ExCO) meeting following finalisation of the new AAO (prepared by the Department of the Prime Minister and Cabinet for approval by the Governor-General).

The Legislation administered by the Attorney-General's Portfolio under the current AAO is provided on page 14 of this brief.

LEGAL SERVICES TO THE COMMONWEALTH

LEGAL SERVICES DIRECTIONS

Background

The *Legal Services Directions 2005* is a statutory instrument issued by the Attorney-General under section 55ZF of the *Judiciary Act 1903*, about the performance of legal work for the Commonwealth (whether performed in-house, by the Australian Government Solicitor or by other external legal service providers).

The *Legal Services Directions 2005*

The current Directions commenced on 1 March 2006 (an earlier version of the Directions commenced on 1 September 1999) and have been amended a number of times, most recently in October 2012. The Chief Executive Officer of an agency regulated under the *Financial Management and Accountability Act 1997* (essentially Departments of State and other agencies that perform core government functions), is responsible for ensuring that their agency adopts appropriate management strategies and practices so as to achieve compliance with the Directions.

The Directions help to ensure that Commonwealth agencies receive consistent and well-coordinated legal services that are of a high standard, uphold the public interest and are sensitive to their context of Commonwealth interests (which are broader than the interests of any one agency). In turn, this approach protects the Commonwealth's legal and financial position. The Directions were issued after most Australian Government legal work was opened to competition in 1999. Before then, agencies had been required to obtain most legal services from AGS which, until that time, was part of the Attorney-General's Department.

The Directions are largely a statement of those policies that have governed the conduct of Commonwealth litigation for a number of years. In their application to FMA agencies the Directions deal with:

- what constitutes 'tied work'; that is, work that must be performed by Government legal services providers (constitutional, Cabinet, national security, public international law and most drafting work)
- the reporting and appropriate oversight of litigation raising 'significant issues' concerning sensitive legal, political or policy matters, a disagreement between Commonwealth agencies or a Commonwealth and a State or Territory agency, involving a significant level of cooperation between agencies, or the likelihood that a significant precedent will be set (see paragraph 3 of the Directions)
- the manner in which Commonwealth agencies and their legal services providers are to conduct litigation (the model litigant obligation) (see Appendix B to the Directions)
- the principles for settlement of monetary claims by Commonwealth agencies (Appendix C to the Directions)
- the use of in-house legal services by Commonwealth agencies for the conduct of litigation
- the fees for counsel engaged to appear on behalf of an agency
- claims for public interest immunity

- pleading a defence based on the expiry of, or opposing an application for the extension of, an applicable limitation period
- the manner in which requests by officials employed by Commonwealth agencies for financial assistance in civil and criminal proceedings are to be determined
- the consultation obligation upon a Commonwealth agency obtaining advice on legislation administered by another agency or on areas of significant interest to another agency
- the reporting of legal services expenditure, and on compliance with the Directions, and
- the requirement to use the Legal Services Multi-Use List when procuring legal services from external providers.

Most bodies subject to the *Commonwealth Authorities and Companies Act 1997* are required to comply with a more limited subset of the Directions. Under that limited subset, those bodies are generally obliged to inform the Attorney-General of litigation involving constitutional issues or a disagreement with another Commonwealth agency, conduct themselves as a model litigant, comply with the Directions in relation to the engagement of counsel and claims for public interest immunity, report on legal services expenditure, and to comply with the requirement to use the Legal Services Multi-Use List.

The Directions are enforceable by the Attorney-General who, in exceptional cases, may give a specific instruction in relation to the handling of claims or the conduct of litigation. Compliance with the Directions is not enforceable by any person other than the Attorney-General under subsection 55ZG(2) of the Judiciary Act. While members of the public can, and do, make complaints to OLSC about the Commonwealth's conduct in litigation, it is ultimately a matter for the Attorney-General to decide whether the conduct complained of was or was not appropriate, and whether any sanction should be applied.

The Office of Legal Services Coordination in the Attorney-General's Department:

- oversees administration of and compliance with the Directions, including legal and legal policy advice on the Directions, decision-making on approvals and exemptions under the Directions, outreach and education on the Directions through advice to agencies on specific situations, delivery of training presentations to both agencies and their law firm providers and preparation and dissemination of guidance material, the review of alleged breaches of the Directions found by agencies and investigating any apparent systemic non-compliance, and by assisting agencies to develop compliance strategies
- provides support and advice to the Attorney-General in relation to the Commonwealth legal services market and the Attorney-General's role as one of two Shareholder Ministers in the Australian Government Solicitor (with the Minister for Finance and Deregulation), and
- coordinates the ongoing relationships between the Department and its external legal services providers. AGS is the major provider of legal services to the Department, primarily due to the Department's high tied work profile. The relationship with AGS extends to cooperation with the Department in other areas, including shared use of a legal opinions database.

The Office of Legal Services Coordination is currently implementing reforms to increase the efficiency of administering the Directions, including the implementation of a new compliance framework and a re-write of the Directions.

PROVISION OF LEGAL ASSISTANCE TO MINISTERS AND THEIR STAFF

Part 3 of the *Parliamentary Entitlements Regulations 1997* (the Regulations) establishes a scheme for the provision of assistance to Ministers (and former Ministers) to defend legal proceedings against them arising out of the performance of their ministerial duties or their position as Minister. The total expenditure under Part 3 of the Regulations in the 2011-12 financial year was $56,174.82 (GST exclusive).

The Regulations do not exhaustively cover the circumstances in which assistance can be provided to Ministers in legal proceedings. Under existing arrangements, the Commonwealth normally meets the costs of administrative law challenges to a Minister's decisions or in responding to subpoenas relating to a Minister's current portfolio.

The Attorney-General is the approving Minister under the Regulations except where the Attorney-General is involved in the matter for which an application for assistance has been made. In summary, the Regulations:

- enable assistance to be given to current and former Ministers who held that office on or after 24 May 1990:
  - for certain legal proceedings against them, including claims for damages and other relief, and for criminal proceedings, where the proceedings have arisen out of the performance of their ministerial duties
  - for inquiries involving a Minister, where the proceedings have arisen out of the performance of their ministerial duties, but not a court challenge to the conduct or validity of the inquiry
  - where a Minister is sued only because of being, or having been, the holder of the office of Minister, and
  - where a subpoena to give evidence or produce documents is received by a Minister and relates to the performance of Ministerial duties or holding the office of Minister
- establish the criteria relevant to giving assistance and the level of assistance that can be given to a Minister
- provide for conditions to be imposed on a decision to give assistance, the revocation of decisions to give assistance and the repayment of money paid if a condition of approval is breached
- require the Secretary to this Department to monitor strategies in legal proceedings for which assistance has been given and to inform the approving Minister if he or she considers that proposed expenditure is unreasonable, and
- require the Attorney-General to report to Parliament on decisions to give assistance and to table a consolidated statement of expenditure at the end of each financial year.

Ministerial Staff

The Commonwealth may also pay the legal costs of ministerial staff, employed under the *Members of Parliament (Staff) Act 1984*, for proceedings arising out of their duties assisting a Minister in performing ministerial duties. Provision for such assistance is set out in Appendix E of the *Legal Services Directions 2005*. The Directions are a statutory instrument issued by the Attorney-General under section 55ZF of the *Judiciary Act 1903*, about the performance of legal work for the Commonwealth.

MINISTERIAL COUNCILS

STANDING COUNCIL ON LAW AND JUSTICE (SCLJ)

Formerly the Standing Committee of Attorneys General (SCAG)

Objectives

SCLJ is a ministerial council that provides a forum for Attorneys-General to discuss and progress issues of national significance which require cooperation across jurisdictions, including through uniform or harmonised action where appropriate. SCLJ also oversees the national classification scheme for film, computer games and publications.

SCLJ priority issues

Current SCLJ priority issues are:

- Implementation of the National Organised Crime Response Plan
- Progressing a national response to combat cyber crime
- Progressing significant justice microeconomic reform initiatives
- Continuing reform and oversight of the National Classification Scheme
- Promoting stronger interactions between the family law, child welfare and child violence systems
- Harnessing the benefits of technology to improve access to justice, and
- Progressing measures to reduce indigenous disadvantage.

Frequency of Meetings

Meetings of SCLJ will be held as determined by the Ministers. Generally, meetings will be held twice a year, around April and October. Meetings are held in each jurisdiction on a rotational basis and are chaired by the Minister who is hosting the particular meeting.

SCLJ meetings are held in conjunction with the Legislative and Governance Forum on Corporations. The Minister for Financial Services, Superannuation and Corporate Law has portfolio responsibility for that meeting.

The next SCLJ meeting is scheduled for 4-5 April 2013 in Darwin.

Membership

SCLJ members comprise the Attorneys-General of the Commonwealth, States and Territories and the New Zealand Minister of Justice. The Commonwealth Minister for Home Affairs and Justice currently attends SCLJ meetings as the Minister responsible for censorship and in relation to other matters for which the Minister is responsible including criminal law. Norfolk Island has observer status at SCLJ meetings.

SCLJ is supported by the National Justice CEOs Group (NJCEO) which is made up of the Chief Executive Officers of Attorney-General's and Justice Departments from the Commonwealth, States and Territories, as well as New Zealand. The Commonwealth CEO is the Secretary of the Department.

Secretariat

The permanent SCLJ Secretariat is located in the New South Wales Department of Justice and Attorney General (DJAG). The Secretary to SCLJ is Mr Laurie Glanfield AM, Director General, NSW DJAG.

The Secretariat provides support to SCLJ (including to the National Criminal Law Reform Committee and the Censorship Officers' Standing Committee) and the NJCEOs Group. The homepage can be accessed at www.sclj.gov.au.

STANDING COUNCIL ON POLICE AND EMERGENCY MANAGEMENT (SCPEM)

SCPEM was officially launched on 17 September 2011 and replaces two previously separate councils, the Ministerial Council on Police and Emergency Management – Emergency Management (MCPEM-EM) and the Ministerial Council on Police and Emergency Management - Police (MCPEM-P).

Objectives

The purpose of the Council is to promote a coordinated national response to law enforcement and emergency management issues. The Council looks to develop a shared framework for cooperation and a basis for strategic directions for the policing and emergency services of Australia and New Zealand. SCPEM looks to develop a shared framework for cooperation and a basis for strategic directions for the emergency services and policing of Australia and New Zealand. The Council also strives to encourage and share best practice across jurisdictions in emergency management and police policy and operations

The Council has particular responsibilities for:

- national leadership on emergency management (all hazards) and disaster resilience, including national policies and priorities
- law enforcement issues such as police powers, criminal offences and the sharing of intelligence
- advancement of the professionalism of policing, and
- consideration of an annual Serious and Organised Crime Threat Assessment presented by the Chair of the Australian Crime Commission Board.

The Council reports to the Council of Australian Governments (COAG) on implementation of the National Strategy for Disaster Resilience.

The Council will work closely with the Standing Council on Law and Justice to ensure coordination of joint priorities, most notably in the areas of organised crime and cyber crime.

Membership

SCPEM has a rotating chair and comprises ministers responsible for Police and Emergency Management from the Commonwealth, States and Territories and New Zealand. The President of the Australian Local Government Association is also a member of SCPEM.

Both the Attorney-General and the Minister for Home Affairs and Justice currently represent the Commonwealth on SCPEM. Other Ministers may be invited to participate in Council meetings with the prior agreement of the Chair.

SCPEM will be hosted and chaired by the Northern Territory in 2013.

Secretariat

The National Security Resilience Policy Division and the Criminal Justice Division within the Department provide joint secretariat support to SCPEM.

INTER-GOVERNMENTAL COMMITTEE OF THE AUSTRALIAN CRIME COMMISSION (IGC-ACC)

Objectives

As legislated under s8 of the Australian Crime Commission Act 2002, the IGC-ACC has the following functions:

- to generally monitor the work of the ACC and ACC Board
- to oversee the strategic direction of the ACC and ACC Board, and
- to receive reports from ACC Board for transmission to the governments represented on the IGC-ACC, and transmit those reports accordingly.

Frequency of Meetings

The IGC-ACC meets twice a year, immediately prior to SCPEM. The next meeting will be held on 4-5 July 2013 in Darwin. .

Membership

The IGC-ACC comprises the Police Ministers of States and Territories and the Commonwealth Minister for Home Affairs. The Minister for Home Affairs chairs IGC-ACC meetings.

Secretariat

The SCPEM Secretariat within the Criminal Justice Division of the Department provides secretariat support to the IGC-ACC.

Transfer of IGC-ACC functions to SCPEM

The COAG decision on a more effective ministerial council system requires that the functions of IGC-ACC be transferred to SCPEM. This will require amendments to both Commonwealth and State and Territory ACC legislation (the amendments to the Commonwealth legislation must be made first). Until this occurs the IGC-ACC will continue to meet separately.

The Department is consulting with the ACC to determine how best to amend the ACC Act to give effect to the COAG decision. Once a settled Commonwealth position has been reached, the Department will consult with the ACC Board on changes which will be necessary for State and Territory legislation.

The Department does not propose to alter the ICG-ACC membership, chairing or voting rules in the transition to SCPEM.

QUINTET OF ATTORNEYS-GENERAL

The Quintet of Attorneys General meets annually and comprises the Attorneys General from the United Kingdom, United States, Canada, New Zealand and Australia. The mandate of the Quintet is to work jointly on issues of mutual concern including criminal justice and legal cooperation. To date the Quintet has met four times.

The next meeting of the Quintet is to be held 8 - 9 May 2013 in Auckland, New Zealand. The agenda usually comprises one substantive issue for discussion, with each country suggesting an additional agenda item for information sharing or discussion purposes.

The agenda for the May 2013 Quintet meeting has yet to be finalised, and a brief outlining options for agenda topics for you to lead will be provided shortly.

Contact details

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Office of Legal Services Coordination

The Office of Legal Services Coordination works to make sure Australian Government agencies receive consistent and well-coordinated legal services.

Legal services should:

- be of a high standard
- uphold the public interest
- be sensitive to the context that Commonwealth interests may be broader than those of any one agency.

