"Taking *Judging* and *Judges* Seriously: Facts, Framework and Function in Australian Constitutional Law"

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Introduction

Constitutional law affects all members of society – it fundamentally shapes the way that society functions by ensuring that "all power of government is limited by law"[1]. Judges, practitioners and the academy are three of the principal actors that contribute to shaping Australian constitutional law. Although they have different roles, functions and aims, their *work* intersects. This article addresses those intersections. It seeks to inquire into and explain not only the importance of judges taking the role of judging as seriously as they do in shaping Australian constitutional law, but also the importance of practitioners and the academy understanding the judicial role, as well as their own roles, in helping to shape Australian constitutional law.

The article is intended to be both principled and practical. Constitutional law has developed a reputation for being complex, and at times, impenetrable. Judges, practitioners and the academy all have a role in ensuring that the law, and developments in constitutional law, are principled, coherent and clear. It is also fitting to provide some practical guidance about shaping Australian constitutional law having regard to the history of the title of the Lucinda Lecture. *Lucinda* was the yacht on which the constitutional Drafting Committee undertook to combine the drafting of the

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1 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24 [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) ('*Graham*').

Constitution with "a brief holiday" over the 1891 Easter long weekend[2]. As it turned out, the conditions on the yacht were not entirely conducive to the task at hand, with poor weather resulting in a number of passengers suffering seasickness[3]. The Drafting Committee might have benefitted from some practical guidance about the best conditions for *drafting* our *Constitution*. This article seeks to provide some practical guidance about the best conditions for *interpreting* our *Constitution*. That task is assisted by reference to, and a proper understanding of, three threads running through the fabric of Australian constitutional law: facts, the framework – the wider legal context – and judicial method.

The judiciary, legal practitioners and the academy

Like all law, constitutional law is a human construct[4], "confined to the realm of ideas"[5]. But the way that those ideas manifest themselves is in the context of *particular cases*, involving and affecting the rights and interests of *particular* individuals, entities and

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2 Williams, *The Australian Constitution: A Documentary History* (2005) at 162-163.

3 Williams, *The Australian Constitution: A Documentary History* (2005) at 163.

4 Stapleton, *Three Essays on Torts* (2021) at 1.

5 Dixon, "Concerning Judicial Method" (1956) 29 *Australian Law Journal* 468 at 470.

polities. And the impacts and consequences that those ideas have are profound.

Judges, legal practitioners, and scholars – with their unique functions, experiences and backgrounds – unsurprisingly take different approaches to the law. I do not suggest that any approach is wrong, but I will suggest that understanding the facts, the framework and judicial method might better facilitate our respective contributions to the coherent and principled development of constitutional law. But first the key actors and their unique roles and functions.

Judges are responsible for articulating and developing constitutional law – indeed, it has never been doubted in Australia that it is emphatically the province and duty of the High Court to decide what is the proper construction of the *Constitution*[6].
But, in doing so, Judges are constrained. First, they have no choice about the facts presented or usually the way legal issues are framed;

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6 *Marbury v Madison* (1803) 5 US 137; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 262-263 (Fullagar J) ('*Communist Party Case*'); *Harris v Caladine* (1991) 172 CLR 84 at 134-135 (Toohey J); *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 570 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Singh v The Commonwealth* (2004) 222 CLR 322 at 330 [7] (Gleeson CJ) ('*Singh*'); *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 48 [101] (Kirby J). See also *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-272 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

they must deal with the cases brought before them[7]. Judges write reasons focused "always upon the determination of the matter before the court", to explain the decision in the particular case[8]. Second, judges are rarely "confronted with a clean slate", precedent inevitably informs the way the law develops[9]. Third, judges have only limited time and resources to immerse themselves in the details of a particular issue, and often they have not considered the issue before[10] – they need help from practitioners and the academy.

The roles of the three players are, to a considerable extent, intertwined but markedly different. The Court "accumulates and builds upon the insights and knowledge" that are revealed by precedent, and which are also "informed and assisted by the work of both legal practitioners and the academy"[11]. As Justices of the High Court, the ultimate court of appeal, we do not have other appellate courts to tell us where we went wrong or how to get the answers

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7 