We also administer the Legal Services Directions 2017. The Legal Services Directions 2017 replace the Legal Services Directions 2005, and by operation of Appendix G, paragraph 6 of the Legal Services Directions 2017, where a pre-existing instrument or document refers to the Legal Services Directions 2005, the reference will be read as a reference to the Legal Services Directions 2017.

More information about the services we provide and our responsibilities can be found by following the links below:

- Legal Services Directions 2017 and guidance notes
- Purchasing legal services
- Compliance and reporting
- Connecting government lawyers
- Commonwealth legal services expenditure

Service of court documents on the Commonwealth

Section 63 of the *Judiciary Act 1903* provides that where the Commonwealth is a party to a suit, a process in that suit is to be served on the Attorney-General, or upon some person appointed by him or her to receive service.

Service can be effected on the Commonwealth at the locations listed in the following document:

- Locations to Effect Service on the Commonwealth - December 2017 [DOCX 30KB]
- Locations to Effect Service on the Commonwealth - December 2017 [PDF 107KB]

Law firms providing legal services to the Commonwealth or its agencies may apply to the Office of Legal Services Coordination to be appointed to receive service on behalf of the Commonwealth under the *Judiciary Act 1903 (Cth).* Guidance note 9 to the Legal Services Directions 2017 provides an indication of what issues an application for appointment should address.

Annexure 2; Statutory Encroachments on Traditional Rights and Freedoms

Australian Government
Australian Law Reform Commission

Traditional Rights and Freedoms—Encroachments by Commonwealth Laws

FINAL REPORT

ALRC Report 129

December 2015

This Final Report reflects the law as at 1 November 2015

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

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Australian Government
Australian Law Reform Commission

Senator the Hon George Brandis QC

Attorney-General of Australia

Parliament House

Canberra ACT 2600

23 December 2015

Dear Attorney-General

Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges

On 19 May 2014, the Australian Law Reform Commission received Terms of Reference to undertake a *Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges.* On behalf of the Members of the Commission involved in this Inquiry and in accordance with the *Australian Law Reform Commission Act 1996,* I am pleased to present you with the Final Report on this reference *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Final Report 129, 2015).

Yours sincerely,

Rosalind Croucher

Professor Rosalind Croucher AM

President

Contents

Appendixes

Terms of Reference

Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges

I, Senator the Hon George Brandis QC, Attorney-General of Australia, having regard to the rights, freedoms and privileges recognised by the common law,

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report pursuant to section 20(1) of the *Australian Law Reform Commission Act 1996* (Cth):

- the identification of Commonwealth laws that encroach upon traditional rights, freedoms and privileges; and
- a critical examination of those laws to determine whether the encroachment upon those traditional rights, freedoms and privileges is appropriately justified.

For the purpose of the inquiry 'laws that encroach upon traditional rights, freedoms and privileges' are to be understood as laws that:

- reverse or shift the burden of proof;
- deny procedural fairness to persons affected by the exercise of public power;
- exclude the right to claim the privilege against self-incrimination;
- abrogate client legal privilege;
- apply strict or absolute liability to all physical elements of a criminal offence;
- interfere with freedom of speech;
- interfere with freedom of religion;
- interfere with vested property rights;
- interfere with freedom of association;
- interfere with freedom of movement;
- disregard common law protection of personal reputation;
- authorise the commission of a tort;
- inappropriately delegate legislative power to the Executive;
- give executive immunities a wide application;
- retrospectively change legal rights and obligations;
- create offences with retrospective application;
- alter criminal law practices based on the principle of a fair trial;
- permit an appeal from an acquittal;
- restrict access to the courts; and
- interfere with any other similar legal right, freedom or privilege.

Scope of the reference

In undertaking this reference, the ALRC should include consideration of Commonwealth laws in the areas of, but not limited to:

- commercial and corporate regulation;
- environmental regulation; and
- workplace relations.

In considering what, if any, changes to Commonwealth law should be made, the ALRC should consider:

- how laws are drafted, implemented and operate in practice; and
- any safeguards provided in the laws, such as rights of review or other accountability mechanisms.

In conducting this inquiry, the ALRC should also have regard to other inquiries and reviews that it considers relevant.

Consultation

In undertaking this reference, the ALRC should identify and consult relevant stakeholders, including relevant Commonwealth departments and agencies, the Australian Human Rights Commission, and key non-government stakeholders.

Timeframe

The Commission is to provide its interim report by December 2014 and its final report by December 2015.

Participants

Australian Law Reform Commission

President

Professor Rosalind Croucher AM

Part-time Commissioners

The Hon Justice John Middleton, Federal Court of Australia

Emeritus Professor Suri Ratnapala, TC Beirne School of Law, University of Queensland (from July 2015)

Executive Director

Sabina Wynn

Principal Legal Officers

Bruce Alston

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Senior Legal Officer

Justine Clarke (from May 2015)

Legal Officers

Robyn Gilbert (from May 2015)

Dr Julie Mackenzie (from May 2015)

Brigit Morris (until August 2015)

Shreeya Smith (from November 2014)

Advisory Committee

Professor Margaret Allars SC, Sydney Law School, University of Sydney, and Wentworth Chambers, Sydney

The Hon Robert Austin, Barrister at Law, Level 22 Chambers, Sydney

Professor Carolyn Evans, Dean, Melbourne Law School, University of Melbourne

Associate Professor Miriam Gani, ANU College of Law, Australian National University, Canberra

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1. Executive Summary

Contents

The Freedoms Inquiry

1.1 The Australian Law Reform Commission was asked to identify and critically examine Commonwealth laws that encroach upon traditional rights, freedoms and privileges recognised by the common law. The ALRC referred to this large and challenging project as the ‘Freedoms Inquiry’.

1.2 In the Report, the ALRC discusses the source and rationale of many important rights and freedoms and provides an extensive survey of current Commonwealth laws that limit them. The ALRC also discusses how laws that limit traditional rights and freedoms might be critically tested and justified and whether some of these laws merit further scrutiny. Central to this task is the question of how rights should be balanced with other rights and with the public interest, when these interests conflict. An important consideration is how laws are scrutinised by parliamentary committees and others to ensure they do not unjustifiably encroach on rights.

1.3 Identifying and critically examining laws that limit rights plays a crucial part in protecting rights, and may inform decisions about whether, and if so how, such laws might be amended or repealed. This may be seen to complement work that considers other ways to protect rights—such as by creating new causes of action or new offences, or by enacting a bill of rights. The Report contributes to broader discussion and debate about protecting rights in democratic societies. Law and law reform has an important role to play in this ongoing discussion.

Traditional rights, freedoms and privileges

1.4 The Terms of Reference,[1] provided by the Attorney-General, Senator the Hon George Brandis QC, state that laws that encroach on traditional rights, freedoms and privileges should be understood to refer to laws that:

- interfere with freedom of speech;
- interfere with freedom of religion;
- interfere with freedom of association;
- interfere with freedom of movement;
- interfere with vested property rights;
- retrospectively change legal rights and obligations;
- create offences with retrospective application;
- alter criminal law practices based on the principle of a fair trial;
- reverse or shift the burden of proof;
- exclude the right to claim the privilege against self-incrimination;
- abrogate client legal privilege;
- apply strict or absolute liability to all physical elements of a criminal offence;
- permit an appeal from an acquittal;
- deny procedural fairness to persons affected by the exercise of public power;
- inappropriately delegate legislative power to the executive;
- authorise the commission of a tort;
- disregard common law protection of personal reputation;

1 The Terms of Reference are set out at the front of the Report and on the ALRC website: <www.alrc.gov.au/inquiries/freedoms>.

- give executive immunities a wide application;
- restrict access to the courts; and
- interfere with any other similar legal right, freedom or privilege.

1.5 There are other important rights not expressly included in the extensive list in the Terms of Reference.[2] There were calls for some of these other rights to be more fully considered in this Inquiry, including: the right to personal liberty—'the most elementary and important of all common law rights';[3] the right not to be unlawfully or arbitrarily detained; the right to privacy—'upon which the exercise of many other rights depends';[4] and the right not to be tortured.[5] Some of these are considered to some extent in the Report, in an integrated way, in chapters concerned with related rights. The broad right to personal liberty, for example, is served by many of the rights listed in the Terms of Reference, including the rights to freedom of speech, movement, assembly and religion and the right to a fair trial.[6]

Common law and constitutional settings

1.6 The rights, freedoms and privileges set out in the Terms of Reference have a long and distinguished heritage. Many have been recognised by courts in Australia, England and other common law countries for centuries. Some are recognised as human rights and are protected in international agreements and bills of rights in other jurisdictions. Human rights have been said to 'incorporate or enhance' rights at common law. In their history and development, common law rights and human rights clearly influenced each other.

1.7 Some common law rights and freedoms are considered to be so important that they have constitutional status, including in countries without a bill of rights. While in Australia 'common law constitutionalism' has not been applied by courts to invalidate statutes, the special status of some rights is reflected in how courts interpret legislation. Applying the 'principle of legality', courts will not interpret a statute so that it encroaches on, or limits, a fundamental right or common law principle unless Parliament has made it unmistakably clear that it intended the statute to do so. This is similar to interpretation provisions in some human rights statutes.

1.8 The *Australian Constitution* expressly protects a handful of rights and has been found to imply certain others, including freedom of political communication. The High Court may also have moved towards entrenching procedural fairness in courts as a constitutional right. However, the *Constitution* does not directly and entirely protect many rights and freedoms, because those who framed the *Constitution* chose to leave

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2 A list of many other traditional rights and freedoms was included in the last chapter of the Issues Paper.
3 Australian Human Rights Commission, *Submission 141*.
4 Australian Privacy Foundation, *Submission 116*.
5 Refugee Advice & Casework Service, *Submission 119*.
6 Notwithstanding this, some stakeholders would have preferred dedicated chapters on these other rights. However, given the extensive scope of this Inquiry, the ALRC chose to focus on the rights listed in the Terms of Reference.

most matters of policy to Parliament, and relied on the common law and other mechanisms to protect rights.

1.9 International instruments that Australia has ratified, such as the *International Covenant on Civil and Political Rights*, also provide rights and freedoms with some protection from statutory encroachment, but generally only through the interpretation of statutes that are unclear or ambiguous. Although international law is an important influence on the common law, it does not create binding domestic law in Australia nor does it abrogate the power of the Commonwealth Parliament to make laws that limit rights.

1.10 The jurisprudence in relation to international human rights law is a valuable resource for laws makers. While the focus of the Inquiry is upon common law rights and freedoms, the ALRC is required, under its Act, to aim to ensure its recommendations are consistent with Australia's international obligations.[7]

Approach

1.11 The Terms of Reference set out two main tasks. The first was to identify Commonwealth laws that encroach upon traditional rights, freedoms and privileges. The second task was to critically examine those laws to determine whether the encroachments are appropriately justified. The ALRC was asked to consider, among other areas of law, commercial and corporate regulation, environmental regulation, and workplace relations.

1.12 Most chapters of the Report are structured to include the following elements with respect to each right, freedom or privilege:

- an analysis of the source and rationale of the right;
- an overview of how the right is protected from statutory encroachment by the *Constitution*, the principle of legality, and international law;
- a general discussion of how limits on the right might be justified;
- an extensive survey of current Commonwealth laws that may limit the right; and
- a discussion of the justifications for some of these laws, with some laws being identified as possibly unjustified and therefore deserving further review.

1.13 The Report sets out many of the Commonwealth laws that may be said to interfere with the common law rights and freedoms listed in the Terms of Reference. It provides an extensive survey of such laws, without making concluded judgments about whether these laws are appropriately justified.[8]

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7 *Australian Law Reform Commission Act 1996* (Cth) s 24(1).

8 A list of Commonwealth laws cited in the Report, including those that may interfere with rights and freedoms, appears in Appendix 1. Lists of laws identified as limiting rights are set out in G Williams, *Submission 76*; Institute of Public Affairs, *Submission 49*. See also Simon Breheny and Morgan Begg, 'The State of Fundamental Legal Rights in Australia: An Audit of Federal Law' (Occasional Paper, Institute of Public Affairs, 2014).

1.14 It is widely recognised that there are reasonable limits to most rights. Only a handful of rights are considered to be absolute. Limits on traditional rights are also recognised by the common law, although such limits may be regarded as part of the *scope* of common law rights. But how can it be determined whether a law that limits an important right is justified? Proportionality tests are now the most widely accepted tool for structuring this analysis.

1.15 Proportionality is used to test limits on constitutional rights by the High Court and by constitutional courts and law makers around the world. This involves considering whether a given law that limits rights has a legitimate objective and is suitable and necessary to meet that objective, and whether—on balance—the public interest pursued by the law outweighs the harm done to the individual right. The use of proportionality tests suggests that important rights and freedoms should only be interfered with reluctantly—when truly necessary. In the Report, the ALRC often draws upon proportionality analyses when considering whether particular laws that limit rights are justified.

1.16 The ALRC's approach in this Inquiry was to determine a forward-looking law reform response that met the essential aspects of the Terms of the Reference across its broad range. Hence in many chapters of the Report, laws are identified that may be unjustified and therefore warrant further review.

1.17 The highlighted laws have been selected following consideration of a number of factors, including whether the law has been criticised for limiting rights in submissions, parliamentary committee reports or other commentary. The fact that a law limits multiple rights has also sometimes suggested the need for further review. Where a law has been identified as being amenable to further review, the conclusion may be that the appropriate action is:

- a review of specific statutes or provisions;
- a review in a coordinated fashion across Commonwealth, state and territory laws;
- consideration as part of existing regular review and monitoring processes; and/or
- a new periodic review.

1.18 The fact that a law has been identified as meriting further review does not imply that the ALRC has concluded the law is unjustified. Further evidence and analysis would be necessary to support such specific conclusions.[9]

1.19 While some stakeholders said the ALRC should have recommended specific changes to laws, others recognised that this was not possible and supported the approach taken.[10] It was acknowledged that the Inquiry was 'extremely large and

9 There may also be other laws that deserve further review, which are not highlighted in the Report.
10 See, eg, Law Council of Australia, *Submission 140*; Australian Institute of Company Directors, *Submission 105*.

complex'[11] and covered 'very broad terrain'.[12] Professor Graeme Orr, for example, said that, with 'all the goodwill in the world, it is hard to see how the ALRC can inform itself expertly of the myriad of social contexts needed to cover the vast terrain of issues and laws flagged in its interim report'.[13] Given the breadth of the Inquiry, the ALRC considered that more detailed recommendations for reform—other than the reviews suggested—would require dedicated projects and further evidence, consultation and analysis. In a number of specific areas the ALRC has already undertaken inquiries, and the recommendations in the final reports of those inquiries provide a foundation upon which Government may act.[14]

1.20 The Report also provides a thorough analysis of how laws are scrutinised by government agencies, parliamentary committees and others for compatibility with rights. This is part of what has been called a 'democratic culture of justification'.[15] The Report describes the role of bodies, such as the Independent National Security Legislation Monitor, the Australian Human Rights Commission and, indeed, the ALRC itself, in contributing to a general vigilance about encroachments on rights.

1.21 The Report discusses how some scrutiny processes might be improved, for example, by: providing additional guidance and assistance to policy makers; improving the quality of explanatory material and statements of compatibility; reducing overlap between the work of the three parliamentary scrutiny committees; giving the committees longer to conduct their scrutiny; and ensuring Parliament has sufficient time to consider committee reports.

1.22 The Councils for Civil Liberties said that the Inquiry had 'provided an opportunity for a national focus on the rapidly increasing numbers of statutes which undermine our rights and freedoms'.[16] The Australian Institute of Company Directors expressed appreciation of 'the extensive work the ALRC has undertaken' that has 'shone a light on traditional rights and freedoms that have been eroded by legislation, commonly without recognition, fanfare or compelling justification'.[17] The Australian Human Rights Commission commended the Interim Report's 'comprehensive review of the source of traditional rights, freedoms and privileges'.[18]

Encroachments on rights, freedoms and privileges

1.23 Chapters 2 and 3 of the Report lay the foundations for the ALRC's analysis of laws that encroach on rights, freedoms and privileges. Chapters 4 to 20 each consider

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11 Refugee Advice & Casework Service, *Submission 119*.
12 Public Interest Advocacy Centre, *Submission 133*.
13 G Orr, *Submission 79*.
14 Secrecy provisions, discussed in Ch 4, for example, were the subject of an ALRC inquiry in 2008–09: Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009). A list of ALRC reports referred to in the Report is included at Appendix 2.
15 Murray Hunt, 'Introduction' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 1, 15–16.
16 Councils for Civil Liberties, *Submission 142*.
17 Australian Institute of Company Directors, *Submission 105*. The AICD said that the ALRC's discussion would also 'benefit State and Territory Governments in their approach to law making'.
18 Australian Human Rights Commission, *Submission 141*.

one or two of the listed rights, freedoms or privileges in the Terms of Reference. Chapters are grouped around related rights, beginning with a set of chapters on the 'freedoms' in the list, and finishing with chapters on property rights. Each chapter identifies areas where further review may be merited. In some cases laws may encroach on a number of different common law rights and freedoms, as in the case of counter-terrorism and national security laws, and migration laws.

Freedom of speech

1.24 Freedom of speech has been described as 'the freedom *par excellence*; for without it, no other freedom could survive' and is closely linked to other fundamental freedoms, such as freedom of religion, thought, and conscience.

1.25 In Australia, legislation prohibits, or renders unlawful, speech or expression in many different contexts—including in relation to various terrorism offences and terrorism-related secrecy offences, other secrecy laws and the *Racial Discrimination Act 1975* (Cth) (*RDA*). At the same time, many limitations on speech have long been recognised by the common law itself, such as incitement to crime, obscenity and sedition.

1.26 The ALRC has not established whether s 18C of the *RDA* has, in practice, caused unjustifiable interferences with freedom of speech. Part IIA of the *RDA*, of which s 18C forms a part, would benefit from more thorough review in relation to freedom of speech. However, any such review should take place in conjunction with consideration of anti-vilification laws more generally.

1.27 There is also reason to review the range of legislative provisions that protect the processes of tribunals, commissions of inquiry and regulators; and whether Commonwealth secrecy laws provide for proportionate limitations on freedom of speech.

Freedom of religion

1.28 Religious freedom encompasses freedom of conscience and belief, the right to observe or exercise religious beliefs, and freedom from coercion or discrimination on the grounds of religious (or non-religious) belief.

1.29 There are very few, if any, provisions in Commonwealth laws that interfere with freedom of religion. The main areas of tension arise where religious freedom intersects with anti-discrimination laws, which have the potential to limit the exercise of freedom of conscience outside liturgical and worship settings.

1.30 There is no obvious evidence that Commonwealth anti-discrimination laws significantly encroach on freedom of religion in Australia, especially given the existing exemptions for religious organisations. Nevertheless, concerns about freedom of religion should be considered in future initiatives directed towards the consolidation of Commonwealth anti-discrimination laws, or harmonisation of Commonwealth, state and territory anti-discrimination laws.

Freedom of association and assembly

1.31 Freedom of association concerns the right of all persons to group together voluntarily for a common goal or to form and join an association, such as a political party, a professional or sporting club, a non-governmental organisation or a trade union. Freedom of association is different from, but also closely related to, freedom of assembly. Australians are generally free to associate with whomever they like and to assemble to participate in activities including, for example, a protest or demonstration.

1.32 A wide range of Commonwealth laws may be seen as interfering with freedom of association or freedom of assembly. These include counter-terrorism and other criminal laws and laws concerning public assembly, workplace relations, migration, and anti-discrimination. Many of these laws provide limitations on freedom of association or assembly that have long been recognised by the common law itself—for example, in relation to consorting with criminals, public assembly and other aspects of preserving public order. Areas of most concern include aspects of counter-terrorism and the character test in migration law.

1.33 Workplace relations laws in Australia have been subject to criticism on the basis of lack of compliance with International Labour Organization Conventions. However, while some of these provisions may offend ILO norms, they do not necessarily infringe common law freedom of association.

Freedom of movement

1.34 Freedom of movement at common law primarily concerns the freedom of citizens both to move freely within their own country and to leave and return to their own country. Freedom of movement has commonly—both in theory and practice—been subject to exceptions and limitations. For example, the freedom does not extend to people trying to evade punishment for a crime and, in practice, a person's freedom to leave one country is limited by the willingness of other countries to allow that person to enter.

1.35 A range of Commonwealth laws may be seen as interfering with freedom of movement. Some of these provisions relate to limitations that have long been recognised by the common law itself, for example, in relation to official powers of arrest or detention, customs and passport controls, and quarantine.

1.36 While many laws interfering with freedom of movement have strong and obvious justifications, it may be desirable to review some laws to ensure that they do not unjustifiably interfere with the right. The areas of concern include various counter-terrorism measures, including aspects of the control and preventative detention order provisions and declared area offences in the *Criminal Code* (Cth). Provisions of the *Bankruptcy Act 1966* (Cth), which provide that a bankrupt person must automatically give their passport to the trustee, also warrant review.

Fair trial

1.37 The right to a fair trial is an absolute right and a requirement of the rule of law. Fundamentally, a fair trial is designed to prevent innocent people being convicted of crimes. Fair trials protect life, liberty, property, reputation and other fundamental rights and interests.

1.38 Some widely recognised components of a fair trial that have been subject to statutory limits include: a trial should be held in public; a defendant has a right to a lawyer; and a defendant has the right to confront the prosecution's witnesses and test their evidence, and to obtain and adduce their own evidence. Other components of a fair trial, such as the burden of proof and the privilege against self-incrimination, are discussed in separate chapters.

1.39 The common law and statute both feature some limits on fair trial rights, for example to protect vulnerable witnesses and to protect national security interests. Some Commonwealth laws that may be said to affect fair trial rights are uncontentious, but others may need to be reviewed to ensure they are justified. Changes to trial procedures for national security reasons have been criticised, as have laws that protect certain confidential communications even from a defendant seeking to obtain the communications to help prove their innocence in a criminal trial.

Burden of proof

1.40 In criminal trials, the prosecution bears the burden of proof. This has been called 'the golden thread of English criminal law' and 'a cardinal principle of our system of justice'. This principle and the related principle that guilt must be proved beyond reasonable doubt are fundamental to the presumption of innocence.

1.41 A number of Commonwealth laws reverse the legal burden of proof on some elements of a criminal offence and may be seen as interfering with the principle that a person is presumed innocent until proved guilty according to law. Reversal of the legal burden of proof on an issue essential to culpability in an offence arguably provides the greatest interference with the presumption of innocence, and its necessity requires the strongest justification.

1.42 Further review of the reversals of the legal burden of proof in these laws may be warranted. Laws that may merit further review include deeming provisions in relation to the requisite intention or belief for serious drug offences, and directors' liability for taxation offences committed by a corporation. Any such review should consider whether placing an evidential rather than legal burden on the defendant would be sufficient to balance the presumption of innocence with the legitimate objectives pursued by these laws.

Strict or absolute liability

1.43 The criminal justice system presumes that an evil intention or knowledge of the wrongfulness of the act (*mens rea*) is necessary to found criminal liability. However, some statutes impose strict or absolute liability on one or more elements of an offence.

1.44 There are strict and absolute liability offences across many areas of law, including corporate and commercial regulation, environmental regulation, work health and safety, customs and border protection, counter-terrorism and national security, and copyright. Areas of particular concern are: various terrorism offences, including declared area offences and offences relating to dealing with terrorism-related assets and financial transactions; reporting requirements under customs legislation; and the imposition of strict liability in relation to commercial scale infringement offences in copyright law.

1.45 Strict and absolute liability provisions should be reviewed to ensure they provide a consistent and uniform standard of safeguards. Any such review should include consideration of provisions in corporations law and prudential and environmental regulation.

Privilege against self-incrimination

1.46 The privilege against self-incrimination allows a person to refuse to answer any question, or produce any document or thing, if doing so would tend to expose the person to conviction for a crime. Many Commonwealth statutes provide coercive information-gathering and investigation powers to Commonwealth agencies, and many of these statutes abrogate the privilege against self-incrimination. Instead, the statutes provide that the information provided under compelled questioning (and in some cases, information discovered as a result of that questioning) is not admissible in subsequent proceedings.

1.47 The High Court has expressed concern that, in certain circumstances, the compelled questioning of persons, without the protection of the privilege against self-incrimination, could fundamentally change the nature of the adversarial system.

1.48 There should be further review of the privilege against self-incrimination and this could consider whether its abrogation in Commonwealth laws has been appropriately justified, and whether the statutory immunities offer appropriate protection.

Legal professional privilege

1.49 Legal professional privilege allows a person to resist a demand to reveal communications between the person and their lawyer. The privilege is rarely abrogated in Commonwealth laws.

1.50 Five statutes concerned with open government and the prevention of corruption, and two concerned with terrorism and the proceeds of crime, provide coercive information-gathering powers and abrogate the privilege. However, the statutes contain immunities to compensate for the loss of the privilege. In each case, the statute provides that communications between client and lawyer revealed under compulsion are not admissible in subsequent proceedings.

1.51 Laws that require monitoring of communications between a client and lawyer may not limit the privilege, but do breach the underlying principle that communications between client and lawyer should be confidential. Further review may be warranted.

Retrospective laws

1.52 At common law, it is abhorrent to impose criminal liability on a person for an act that was lawful when it was done. The Australian Parliament has rarely created offences with retrospective application. The few offences that have been enacted have concerned behaviour that could never have been considered innocent, legitimate or moral, such as war crimes and offences against Australians overseas, and could be justified on this basis.

1.53 Amendments made in 2011 to the people smuggling offences in the *Migration Act 1958* (Cth) may have enlarged the scope of the criminal offence with retrospective effect to 1999, thereby criminalising behaviour that was not unlawful when it occurred.

1.54 Retrospective civil laws, that is, laws that retrospectively change legal rights and obligations, are reasonably common. Retrospective laws are not an effective way of deterring behaviour, but may serve other policy objectives such as ensuring fairness, protecting the public, or addressing the consequences of a court decision that unsettled previous understandings of the law.

1.55 Taxation laws with significant periods of retrospectivity may create uncertainty and inconvenience. Migration laws that have the stated intention of deterring behaviour, but apply to behaviour that occurred before the commencement of the legislation, could be further reviewed to ensure that their retrospective nature is proportionate and appropriately justified.

Procedural fairness

1.56 A fair procedure for decision making is an important component of the rule of law. The common law recognises a duty to accord a person procedural fairness before a decision that affects them is made.

1.57 A number of Commonwealth laws affect the common law duty to afford procedural fairness to persons affected by the exercise of public power. Excluding procedural fairness may be justified in some instances—in particular, where urgent action needs to be taken in the public interest.

1.58 Some migration laws that encroach on the duty to afford procedural fairness would benefit from further review, given the gravity of the consequences for those affected by the relevant decision. Migration laws that might be further scrutinised include those relating to the mandatory cancellation of visas and the fast track review process for decisions to refuse protection visas.

Judicial review

1.59 Access to the courts to challenge administrative action is an important common law right and superior courts of record have an inherent jurisdiction to conduct judicial review.

1.60 The primary mechanism used to restrict access to the courts is the privative clause—essentially a legislative attempt to limit access to judicial review in a certain field. However, the courts have construed privative clauses so narrowly that they are sometimes largely or even entirely deprived of effect.

1.61 Privative clauses in Commonwealth laws should be reviewed. Consideration should be given to whether alternative solutions that do not restrict access to the courts may be implemented to achieve the underlying policy objective of the provision (for example, to avoid delays in implementing administrative decisions).

Immunity from civil liability

1.62 Immunity provisions in legislation can limit the legal protection given to important rights and freedoms. Although sometimes necessary, laws that give immunity from civil liability and authorise what would otherwise be a tort operate to limit individual rights and deny civil redress—and therefore require careful justification.

1.63 Many Commonwealth statutes give some immunity to the federal police and 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.

1.64 Executive immunities warrant careful justification and consideration should be given to their appropriate scope. This issue was reviewed more fully in the ALRC's 2001 report, *The Judicial Power of the Commonwealth*. Some of the recommendations in that report warrant further consideration by Government.

Delegating legislative power

1.65 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.

1.66 Laws that will 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 also to make the law.

1.67 However, delegating legislative power to the Executive is now commonplace and is said to be essential for efficient and effective government. Parliament delegates such power not only to government ministers, but also to various government agencies such as the Australian Taxation Office and the Australian Securities and Investments Commission.

1.68 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.

Property rights

1.69 The common law has long regarded a person's property rights as fundamental. However, property rights could be encroached upon by legislative action, so long as any deprivation was not arbitrary and reasonable compensation was given.

1.70 In relation to personal property rights, the key areas of concern include banking and taxation laws, personal property securities, intellectual property and criminal laws. Many have been the subject of recent reviews or extended consideration by parliamentary committees or the High Court. The breadth of the *Proceeds of Crime Act 2002* (Cth) is one area that may require further consideration. The Parliamentary Joint Committee on Law Enforcement provides ongoing scrutiny of the Commonwealth legislation and the Australian Federal Police provide annual reports. However, given the potential impact of unexplained wealth measures on personal property, and the proposal for a national coordinated scheme by the Committee, the ongoing scrutiny needs to ensure that such a scheme is proportionate in light of its objectives to meet the obligations agreed to under the *United Nations Convention Against Corruption*. In addition, the ALRC also suggests that a further review be scheduled in due course.

1.71 With respect to real property and the rights of land owners, the main focus of concern is on interferences with the right to use the land and water. State environmental laws are not the concern of this Inquiry; however, from the landholders' perspective the complexity of the 'interference' can only be understood in the light of both state and Commonwealth laws. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*) interferes with the right to use land to a limited extent. The next scheduled review of the *EPBC Act* could reassess whether the interferences are proportionate and explore a range of compensatory mechanisms. This review may also afford an opportunity for consideration of the interrelationship of Commonwealth and state laws. The *Water Act 2007* (Cth) does not interfere in a negative way with the water entitlements in the Murray-Darling Basin that have been established under state and territory statutes. However, it may be appropriate for the Act to be reviewed periodically.

Counter-terrorism and national security laws

1.72 Acts of terrorism are a gross violation of fundamental rights to life and safety and the Government has both a right and a duty to take action to protect its citizens.[19] This may require the enactment of legislation that places limits on traditional rights and freedoms. National security is recognised as a legitimate objective of such limitations, at common law and in international human rights law.[20]

1.73 Counter-terrorism and national security laws that encroach on rights and freedoms should nevertheless be justified, to ensure the laws are suitable, necessary and represent a proper balance between the public interest and individual rights.

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19 See, eg, United Nations Security Council, Resolution 1373 (2001), Adopted by the Security Council at its 4385th Meeting, 28 September 2001. This resolution required States to ensure that terrorists, their accomplices and supporters be brought to justice and that terrorist acts are established as serious criminal offences in domestic laws and the punishment duly reflects the seriousness of such terrorist acts.

20 See, eg, *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 161. For example, under the ICCPR national security is recognised expressly as a permissible limitation in relation to freedom of movement, freedom of expression, the right to peaceful assembly and freedom of association: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 12.3; 19.3; 21; 22.2 respectively.

1.74 In the Report, a range of counter-terrorism and national security laws are identified that interfere with traditional rights and freedoms. These include laws that limit freedom of speech (for example, laws about advocating terrorism and disclosing intelligence operations); freedom of association and assembly (for example, control orders, preventative detention orders, and laws about foreign incursions and recruitment); laws that impose strict or absolute liability (for example, in relation to offences for disclosing certain classified operational information); laws that change fair trial procedures (for example, to protect sensitive information about national security).

1.75 Some counter-terrorism laws engage multiple rights. For example, the control order and preventative detention order regimes contained in divs 104–105 of the *Criminal Code* have implications for freedom of speech, freedom of association and freedom of movement.

1.76 Counter-terrorism and national security laws should be subject to ongoing and careful review, given the extent to which they may interfere with individual rights. While some of these laws have been subject to significant scrutiny, including by parliamentary committees and the Independent National Security Legislation Monitor (INSLM), it has been suggested that many are not proportionate, and would benefit from further consideration and analysis.

1.77 Ongoing review of these laws falls within the functions of the INSLM[21] and the Parliamentary Joint Committee on Intelligence and Security (Intelligence Committee).[22] INSLM and Intelligence Committee review of legislation is discussed further in Chapter 3.

Migration laws

1.78 A number of migration laws have also been identified as encroaching on traditional rights and freedoms, including freedom of association and assembly (the operation of the 'character test' in the *Migration Act*); the right not to be subject to retrospective laws (the *Migration Act* people smuggling offence and provisions converting applications for permanent protection visas into applications for temporary protection visas); the right to procedural fairness (for example, the fast track review process for decisions to refuse protection visas); and the right to judicial review (for example, the privative clause in the *Migration Act*).

1.79 Migration laws pursue the objective of regulating, in the national interest, the coming into, and presence in, Australia of non-citizens.[23] Pursuit of this objective may involve some limitations on traditional rights and freedoms. However, such limitations should be proportionate.

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21 *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1B). At 1 November 2015, the Acting INSLM was preparing a report on any impact on journalists in the operation of s 35P of the *ASIO Act* concerning offences for the disclosure of information relating to a 'special intelligence operation' and was seeking public submissions concerning the adequacy of the safeguards relating to the control order regime provided for by div 104 of the *Criminal Code*.

22 *Intelligence Services Act 2001* (Cth) s 29(1)(bb).

23 *Migration Act 1958* (Cth) s 4.

1.80 In this Inquiry, significant concerns were expressed that a number of migration laws are not proportionate. The ALRC suggests that these laws would benefit from further analysis to ensure that the laws do not interfere unjustifiably with traditional rights and freedoms.[24]

Further consideration or review

1.81 A range of Commonwealth laws appear to warrant further consideration or review. Some of these laws might be reviewed by a parliamentary committee, a government department, or a body such as the INSLM or the ALRC itself. Others may simply warrant reconsideration by government, given their effect on traditional rights and freedoms.

Freedom of speech

- *Racial Discrimination Act 1975* (Cth) pt IIA—review in conjunction with consideration of anti-vilification laws more generally.
- Legislative provisions that protect the processes of tribunals, commissions of inquiry and regulators, for example *Veterans' Entitlements Act 1986* (Cth) s 170.
- Secrecy offences, including the general secrecy offences in *Crimes Act 1914* (Cth) ss 70, 79.
- *Criminal Code* s 80.2C (advocating terrorism), ss 102.1, 102.3, 102.5, 102.7 (prescribed terrorist organisations), s 105.41 (preventative detention orders)—review by INSLM and the Intelligence Committee as part of their ongoing roles.
- *Australian Security Intelligence Organisation Act* 1979 (Cth) (*ASIO Act*) s 35P (special intelligence operations)—review by INSLM and the Intelligence Committee as part of their ongoing roles.

Freedom of association and assembly

- *Criminal Code* s 102.8, divs 104–105 (control orders and preventative detention orders), s 119 (foreign incursions and recruitment)—review by INSLM and the Intelligence Committee as part of their ongoing roles.
- *Migration Act* s 501 (character test).

Freedom of movement

- *Criminal Code* divs 104–105 (control orders and preventative detention orders), s 119 (declared area offences)—review by INSLM and the Intelligence Committee as part of their ongoing roles.
- *Bankruptcy Act 1966* (Cth) s 77, which provides that a bankrupt person must automatically give their passport to the trustee in bankruptcy.

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24 The Law Council of Australia has suggested that an independent body should be appointed to review immigration legislation: Law Council of Australia, *Submission 140*.

Fair trial

- Uniform Evidence Acts pt 3.10 (client legal privilege and a privilege for religious confessions without exceptions for defendants seeking to adduce evidence in support of their defence).

Burden of proof

- *Criminal Code* deeming provisions in relation to the fault elements for drug offences, for example *Criminal Code* s 302.5.
- *Taxation Administration Act 1953* (Cth) s 8Y, in relation to directors' liability for taxation offences committed by a corporation.

Strict or absolute liability

- Legislative provisions that provide for strict and absolute liability in corporations law and prudential and environmental regulation, for example, *Corporations Act 2001* (Cth) s 588G.
- Legislative provisions that provide for strict liability in relation to commercial scale copyright infringement offences under the *Copyright Act 1968* (Cth)—review by the Productivity Commission as part of its current review into intellectual property arrangements.
- *Criminal Code* ss 102.5, 102.8 (associating with a terrorist organisation), ss 119.1, 119.2 (declared area offences)—review by INSLM and the Intelligence Committee as part of their ongoing roles.
- *ASIO Act* s 34ZS (disclosure of operational information concerning an ASIO warrant)—review by INSLM and the Intelligence Committee as part of their ongoing roles.
- *Charter of the United Nations Act 1945* (Cth) ss 20–21 (freezable assets or giving freezable assets to a proscribed person or entity)—review by INSLM and the Intelligence Committee as part of their ongoing roles.

Privilege against self-incrimination

- Legislative provisions that abrogate the privilege against self-incrimination, particularly those that provide only use immunity, for example *Australian Crime Commission Act 2002* (Cth) s 30.
- *Taxation Administration Act 1953* (Cth) sch 1 s 353–10, which abrogates the privilege against self-incrimination and provides no immunity.

Legal professional privilege

- *Criminal Code* s 105.38(1), which requires contact between a lawyer and a detained person to be capable of being monitored.
- *ASIO Act* s 34ZQ(2), which requires contact between a lawyer and a detained person to be capable of being monitored.

Retrospective laws

- *Migration Act* s 228B, which defines the scope of the offence of people smuggling.
- *Income Tax Assessment Act 1997* (Cth) div 13, regarding transfer pricing.
- *Migration Act* s 45AA and *Migration Regulations 1994* (Cth) reg 2.08F, which converted applications for permanent protection visas into temporary protection visas.

Procedural fairness

- *Migration Act* s 501(3A) and associated provisions relating to the mandatory cancellation of visas on character grounds;
- *Migration Act* pt 7AA (fast track review process for decisions to refuse protection visas).

Judicial review

- Privative clauses that restrict access to judicial review, for example *Migration Act* s 474.

Property rights

- *Proceeds of Crime Act 2002* (Cth)—ongoing scrutiny by the Parliamentary Joint Committee on Law Enforcement and, in due course, by a further independent review.
- *EPBC Act*—as part of the next scheduled independent review.
- *Water Act*—in due course, by a further independent review.

Law reform process

1.82 A major aspect of building the evidence base to support the formulation of ALRC recommendations for reform is consultation, acknowledging that widespread community consultation is a hallmark of best practice law reform.[25] Under the provisions of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC 'may inform itself in any way it thinks fit' for the purposes of reviewing or considering anything that is the subject of an inquiry.[26]

1.83 The process for each law reform project may differ according to the scope of the inquiry, the range of stakeholders, the complexity of the laws under review, and the period of time allotted for the inquiry. For each inquiry the ALRC determines a consultation strategy in response to its particular subject matter and likely stakeholder interest groups. The nature and extent of this engagement is normally determined by

25 Brian Opeskin, 'Measuring Success' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 202.
26 *Australian Law Reform Commission Act 1996* (Cth) s 38.

the subject matter of the reference and the timeframe in which the inquiry must be completed under the Terms of Reference. While the exact procedure is tailored to suit each inquiry, the ALRC usually works within an established framework, outlined on the ALRC's website.[27]

1.84 Following ALRC established practice, a multi-pronged strategy of seeking community comments was used in this Inquiry. Two consultation documents were released to facilitate focused consultations in a staged way throughout the Inquiry: an Issues Paper, in December 2014 and an Interim Report in July 2015.[28]

1.85 Two national rounds of stakeholder consultation meetings, teleconferences and roundtables were also conducted following the release of each of the consultation documents. The Terms of Reference for this Inquiry directed the ALRC to 'identify and consult with relevant stakeholders, including relevant Commonwealth departments and agencies, the Australian Human Rights Commission, and key non-government stakeholders'. The individuals, departments, agencies and the many bodies consulted in the Inquiry are listed in Appendix 3. In a broad-reaching inquiry of this kind, the consultations and the submissions received were particularly valuable in assisting the ALRC to achieve the balance in breadth and depth necessary to discharge the brief set out in the Terms of Reference.

1.86 The ALRC received 151 submissions.[29] Submissions were received from a wide range of people and agencies, including: individuals; academics; lawyers; unions; employer organisations; employment agencies; community legal centres; law societies and representative groups; state and federal government agencies; and peak bodies.

1.87 In this Inquiry the ALRC also conducted a national series of symposia, in September and October 2015, focusing on aspects of the Inquiry raised in the Interim Report. The first, held in Brisbane, focused on property rights. In Perth the focus was 'Freedom's Limits: Speech, Association and Movement in the Australian Legal System'. In Melbourne, the topic was 'Fair trial, procedural fairness and other traditional rights'; and the Sydney topic was 'Proportionality and the Constitution'.[30]

1.88 The ALRC acknowledges the contribution of all those who participated in the consultation rounds, the symposia and in preparing submissions. It is the invaluable work of participants that enriches the whole consultative process and the ALRC records its deep appreciation for this contribution.

1.89 The ALRC also convened an Advisory Committee of experts, which met twice during the Inquiry. The Committee comprised 13 members, and their names appear at the beginning of the Report. Professor Barbara McDonald of the University of Sydney also provided crucial assistance, particularly in the preparation of the Issues Paper.

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27 <www.alrc.gov.au/law-reform-process>.
28 Australian Law Reform Commission, *Traditional Rights and freedoms—Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014); Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Interim Report No 127 (2015).
29 These are all published on the ALRC website. Seven confidential submissions were also received.
30 Presentations from the symposia are available on the ALRC website.

1.90 In this Inquiry, the ALRC was able to call upon the expertise and experience, as part-time Commissioners, of the Hon Justice John Middleton of the Federal Court of Australia and, from 9 July 2015, Emeritus Professor Suri Ratnapala. Invaluable input was also provided by six expert readers who commented on certain chapters of the report. Their names appear at the beginning of the Report.

1.91 While the ultimate responsibility in each inquiry remains with the Commissioners of the ALRC, the establishment of a panel of experts as an Advisory Committee, and the enlisting of expert readers, are invaluable aspects of ALRC inquiry processes—assisting in the identification of key issues, providing quality assurance in the research and consultation effort, and assisting with the development of reform proposals. The ALRC acknowledges the considerable contribution made by the Advisory Committee and the expert readers in this Inquiry and expresses its gratitude to them for voluntarily providing their time and expertise.

1.92 Once tabled in the Australian Parliament, the Report becomes a public document.[31] ALRC reports are not self-executing documents. The ALRC is an advisory body and provides recommendations about the best way to proceed—but implementation is a matter for others. However, the ALRC has a strong track record of having its advice followed. The Annual Report 2014–15 records that 60% of ALRC reports are substantially implemented and 26% are partially implemented, representing an overall implementation rate of 86%.[32]

Outcomes

1.93 The overall effect of the Report will be to provide a significant contribution to a broader discussion and debate about protecting rights in democratic societies. The specific outcomes of the ALRC's review include :

- discussion of the source and rationale of the traditional rights and freedoms listed in the Terms of Reference;
- consideration of the protection from statutory encroachment given to traditional rights and freedoms by the *Constitution*, principles of statutory interpretation and international law—complementing work that considers other ways to protect rights;
- an extensive survey of Commonwealth laws that encroach on the listed traditional rights and freedoms recognised by the common law;
- analysis of the justification for a range of these laws;
- discussion of a proportionality test to provide a structured method of reviewing the justification of laws that limit rights and freedoms;

31 The Attorney-General is required to table the report within 15 sitting days of receiving it: *Australian Law Reform Commission Act 1996* (Cth) s 23.

32 Australian Law Reform Commission, *Annual Report 2014–2015*, Report No 128 (2015) 27. See also Appendixes F and G.

- analysis of the law-making processes for testing compatibility of laws with fundamental rights and how these can be improved to ensure that laws that limit traditional rights and freedoms are thoroughly scrutinised; and
- the highlighting of laws that warrant further consideration or review—to provide a road map for future work to ensure that encroachments on rights, freedoms and privileges are avoided or appropriately justified.

2. Rights and Freedoms in Context

Contents

Summary

2.1 This chapter provides the conceptual foundation for the Inquiry and considers such questions as: What are traditional rights, freedoms and privileges? What is their source and where may they be found? How do they relate to human rights in international law and bills of rights? To what extent may Parliament interfere with traditional rights and freedoms? Should laws that limit rights and freedoms require particular scrutiny and justification and, if so, how might this be done—by applying what standard and following what type of process?

Common law foundations

2.2 The rights, freedoms and privileges set out in the Terms of Reference have a long and distinguished heritage. Many have been recognised in Australia, England and other common law countries for centuries. They form part of the history of the common law, embodying key moments in constitutional history, such as the sealing of the Magna Carta in 1215,[1] the settlement of parliamentary supremacy following the

1 ‘The liberties often associated with the *Magna Carta* were a product of the institutions of Parliament and the Courts, over the course of centuries. However, the development of those institutions was significantly influenced by the *Magna Carta*’: James Spigelman, ‘Magna Carta: The Rule of Law and Liberty’ (Centre for Independent Studies, 15 June 2015) 1. See also Paul Brand, ‘Magna Carta and the Development of the Common Law’ (Patron’s Address, Academy of Law, Sydney, 18 May 2015); Nicholas Cowdery, ‘Magna Carta—800 Years Young’ (Speech, St James’ Church, Sydney, 14 June 2015).

Glorious Revolution of 1688 and the enactment of the *Bill of Rights Act 1688*.[2] They were recognised and developed by the courts and some were declared and affirmed by historic statutes and further developed by modern legislation.

2.3 The Hon Robert French AC, Chief Justice of the High Court, has said that

> many of the things we think of as basic rights and freedoms come from the common law and how the common law is used to interpret Acts of Parliament and regulations made under them so as to minimise intrusion into those rights and freedoms.[3]

2.4 Many traditional rights and freedoms are recognised now as 'human rights'. Murphy J referred to 'the common law of human rights'[4] and Professors George Williams and David Hume have written that the common law is 'a vibrant and rich source of human rights.'[5]

2.5 Traditional rights recognised by the common law are now found in international agreements and bills of rights in other jurisdictions—including, the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the bills of rights in the United States and Canadian constitutions, and the human rights Acts in the United Kingdom, New Zealand and two Australian jurisdictions, the Australian Capital Territory and Victoria. French CJ has said that the human rights and freedoms in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Victorian Charter) 'in significant measure incorporate or enhance rights and freedoms at common law'.[6]

2.6 Before the wave of international conventions in the aftermath of the Second World War, legislation and the common law were the principal sources of protection of rights and freedoms in the UK, Australia, New Zealand and Canada. In his book, *Human Rights and the End of Empire*, English legal historian AW Brian Simpson wrote about the widely held assumption that, before international conventions on human rights, human rights in the UK were 'so well protected as to be an example to the world'. In normal times, Simpson writes, 'when there was neither war, nor insurrection, nor widespread problems of public order, few would deny that people in the United Kingdom enjoyed a relatively high level of personal and political freedom'.[7]

> In the modern period, and subject to certain limitations which, for most persons, were of not the least importance, individuals could worship as they pleased, hold whatever meetings they pleased, participate in political activities as they wished, enjoy a very extensive freedom of expression and communication, and be wholly

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2 *Bill of Rights 1688* 1 Will & Mar Sess 2 c 2 (Eng). The Bill of Rights remains an important element in the rule of law in Australia, as illustrated by *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195; *Port of Portland v Victoria* (2010) 242 CLR 348.

3 Robert French, 'The Common Law and the Protection of Human Rights' (Speech, Anglo Australasian Lawyers Society, Sydney, 4 September 2009).

4 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346.

5 George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 33.

6 *Momcilovic v The Queen* (2011) 245 CLR 1, [51].

7 AW Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2004).

> unthreatened by the grosser forms of interference with personal liberty, such as officially sanctioned torture, or prolonged detention without trial.[8]

2.7 To the extent that Australian law has protected and fostered rights and freedoms, it has long been statutes and judge-made law that have done so.[9] In a 2013 speech, former Justice of the High Court of Australia, the Hon John Dyson Heydon AC QC, considered some of the benefits of protecting rights through statutes and the common law. He said that statutes and the common law protect rights often by 'detailed and precise rules' and vindicate 'human rights directly and specifically':

> [C]ommon law and statutory rules tend to be detailed. They are generally enforceable. They are specifically adapted to the resolution of particular problems. Their makers seek, with some success, to make them generally coherent with each other and with the wider legal system.[10]

2.8 Taking the right to a fair trial as an example, Heydon said that rules found in certain statutes and in the common law 'were worked out over a very long time by judges and legislators who thought deeply about the colliding interests and values involved in the light of practical experience of conditions in society to which the rules were applied'.[11]

2.9 Identifying and critically examining laws that limit rights is a crucial part of protecting rights, and may inform decisions about whether, and if so how, such laws might need to be amended or repealed. This may be seen to complement work that considers other ways to protect rights—such as by creating new offences and new causes of action, or by enacting a bill of rights.[12] Whether the introduction of a bill of rights in Australia is desirable is widely debated,[13] and draws in part upon historical arguments about whether the courts or parliaments are better guardians of individual rights.[14] However, the question is not the subject of this Inquiry.[15]

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8 Ibid.

9 Traditions, culture and politics also play a role. 'Legal rights do not necessarily offer better protection than societal rights. Public opinion, peer pressure and individual conscience may be more effective in seeing that rules are obeyed than expensive and elaborate bureaucratic and court procedures which may have very low compliance rates': Tom Campbell, *Rights: A Critical Introduction* (Taylor & Francis, 2011) 87.

10 J D Heydon, 'Are Bills of Rights Necessary in Common Law Systems?' (Lecture, Oxford Law School, 23 January 2013).

11 'Abstract slogans and general aspirations about human rights played no useful role in their development. The great detail of this type of regime renders it superior to bills of rights': Ibid.

12 A bill of rights might give courts the power to strike down, or make declarations about, laws that unjustifiably limit rights.

13 See, eg, discussion in Attorney-General's Department, *National Human Rights Consultation Report* (2009).

14 See, eg, Jeremy Waldron, 'The Core of the Case against Judicial Review' [2006] *The Yale Law Journal* 1346. Hiebert contrasts the two 'rival paths' in liberal constitutionalism to rights protection: one is the codification of rights, as in the US; the other emphasises parliamentary supremacy, as in Westminster-modelled parliamentary systems: Janet L Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69 *Modern Law Review* 7, 7–8.

15 Some stakeholders nevertheless took the opportunity to argue that the most appropriate way to protect traditional rights is to enact a Commonwealth Human Rights Act: National Association of Community Legal Centres, *Submission 143*; Law Council of Australia, *Submission 140*; Australian Privacy Foundation, *Submission 116*; Kingsford Legal Centre, *Submission 110*.

2.10 The focus of this Inquiry is on identifying and critically examining Commonwealth laws that encroach upon traditional rights. However, as part of the context of this analysis, it is useful to first consider how these rights are protected in law from statutory encroachment. Broadly speaking, some protection is provided by the *Australian Constitution* and by rules of statutory construction, such as the principle of legality. These are discussed generally below and more fully throughout the report.

Australian Constitution

2.11 The *Constitution* expressly protects a handful of rights and has been found to imply certain other rights. The rights expressly protected by the *Constitution* are:

- the right to trial by jury on indictment for an offence against any law of the Commonwealth—s 80;
- freedom of trade, commerce and intercourse within the Commonwealth—s 92;
- freedom of religion—s 116; and
- the right not to be subject to discrimination on the basis of the state in which one lives—s 117.

2.12 Section 51(xxxi) of the *Constitution* provides that if the Commonwealth compulsorily acquires property, it must do so on 'just terms'—which may also be conceived of as a right.[16]

2.13 The High Court has also found certain rights or freedoms to be implied in the *Constitution*—notably, freedom of political communication.[17] This freedom is not absolute, but any law that interferes with political communication must be 'reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'.[18] The High Court has often said the freedom is not a personal right, but rather is 'best understood as a constitutional restriction on legislative power'.[19]

16 *Bank of NSW v Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1, 349 (Dixon J).

17 See *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322; *Unions NSW v State of New South Wales* (2013) 88 ALJR 227. The High Court has said that 'freedom of association to some degree may be a corollary of the freedom of communication': *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 181, [148] (Gummow and Hayne JJ).

18 This is part of the second limb of the *Lange* test, as set out by French CJ in *Hogan v Hinch* (2011) 243 CLR 506.

19 *McCloy v New South Wales* [2015] HCA 34 [30]. See also *Unions NSW v New South Wales* (2013) 252 CLR 530 at 554 [36]. Ratnapala and Crowe question the accuracy and usefulness of this distinction: Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 3rd ed, 2012) 421.

2.14 A right to vote has also been found to be implied in the *Constitution*—laws that limit adult suffrage can only be made when the law is 'reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government'.[20]

2.15 The High Court may have moved towards entrenching procedural fairness in courts as a constitutional right.[21] Chapter III of the *Constitution* vests the judicial power of the Commonwealth in the High Court and in other courts that Parliament creates or invests with federal jurisdiction. In *Leeth v Commonwealth*, Deane and Toohey JJ observed that investing judicial power in 'courts' implies that courts 'exhibit the essential attributes of a court and observe, in the exercise of that judicial power, the essential requirements of the curial process, including the obligation to act judicially'.[22] In *Dietrich v The Queen*, the High Court drew natural justice implications from the nature of judicial power and held that a person accused of a serious crime might in some circumstances be denied a fair trial, if they were not represented by a lawyer.[23] In *Polyukhovich v Commonwealth*, Deane J said:

> Common sense and the provisions of Ch III, based as they are on the assumption of traditional judicial procedures, remedies and methodology, compel the conclusion that, in insisting that the judicial power be vested only in the courts designated by Chapter III, the Constitution's intent and meaning were that judicial power would be exercised by those courts acting as courts with all that notion essentially requires.[24]

2.16 In *Polyukhovich*, it was accepted that bills of attainder violate the constitutional separation of powers.[25] The legislature cannot therefore usurp the distinctly judicial power of the courts to determine criminal guilt.

2.17 If procedural fairness were considered an essential characteristic of a court, Williams and Hume write, this might have the potential, among other things, to constitutionalise

> the presumption of innocence, the 'beyond reasonable doubt' standard of proof in criminal proceedings, the privilege against self-incrimination, limitations on the use of secret evidence, limitations on ex parte proceedings, limitations on any power to continue proceedings in the face of an unrepresented party, limitations on courts' jurisdiction to make an adverse finding on law or fact that has not been put to the parties, and limitations on the power of a court or a judge to proceed where proceedings may be affected by actual or apprehended bias.[26]

2.18 It remains to be seen whether this will become settled doctrine of the court.

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20 *Roach v Electoral Commissioner* (2007) 233 CLR 162, [85] (Gummow, Kirby and Crennan JJ). See also, *Rowe v Electoral Commissioner* (2010) 243 CLR 1.
21 Williams and Hume, above n 5, 375.
22 *Leeth v Commonwealth* (1992) 174 CLR 455, 486–7.
23 *Dietrich v The Queen* (1992) 177 CLR 292, 315, 337, 362, 374.
24 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607.
25 A bill of attainder is a statute that states that a specific person is 'guilty of an offence constituted by past conduct and impos[es] punishment in respect of that offence': Ibid [30].
26 Williams and Hume, above n 5, 376.

2.19 The *Constitution* does not directly and entirely protect many of the rights, freedoms and privileges listed in the ALRC's Terms of Reference. One reason the *Constitution* does not expressly protect most civil rights, Professor Helen Irving writes, was the 'general reserve about directly including policy in the *Constitution*, instead of powers subsequently to enact policy'.

> Specifically, the British legal tradition (in which in fact the ideas of freedom and 'fair play', far from being overlooked, were thought central) largely relied on the common law, rather than statute or constitutional provision to define and protect individual rights and liberties. This approach was adopted for the most part by the Australians in constitution-making. It explains in large degree the shortage (as it is now perceived) of explicit statements of ideals and guarantees of rights, and descriptions of essential human and national attributes.[27]

2.20 Professor Jeffrey Goldsworthy has written that the constitutional tradition Australia inherited from Britain was 'obviously not opposed to rights such as freedom of speech, but was opposed to judges having power to protect them from interference by legislation':[28]

> With a few exceptions, our framers relied on other mechanisms for protecting rights, including constitutional conventions; the common law; presumptions of statutory interpretation; and community attitudes, of tolerance and respect for rights, expressed through the ballot box.[29]

2.21 In *Australian Capital Television v Commonwealth*, Dawson J suggested that those who drafted the *Constitution* saw constitutional guarantees of freedoms as 'exhibiting a distrust of the democratic process':

> They preferred to place their trust in Parliament to preserve the nature of our society and regarded as undemocratic guarantees which fettered its powers. Their model in this respect was, not the United States Constitution, but the British Parliament, the supremacy of which was by then settled constitutional doctrine.[30]

A common law constitution?

2.22 The term 'common law constitutionalism' is now 'widely used to denote the theory that the most fundamental constitutional norms of a particular country or countries (whether or not they have a written constitution) are matters of common law'.[31] Under this theory, the common law is said to incorporate fundamental moral principles, against which the legality of governmental decisions, and even Acts of

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27 Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1999) 162.

28 Jeffrey Goldsworthy, 'Constitutional Implications Revisited' (2011) 30 *University of Queensland Law Journal* 9, 25.

29 Ibid.

30 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, [23]. Mason CJ said: 'The framers of the Constitution accepted, in accordance with prevailing English thinking, that the citizen's rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy': Ibid [31].

31 Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 17.

Parliament, may be tested.[32] Many of the rights and freedoms listed in the Terms of Reference, even those not fully protected by the *Australian Constitution*, would be considered constitutional in this way.

2.23 Commonly associated with the writing of Professor Trevor Allan[33] and Lord Justice John Laws,[34] common law constitutionalism has been called 'a potent phenomenon within contemporary public law discourse'.[35] Allan has written that 'the common law is prior to legislative supremacy, which it defines and regulates':[36]

> We should not underestimate the power of the common law constitution to protect fundamental rights, and the central role it ascribes to the individual conscience in testing the moral credentials of law, or rather of what purports to be law but may, on inspection, prove to be an infringement of the rule of law.[37]

2.24 Some even suggest that courts may invoke this common law constitution to invalidate Acts of Parliament.[38] The theory has been said to invert the traditional relationship between statute law and the common law.[39] Professor Jeffrey Goldsworthy, a critic of common law constitutionalism, has written that the theory amounts to a 'takeover bid' which replaces legislative supremacy with judicial supremacy.[40] The political constitution, Thomas Poole writes, is 'turned on its head in favour of a system of constitutional politics whose central institution is the common law court'.[41]

2.25 The theory has its leading proponents in the UK, which lacks a written and rigid constitution. In Australia, it has not been applied to invalidate unambiguous statutes. In *South Australia v Totani*, French CJ said that it is

> self-evidently beyond the power of the courts to maintain unimpaired common law freedoms which the Commonwealth Parliament or a State Parliament, acting within its constitutional powers, has, by clear statutory language, abrogated, restricted, or qualified.[42]

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32 Thomas Poole, 'Dogmatic Liberalism? TRS Allan and the Common Law Constitution' (2002) 65 *The Modern Law Review* 463, 463.

33 See, eg, TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2003); TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford University Press, 2013).

34 See, eg, John Laws, *The Common Law Constitution* (Cambridge University Press, 2014). Paul Craig, Jeffrey Jowell and Dawn Oliver are the other 'prime movers' behind this 'quiet revolution' identified by Poole: Thomas Poole, 'Questioning Common Law Constitutionalism' (2005) 25 *Legal Studies* 142, 142.

35 Poole, above n 32.

36 TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2003) 271.

37 TRS Allan, 'In Defence of the Common Law Constitution: Unwritten Rights as Fundamental Law' 190.

38 See also the comments of Sir Robin Cooke, former President of the New Zealand Court of Appeal, and discussed in Justice Michael Kirby, 'The Struggle for Simplicity: Lord Cooke and Fundamental Rights' (Speech, New Zealand Research Foundation Conference, Auckland, 4 April 1997).

39 Goldsworthy, *Parliamentary Sovereignty*, above n 31, 15.

40 Ibid.

41 Poole, above n 32, 463.

42 *South Australia v Totani* (2010) 242 CLR 1, [31]. In a speech, Chief Justice French said: 'The theoretical question whether fundamental common law principles can qualify legislative power has not been definitively answered in Australia. … The omens are not promising for the proponents of a free-standing

2.26 Common law constitutionalism does however find a more confined application in an accepted principle of statutory construction known as the 'principle of legality'.

The principle of legality

2.27 The principle of legality is a principle of statutory interpretation that gives some protection to certain traditional rights and freedoms, including almost all of those listed in the Terms of Reference.[43] In fact, as Spigelman has said, the 'protection which the common law affords to the preservation of fundamental rights is, to a very substantial degree, secreted within the law of statutory interpretation'.[44]

2.28 The principle of legality may go back at least as far as Blackstone and Bentham.[45] It may be a new label for a traditional principle.[46] Early Australian authority may be found in the 1908 High Court case, *Potter v Minahan*.[47] A more recent statement of the principle appears in *Re Bolton; Ex parte Beane*:

> Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation.[48]

2.29 The rights or freedoms protected by the principle of legality 'often relate to human rights and are sometimes described as having a constitutional character'.[49] The principle 'extends to the protection of fundamental principles and systemic values'.[50] There is no settled list of rights protected by the principle, but in *Momcilovic*, Heydon J set out the following examples:

> [F]reedom from trespass by police officers on private property; procedural fairness; the conferral of jurisdiction on a court; and vested property interests …; rights of

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common law limitation. However, the question has been left, at least theoretically, open': Robert French, 'Common Law Constitutionalism' (Robin Cooke Lecture, Wellington, New Zealand, 27 November 2014).

43 The phrase 'principle of legality' is also used to refer to 'a wider set of constitutional precepts requiring any government action to be undertaken only under positive authorisation': Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37 *Melbourne University Law Review* 372, 373. In this Report, the phrase is used to refer to the narrower point of statutory interpretation. Recent papers on the principle also include Dan Meagher, 'The Common Law Principle of Legality in the Age of Human Rights' (2011) 35 *Melbourne University Law Review* 449; James Spigelman, 'The Common Law Bill of Rights' (2008) 3 *Statutory Interpretation and Human Rights: McPherson Lecture Series*.

44 Spigelman, above n 43, 9. See also Robert French, 'The Common Law and the Protection of Human Rights' (Speech, Anglo Australasian Lawyers Society, Sydney, 4 September 2009) 2.

45 James Spigelman, 'The Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769, 775. It has 'many authorities, ancient and modern, Australian and non-Australian': *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, 66 [148] (Heydon J). Although the continuity of the principle is questioned in Lim, above n 43, 380.

46 Jeffrey Goldsworthy, 'The Constitution and Its Common Law Background' (2014) 25 *Public Law Review* 265, 279.

47 'It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used': *Potter v Minahan* (1908) 7 CLR 277, 304.

48 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523. This was quoted with approval in *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

49 *Momcilovic v The Queen* (2011) 245 CLR 1, [444] (Heydon J).

50 *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, (Gageler and Keane JJ).

> access to the courts; rights to a fair trial; the writ of habeas corpus; open justice; the non-retrospectivity of statutes extending the criminal law; the non-retrospectivity of changes in rights or obligations generally; *mens rea* as an element of legislatively-created crimes; freedom from arbitrary arrest or search; the criminal standard of proof; the liberty of the individual; the freedom of individuals to depart from and re-enter their country; the freedom of individuals to trade as they wish; the liberty of individuals to use the highways; freedom of speech; legal professional privilege; the privilege against self-incrimination; the non-existence of an appeal from an acquittal; and the jurisdiction of superior courts to prevent acts by inferior courts and tribunals in excess of jurisdiction.[51]

2.30 The primary rationale for this principle of statutory construction was provided by Lord Hoffmann:

> [T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.[52]

2.31 The 'political cost' of the decision was also something referred to by French CJ. The interpretation of legislation takes place 'against the backdrop of the supremacy of Parliament', which can qualify or extinguish rights and freedoms by 'clear words'—but words 'for which it can be held politically accountable'.[53] As suggested in *Coco v The Queen*, the principle may 'enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights'.[54]

2.32 The principle of legality may be applied not only to statutes, but also to regulations and other delegated legislation, where in fact it may assume greater importance, given such laws are not made directly by Parliament.[55]

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51 *Momcilovic v The Queen* (2011) 245 CLR 1, [444] (Heydon J) (citations omitted). In *Malika Holdings v Stretton*, McHugh J said: 'No doubt there are fundamental legal principles—a civil or criminal trial is to be a fair trial, a criminal charge is to be proved beyond reasonable doubt, people are not to be arrested or searched arbitrarily, laws, especially criminal laws, do not operate retrospectively, superior courts have jurisdiction to prevent unauthorised assumptions of jurisdiction by inferior courts and tribunals are examples. Clear and unambiguous language is needed before a court will find that the legislature has intended to repeal or amend these and other fundamental principles': *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, [28]. Other lists appear in: Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014); Spigelman, above n 43; Williams and Hume, above n 5. See also Australian Law Reform Commission, *Traditional Rights and freedoms—Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014) Ch 19.

52 *R v Secretary of State for the Home Department; ex parte Simms* [2002] 2 AC 115 131.

53 Robert French, 'The Common Law and the Protection of Human Rights' (Speech, Anglo Australasian Lawyers Society, Sydney, 4 September 2009) 2.

54 *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ). This is a classic discussion of the principle of legality, although the phrase 'principle of legality' is not used.

55 See Dan Meagher and Matthew Groves, 'The Common Law Principle of Legality and Secondary Legislation' (forthcoming, to be published in the *University of New South Wales Law Journal*).

2.33 The principle of legality is similar to interpretation provisions in some human rights Acts, such as s 32(1) of the Victorian Charter, which provides: 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'.[56] French CJ has said that this provision is 'analogous to the common law principle of legality'.[57] The principle of legality could be similarly codified in a Commonwealth statute, such as the *Acts Interpretation Act 1901* (Cth). This could act as a clear statement of parliamentary support for the principle of legality and further protect fundamental rights and freedoms from statutory limitation.

2.34 Finally, it should be stressed that the principle 'does not constrain legislative power'.[58] Subject to the *Constitution*, Parliament has the power to modify or extinguish common law rights. Chief Justice Robert French has said while the principle has a 'significant role to play in the protection of rights and freedoms', it does not 'authorise the courts to rewrite statutes'.[59] The principle of legality will have a very limited application where encroaching on a right is a clear object of a statute.[60]

International law

2.35 Each chapter of this Report sets out examples of international instruments that protect the relevant right or freedom. Most commonly cited is the *International Covenant on Civil and Political Rights* (ICCPR),[61] to which Australia is a party.[62]

56 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1). See also *Human Rights Act 1998* (UK) s 3(1).

57 Robert French, 'Common Law Constitutionalism' (Robin Cooke Lecture, Wellington, New Zealand, 27 November 2014).

58 *Momcilovic v The Queen* (2011) 245 CLR 1, [43] (French CJ). In a 2012 speech, Chief Justice Robert French said: 'The common law principle of legality has a significant role to play in the protection of rights and freedoms in contemporary society while operating consistently with the principle of parliamentary supremacy. It does not, however, authorise the courts to rewrite statutes in order to accord with fundamental human rights and freedoms': Chief Justice Robert French, 'The Courts and Parliament' (Speech, Queensland Supreme Court, Brisbane, 4 August 2013).

59 Chief Justice Robert French, *The Courts and the Parliament* (Queensland Supreme Court Seminar, Brisbane, 4 August 2012).

60 'The principle at most can have limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked': *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, [314] (Gageler and Keane JJ).

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

62 The other United Nations human rights treaties Australia has signed are: *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008); *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1980, 1249 UNTS (entered into force 3 September 1981).

2.36 Instruments such as the ICCPR provide some protection to rights and freedoms from statutory encroachment, but, like the principle of legality, generally only when a statute is unclear or ambiguous:[63]

> Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party.[64]

2.37 In *Mabo v Queensland [No 2]*, Brennan J said that 'international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'.[65]

2.38 However, even international instruments to which Australia is a party do not create binding domestic law in Australia. Nor do they abrogate the power of the Commonwealth Parliament to make laws that are inconsistent with the rights and freedoms set out in these instruments. In *Dietrich v The Queen*, Mason CJ and McHugh J said:

> Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions.[66]

2.39 In *Minister for Immigration v B*, Kirby J said that the High Court 'cannot invoke international law to override clear and valid provisions of Australian national law'.[67]

2.40 International law protects rights in other ways. For example, Australia periodically reports to and appears before relevant United Nations human rights treaty bodies.[68] And as discussed below and in Chapter 3, Australian parliamentary committees scrutinise laws for compatibility with core international human rights

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63 In *Coleman v Power,* Gleeson CJ distinguished between statutes enacted before ratification of a particular international treaty and those statutes enacted after ratification, arguing that only the latter can be interpreted in line with the relevant treaty: *Coleman v Power* (2004) 220 CLR 1, [19].

64 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). There is a 'common law principle that statutes should be interpreted and applied, so far as their language permits, so as not to be inconsistent with international law or conventions to which Australia is a party': *Momcilovic v The Queen* (2011) 245 CLR 1, [18] (French CJ). Every statute is 'to be so interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with established rules of international law': *Jumbunna Coal Mine NL v Victorian Coal Miners'Association* (1908) 6 CLR 309, 353 (O'Connor J).

65 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42. Professor Ivan Shearer has said: 'This puts the matter in a nutshell: the Covenant is not as such part of the law of Australia, but is a powerful influence on the judges in developing the common law': Ivan Shearer, 'The Relationship between International Law and Domestic Law' in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 56.

66 *Dietrich v The Queen* (1992) 177 CLR 292, 305.

67 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J). Similarly, in *The Malaysian Declaration Case*, Kiefel J said that a 'statute is to be interpreted and applied, so far as its language permits, so that it is in conformity, and not in conflict, with established rules of international law … However, if it is not possible to construe a statute conformably with international law rules, the provisions of the statute must be enforced even if they amount to a contravention of accepted principles of international law'. *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, [247].

68 See Attorney-General's Department, *United Nations Human Rights Reporting* <http://www.ag.gov.au>.

treaties. The United Nations Human Rights Committee also considers communications from individuals who claim to be victims of a human rights violation.[69]

2.41 While the focus of the Terms of Reference is upon common law rights and freedoms,[70] international human rights law informs approaches to domestic law and also the ALRC's obligations in conducting inquiries.[71]

The nature of common law rights

2.42 Some of the rights and freedoms listed in the Terms of Reference directly give rise to legal obligations and may be enforced in courts of law. Others are more like freedoms or liberties and are protected in Australia by virtue of the fact, and largely only to the extent, that laws do not encroach on the freedom.[72] The High Court said in *Lange v Australian Broadcasting Corporation*:

> Under a legal system based on the common law, 'everybody is free to do anything, subject only to the provisions of the law', so that one proceeds 'upon an assumption of freedom of speech' and turns to the law 'to discover the established exceptions to it'.[73]

2.43 Many common law rights may therefore be largely residual,[74] and perhaps for this reason, more vulnerable to statutory encroachment.[75]

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69 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) First Optional Protocol, art 1.

70 The Terms of Reference do not expressly refer to Australia's legal obligations under international human rights instruments, as pointed out by Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 140*; Refugee Advice & Casework Service, *Submission 119*. See also Monash University Castan Centre for Human Rights, *Submission 18*.

71 The ALRC must aim to ensure that the laws, proposals and recommendations it reviews, considers or makes are, as far as practicable, consistent with Australia's international obligations that are relevant to the matter: *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(b).

72 The most comprehensive and compelling explanation of the nature of rights and liberties and the jural relations that they create was provided by the American jurist Wesley Newcomb Hohfeld: Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16. For a discussion, see Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2009) ch 13. In a speech about common law protections of human rights, Chief Justice French said that it was 'important to recognise … that common law 'rights' have varied meanings. In their application to interpersonal relationships, expressed in the law of tort or contract or in respect of property rights, they are justiciable and may be said to have 'a binding effect'. But 'rights', to movement, assembly or religion, for example, are more in the nature of 'freedoms'. They cannot be enforced, save to the extent that their infringement may constitute an actionable wrong such as an interference with property rights or a tort': Chief Justice Robert French, 'Protecting Human Rights Without a Bill of Rights' (Speech, John Marshall Law School, Chicago, 26 January 2010).

73 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) quoting *Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109, 283. The corollary of this principle is that no person or authority may interfere with the liberty of a person except by authority of law: see, eg, *Entick v Carrington* (1765) 19 St Tr 1029.

74 'The traditional doctrine in English law is that Parliament is sovereign. However, individuals may say or do whatever they please provided they do not transgress the substantive law or infringe the legal rights of others. Furthermore, public authorities including the Crown may do nothing but that which they are authorized to do by some rule of common law (including the royal prerogative) or statute and, in particular, may not interfere with the liberties of individuals without statutory authority. Where public authorities are not authorized to interfere with the individual, the individual has liberties. It is in this sense that such liberties are residual rather than fundamental and positive in their nature: they consist of what

2.44 In some other jurisdictions, rights and freedoms are afforded additional protection from statutory encroachment by bills of rights and human rights statutes. The degree of protection offered by these statutes varies. A constitutionally entrenched bill of rights, such as that found in the United States Constitution, allows the judiciary to declare a law invalid. This may be contrasted with the *Human Rights Act 1998* (UK), which does not give courts the power to strike down legislation, but provides that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible' with rights and freedoms set out in the *European Convention on Human Rights*.[76] The Victorian Charter has a similar provision, quoted above.[77]

2.45 Common law rights overlap with the rights protected in these international instruments and bills of rights. In their history and development, each may be seen as an important influence on the other. A statute that encroaches on a traditional common law right will often, therefore, also encroach on its related human right. However, the two rights may not always have the same scope. While some common law rights are often conceived of as residual, human rights are rarely thought of in this way. Moreover, human rights have been said to tend to grow in content and form. Professor Tom Campbell has written:

> More and more interests are recognized as justifying the protection that flows from being adopted as a human right. This growth is a matter of the form of human rights as well as their content. Thus, even traditional core civil and political liberties are seen as involving positive correlative duties to secure the interest identified in the right, and not, as before, merely negative correlative duties to let people be and leave them alone to go their own way. Human rights are also being put to a wider variety of uses.[78]

2.46 Many social and economic rights are also recognised as human rights in international law—for example, the right to work and the right to housing. As important as these rights may be, they are not the focus of this Inquiry.[79]

remains after taking account of all the legal restraints that impinge upon an individual': Hugh Tomlinson, Richard Clayton and Victoria Butler-Cole, *The Law of Human Rights* (University Press, 2009) 28.

75 One consequence of the fact that many common law rights are residual is that Parliament can always 'legislate fundamental rights out of existence': Ibid 29.

76 *Human Rights Act 1998* (UK) s 3(1). Section 4(2) also gives the courts a power to make a 'declaration of incompatibility'. In a speech about human rights, Lady Hale said that statements from Lord Nicholls, Lord Steyn and Lord Rodger in *Ghaidan v Godin Mendoza* gave 'a very broad meaning' to what was 'possible': 'as long as an interpretation was not contrary to the scheme or essential principles of the legislation, words could be read in or read out, or their meaning elaborated, so as both to be consistent with the convention rights and "go with the grain" of the legislation, even though it was not what was meant at the time': Lady Hale, 'What's the Point of Human Rights?' (Warwick Law Lecture, 28 November 2013). See also, *Ghaidan v Godin Mendoza* [2004] 2 AC 557.

77 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1).

78 Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone, *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2003) 17.

79 The Report focuses on the rights and freedoms listed in the Terms of Reference.

Extra-territorial application

2.47 In the absence of a specific legislative restriction which is consistent with the *Constitution*, the enjoyment of most common law rights and freedoms is not confined to Australian citizens.[80]

2.48 At common law, people who are not Australian citizens ('aliens'), other than enemy aliens, are to be treated, while they are in Australia, as being within 'the Queen's Peace', not as outlaws placed beyond the ordinary legal system. The High Court has noted on several occasions that such people are entitled to the same protection with respect to civil rights as the law affords to Australian citizens.[81]

2.49 A related issue concerns whether common law rights have extra-territorial effect—that is, do they apply to people who are outside Australia, or on their way to Australia. Generally, Australian common law does not apply of its own force in areas beyond the limits of Australia.[82] In *Ruddock v Vadarlis*, Beaumont J held that asylum seekers aboard the MV *Tampa* had not, and could not, assert a common law right to enter Australia; and it is unlikely they had other Australian common law rights that could be enforced.[83]

2.50 There is a common law presumption that legislation does not have extra-territorial application. Australian law may be given extra-territorial effect in legislation—for example, as has been done in relation to child sex offences.[84] Where Australian law has extra-territorial effect, common law rights may apply. For example, an Australian military tribunal operating outside Australia would be expected to observe natural justice.

Identifying laws that limit rights and freedoms

2.51 The first of the tasks of this Inquiry is to identify Commonwealth laws—not state and territory laws—that encroach upon traditional rights, freedoms and privileges.[85] There is no doubt that laws often encroach on traditional rights and freedoms. In *Malika Holdings v Stretton*, McHugh J said that 'nearly every session of Parliament produces laws which infringe the existing rights of individuals',[86] although

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80 At common law, freedom of movement concerns the freedom of citizens to leave and return to their own country. Therefore, migration laws applying to non-citizens are not generally considered to directly engage this particular right. See Ch 7.

81 *Bradley v Commonwealth* (1973) 128 CLR 557, 582 (Barwick CJ); *Re Minister for Immigration and Multicultural Affairs v Te* (2002) 212 CLR 165, [125] (Gummow J); *Singh v Commonwealth* (2004) 222 CLR 322, [201] (Gummow, Hayne and Heydon JJ).

82 In *Commonwealth v Yarmirr*, the High Court held that native title rights and interests were capable of being recognised by the common law in respect of the sea and sea-bed beyond the low-water mark: *Commonwealth v Yarmirr* (2001) 208 CLR 1, [34]–[35]. However, there was no suggestion that the common law extended beyond the territorial sea.

83 *Ruddock v Vadarlis* (2001) 110 FCR 491, [97]. Beaumont J stated that the absence of a common law claim was fatal to the case for relief in the form of the common law prerogative writ of *habeas corpus*. See also *CPCF v Minister for Immigration* [2015] HCA 1.

84 *Criminal Code* div 272.

85 See Terms of Reference.

86 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, [28] (McHugh J).

perhaps fewer encroach on the most important and fundamental of common law rights.[87] This Report sets out many of the Commonwealth laws that may be said to interfere with the common law rights and freedoms listed in the Terms of Reference. It provides an extensive survey of such laws, without making a judgment about the justification for them.[88]

2.52 The Terms of Reference ask the ALRC to include consideration of Commonwealth laws in the areas of commercial and corporate regulation, environmental regulation, and workplace relations.[89] These laws are highlighted throughout this Report.

2.53 Having identified laws that affect traditional rights and freedoms, the second task was to ask whether the laws were appropriately justified. The following section discusses justifications for limits on important rights and principles at a general level—and particularly the framing principle of proportionality. More particular justifications are then discussed throughout the Report, in the context of the rights listed in the Terms of Reference.

Justifying limits on rights and freedoms

2.54 Laws that interfere with traditional rights and freedoms are sometimes considered necessary for many reasons—such as public order, national security, public health and safety. The mere fact of interference will rarely be sufficient ground for criticism.

2.55 Important rights often clash with each other, so that some must necessarily give way, at least partly, to others. Freedom of movement, for example, does not give a person unlimited access to another person's private property, and convicted murderers must generally lose their liberty, in part to protect the lives and liberties of others. Individual rights and freedoms will also sometimes clash with a broader public interest—such as public health or safety, or national security.

2.56 Accordingly, it is widely recognised that there are reasonable limits even to fundamental rights. Only a handful of rights—such as the right not be tortured—are considered to be absolute.[90] Limits on traditional rights are also recognised by the common law. In fact, some laws that limit traditional rights may be as traditional as the rights themselves. However, such laws are generally regarded as part of the *scope* of common law rights, rather than as limits or encroachments on those rights.

87 Although in this same passage, McHugh J also said that 'times change': 'What is fundamental in one age or place may not be regarded as fundamental in another age or place… [C]are needs to be taken in declaring a principle to be fundamental': *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, [28] (McHugh J).

88 A list of all the statutory provisions cited in this report is included at Appendix A. Lists of certain laws that limit rights are also set out in G Williams, *Submission 76*; Institute of Public Affairs, *Submission 49*.

89 The Terms of Reference are also clear that this Inquiry is not to be limited to these areas.

90 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 6, 7, 8 (paras 1 and 2) 11, 15, 16 and 18: art 4.2. See, eg, Williams and Hume, above n 5, [5.3]. See also Attorney-General's Department, *Absolute Rights* <http://www.ag.gov.au>.

2.57 Bills of rights in other jurisdictions and international human rights covenants and related guidelines also feature limitations provisions. For example, limits on rights in the ICCPR are recognised in the text of the ICCPR and are elaborated upon in the 'Siracusa Principles'.[91]

2.58 Nevertheless, much of the value of calling something a right will be lost if the right is too easily qualified or diluted. Many common law rights were developed carefully over long periods of time and have been applied in many cases. In many jurisdictions, these rights are considered so fundamentally important that they have constitutional status. There seems little doubt, therefore, that the common law rights in the Terms of Reference should be treated with considerable respect in law making and should not lightly be encroached upon. Where a law does encroach on a traditional right, the encroachment should be justified.

2.59 'Human rights enjoy a prima facie, presumptive inviolability, and will often "trump" other public goods,' Louis Henkin wrote in *The Age of Rights*:

> Government may not do some things, and must do others, even though the authorities are persuaded that it is in the society's interest (and perhaps even in the individual's own interest) to do otherwise; individual human rights cannot be sacrificed even for the good of the greater number, even for the general good of all. But if human rights do not bow lightly to public concerns, they may be sacrificed if countervailing societal interests are important enough, in particular circumstances, for limited times and purposes, to the extent strictly necessary.[92]

2.60 The ALRC has been asked to consider whether limits on traditional rights and freedoms are 'appropriately justified'.[93] This question might be considered on two broad levels. The first involves testing the law according to a particular measure or standard—such as proportionality. Laws that pass this standard might be said to have been *substantively* justified. This is the most commonly used meaning of the word justified, in this context, and it is the main focus of this Inquiry.

2.61 The second level concerns the processes that lead to the making of the law—the *procedural* justification. It is not suggested, however, that procedural justification implies substantive justification. Both of these types of justification are discussed below.

Proportionality

2.62 A common way of determining whether a law that limits rights is justified is by asking whether the law is proportionate. This concept is commonly used by courts to test the validity of laws that limit rights protected by constitutions and statutory bills of

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91 United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984). These principles were formulated at a conference sponsored by non-governmental organisations in Siracusa, Italy, in 1984. The object of the conference was to achieve a consistent interpretation and application of the limitation and restriction clauses of the ICCPR.

92 Louis Henkin, *The Age of Rights* (Columbia University Press, 1990) 4.

93 See Terms of Reference.

rights.[94] However, proportionality tests can also be a valuable tool for law makers and others to test the justification of laws that limit other important—even if not strictly constitutional—rights and principles.[95]

2.63 In short, a structured proportionality analysis involves considering whether a given law that limits important rights has a **legitimate objective** and is **suitable** and **necessary** to meet that objective, and whether—on **balance**—the public interest pursued by the law outweighs the harm done to the individual right.

2.64 A 2014 book on the jurisprudence of proportionality includes this 'serviceable—but by no means canonical' formulation of the test:

> 1. Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?
>
> 2. Are the means in service of the objective rationally connected (suitable) to the objective?
>
> 3. Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective?
>
> 4. Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right?[96]

2.65 Proportionality has been called the 'most important doctrinal tool in constitutional rights law around the world for decades'[97] and 'the orienting idea in contemporary human rights law and scholarship'.[98]

> Proportionality has been received into the constitutional doctrine of courts in continental Europe, the United Kingdom, Canada, New Zealand, Israel, and South Africa, as well as the jurisprudence of treaty-based legal systems such as the European Court of Human Rights, giving rise to claims of a global model, a received approach, or simply the best-practice standard of rights adjudication. Even in the United States, which is widely understood to have formally rejected

94 Former President of the Supreme Court of Israel, Aharon Barak, said proportionality can be defined as 'the set of rules determining the necessary and sufficient conditions for a limitation on a constitutionally protected right by a law to be constitutionally protected': Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 3.

95 In other words, proportionally tests need not only be used by *courts*, and need not only be used to test limits on *constitutional* rights.

96 G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014). Cf Aharon Barak: 'According to the four sub-components of proportionality, a limitation of a constitutional right will be constitutionally permissible if (i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation ("proportionality *stricto sensu*" or "balancing") between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right': Barak, above n 94, 3.

97 Kai Moller, 'Proportionality: Challenging the Critics' (2012) 10 *International Journal of Constitutional Law* 709, 709.

98 Huscroft, Miller and Webber, above n 96, 1.

> proportionality, some argue that the various levels of scrutiny adopted by the US Supreme Court are analogous to the standard questions posed by proportionality.[99]

2.66 Proportionality may now also be said to have been received to some extent into the constitutional doctrine of courts in Australia. For example, in *McCloy v New South Wales*, the High Court applied a structured proportionality test to determine whether a law infringed the constitutional right to political communication.[100] More commonly the courts have considered this question in terms of whether the law is 'reasonably appropriate and adapted to serve a legitimate end', which reflects a form of proportionality analysis.[101]

2.67 The Court in *McCloy* explained how proportionality has been used in various contexts in Australian law:

> The term 'proportionality' in Australian law describes a class of criteria which have been developed by this Court over many years to determine whether legislative or administrative acts are within the constitutional or legislative grant of power under which they purport to be done. Some such criteria have been applied to purposive powers; to constitutional legislative powers authorising the making of laws to serve a specified purpose; to incidental powers, which must serve the purposes of the substantive powers to which they are incidental; and to powers exercised for a purpose authorised by the Constitution or a statute, which may limit or restrict the enjoyment of a constitutional guarantee, immunity or freedom, including the implied freedom of political communication. Analogous criteria have been developed in other jurisdictions, particularly in Europe, and are referred to in these reasons as a source of analytical tools which, according to the nature of the case, may be applied in the Australian context.[102]

2.68 Proportionality is used by Australian parliamentary committees to scrutinise Bills. The Parliamentary Joint Committee on Human Rights, for example, applies a proportionality test. The Committee's *Guide to Human Rights* states:

> A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. Even if the objective is of sufficient importance and the measures in question are rationally connected to the

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99 Ibid. The Siracusa Principles, noted above, includes a proportionality test: United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984) [10], [11]. For recent discussions of proportionality in the UK High Court, see *R (Lord Carlile) v Home Secretary* [2014] 3 WLR 1404, [28]–[34] (Lord Sumption); *Bank Mellat v HM Treasury [No. 2]* [2014] AC 700, [68]–[76] (Lord Reed); and *R (Nicklinson) v Ministry of Justice* [2014] 3 All ER 843, [168] (Lord Mance).

100 *McCloy v New South Wales* [2015] HCA 34 (7 October 2015).

101 'What upon close scrutiny is disproportionate or arbitrary may not answer to the description reasonably appropriate and adapted for an end consistent or compatible with observance of the relevant constitutional restraint upon legislative power': *Roach v Electoral Commissioner* (2007) 233 CLR 162, [85] (Gummow, Kirby and Crennan JJ). The question of whether a law is reasonably appropriate and adapted to advance a legitimate object 'involves what is referred to in these reasons as "proportionality testing" to determine whether the restriction which the provision imposes on the freedom is justified': *McCloy v New South Wales* [2015] HCA 34 (7 October 2015) [2] (French CJ, Kiefel, Bell and Keane JJ). See also Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, 677.

102 *McCloy v New South Wales* [2015] HCA 34 (7 October 2015) [3] (French CJ, Kiefel, Bell and Keane JJ).

> objective, the limitation may still not be justified because of the severity of its impact on individuals or groups.[103]

2.69 In a public sector guidance sheet about permissible limits on rights, the Attorney-General's Department includes a list of 'useful questions to ask when assessing whether a measure limiting a right is reasonable, necessary and proportionate':

> Will the limitation in fact lead to a reduction of that problem? Does a less restrictive alternative exist, and has it been tried? Is it a blanket limitation or is there sufficient flexibility to treat different cases differently? Has sufficient regard been paid to the rights and interests of those affected? Do safeguards exist against error or abuse? Does the limitation destroy the very essence of the right in issue?[104]

2.70 A classic discussion of the principle of proportionality may be found in the 1986 Canadian Supreme Court case of *R v Oakes*.[105] This case concerned a drug control statute that placed a legal burden of proof on the defendant, and so undermined the person's right, under the *Canadian Charter of Rights and Freedoms*, to be presumed innocent until proven guilty. Section 1 of the Canadian Charter guarantees the rights and freedoms in the Charter 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[106]

2.71 Dickson CJ said that to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. The first concerned the importance of the objective of the law:

> First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.[107]

2.72 Secondly, the means chosen for the law must be 'reasonable and demonstrably justified', which involves 'a form of proportionality test' with three components:

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In

103 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guide to Human Rights* (2014) 8.

104 Attorney-General's Department (Cth), *Permissible Limitations*, available at <www.ag.gov.au>.

105 *R v Oakes* [1986] 1 SCR 103 [69]–[70].

106 The Victorian Charter similarly provides: 'A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—(a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve': *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2). See also, *Human Rights Act 2004* (ACT) s 28; *New Zealand Bill of Rights Act 1990* (NZ) s 5.

107 *R v Oakes* [1986] 1 SCR 103 [69]–[70].

> short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'.[108]

2.73 In each case, Dickson CJ said, courts will be 'required to balance the interests of society with those of individuals and groups'.[109] There are variations, but the language in *Oakes* is reflected in most proportionality tests.

2.74 Proportionality—'a single flexible standard'—has been contrasted with the law of the First Amendment to the *United States Constitution*, which 'uses a multitude of less flexible, but more precise, rules designed to respond to particular kinds of cases'.[110]

2.75 In *Roach v Electoral Commissioner*, Gleeson CJ expressed reservations about an 'uncritical translation' of proportionality into Australia from jurisdictions with human rights instruments and wider powers of judicial review.[111] In *Momcilovic*, Heydon J suggested that the proportionality test in the Victorian Charter created 'difficult tasks' that should be for legislatures, not judges.[112] Professor John Finnis has said that all the proportionality criteria 'involve matters of fact (including counter-factuals) and evaluative opinion in which legal learning is of little assistance and forensically ascertainable evidence is unavailable':

> [T]here is little or nothing judicial—nothing *law applying*—about assessments of proportionality in relation to rights such as those in the [*European Convention on Human Rights*], when these assessments are made by courts coming fresh to them in the context of general legislative or legislatively approved arrangements for social life.[113]

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108 Ibid.

109 Ibid.

110 Adrienne Stone, 'The Limits of Constitutional Text and Structure Revisited' 28(3) *UNSWLJ* 842, 844. 'The choice between the competing merits of these approaches depends on rather large questions of fact and value. Rules will appeal to those who value certainty in the application of judicial rules and who believe that rules created by one court are capable of constraining later and lower courts. Flexible standards will appeal to those who value flexibility and to those who are, in any event, sceptical about the capacity of legal doctrine to effectively constrain judges': Ibid.

111 Human rights instruments 'create a relationship between legislative and judicial power significantly different from that reflected in the Australian Constitution': *Roach v Electoral Commissioner* (2007) 233 CLR 162, [17] (Gleeson CJ).

112 'It will lead to debates in which many different positions could be taken up. They may be debates on points about which reasonable minds may differ. They may be debates in which very unreasonable minds may agree. They are debates that call for resolution by legislative decision': *Momcilovic v The Queen* (2011) 245 CLR 1, [431] (Heydon J). Heydon J said that s 7(2) 'creates a kind of "proportionality" regime without comprehensible criteria': Ibid [432].

113 John Finnis, 'Judicial Power: Past, Present and Future' (Speech, Gray's Inn Hall, London, 20 October 2015) 21.

2.76 However, some of these concerns may not arise when the proportionality analysis is being applied by law makers, parliamentary committees and others to test the merits of laws, rather than by courts.[114]

2.77 Other criticisms of proportionality apply more broadly.[115] Some have suggested that proportionality tests give insufficient weight to rights, or call for the comparison of incommensurable values. Others have said it 'suggests a far more rigorous algorithm of criteria than is in fact or law available'.[116] Proportionality has even been called an 'assault on human rights'.[117] To balance rights may be to 'miss the distinctive moral status that a rights claim presupposes and affirms'.[118] Far from rights being 'trumps',[119] a balancing approach might suggest that everything is 'up for grabs'.[120]

2.78 Nevertheless, in submissions to this Inquiry, a number of stakeholders said that proportionality was the appropriate concept to apply.[121] For example, the Law Council of Australia submitted that the proportionality test in *R v Oakes* 'has been applied in Australian domestic law and can produce logical and predictable outcomes when applied to legislation':

> 'Proportionality' is … a fluid test which requires those analysing and applying law and policy to have regard to the surrounding circumstances, including recent developments in the law, current political and policy challenges and contemporary public interest considerations.[122]

2.79 In its submission to this Inquiry, the Human Rights Law Centre stated that

> the test for determining whether a restriction is appropriate should be one of proportionality as used in international and comparative human rights jurisprudence and under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) … A proportionality test is appropriate as it preserves rights, provides a framework for

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114 The role of parliamentary committees is discussed below and in Ch 3.

115 For criticisms of proportionality reasoning, see, eg, Francisco J Urbina, 'Is It Really That Easy: A Critique of Proportionality and "Balancing as Reasoning"' (2014) 27 *Canadian Journal of Law and Jurisprudence* 167; Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468; Gregoire CN Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 *Canadian Journal of Law and Jurisprudence* 179. In defence, see, eg, Moller, above n 97; Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012).

116 John Finnis, 'Judicial Power: Past, Present and Future' (Speech, Gray's Inn Hall, London, 20 October 2015) 20.

117 Tsakyrakis, above n 115.

118 Ibid 489.

119 This is Ronald Dworkin's well-known metaphor: Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press, 1984).

120 Tsakyrakis, above n 115, 489. 'With the balancing approach, we no longer ask what is right or wrong in a human rights case but, instead, try to investigate whether something is appropriate, adequate, intensive, or far-reaching': Ibid 487.

121 National Association of Community Legal Centres, *Submission 143*; Australian Human Rights Commission, *Submission 141*; Law Council of Australia, *Submission 140*; Public Interest Advocacy Centre, *Submission 133*; ANU Migration Law Program, *Submission 107*; Law Council of Australia, *Submission 75*; Human Rights Law Centre, *Submission 39*. See also Centre for Comparative Constitutional Studies, *Submission 58*. Although in most submissions, the justification for laws limiting rights was not discussed at this more general level.

122 Law Council of Australia, *Submission 75*.

> balancing competing rights and enables other important public concerns, such as national security and public order, to be duly taken into account.[123]

2.80 The Public Interest Advocacy Centre endorsed the use of the principle and suggested that it could be 'more deeply embedded' in Australian law.[124]

2.81 In this Inquiry, the ALRC does not consider the question of whether testing the proportionality of laws that limit rights is better carried out by the judiciary or the legislature. Nor is it necessary, in this Inquiry, to find a perfect method—if such a method exists—for testing the justification of laws that limit rights. Whether a particular law that limits a right is justified will of course sometimes be a question about which reasonable people acting in good faith disagree. A rigid insistence on a prescribed proportionality framework may also discourage more thorough and wide ranging analysis.

2.82 While the ALRC does not propose that one particular method must always be used to test the justification for laws that limit traditional rights and freedoms, proportionality tests offer a valuable way of structuring the critical analysis. They call for a considerable degree of rigour, and are clearly more thorough than mere unsupported statements that a law is justified because it is in the public interest. Proportionality is also used widely in many other countries and jurisdictions. When considering similar laws in Australia, law makers will naturally find these other analyses instructive. Importantly, the use of proportionality tests suggests that important rights and freedoms should only be interfered with reluctantly—when truly necessary.

Scrutiny processes

2.83 A law that limits important rights may be said to be justified in another more limited sense, namely, that it was made following open and robust scrutiny. A law that limits a right might therefore be said to be justified *procedurally*, if the law was made after a procedure that thoroughly tested whether the limit was *substantively* justified. A fundamental procedural justification for laws might be, for example, that they are made by a democratically elected parliament in a country with a free press. Another important process is scrutiny by parliamentary committees.

2.84 Rigorous processes for scrutinising laws for compatibility with traditional rights may be more important in jurisdictions without a constitutional bill of rights. So called 'political rights review' or 'legislative rights review', Professor Janet Hiebert has written,

> entails new responsibilities and new incentives for public and political officials to assess proposed legislation in terms of its compatibility with protected rights. This innovation results in multiple sites for non-judicial rights review (government, the public service, and parliament), which distinguish this model from the American-

123 Human Rights Law Centre, *Submission 39*.
124 It also suggested how might this be done: Public Interest Advocacy Centre, *Submission 133*.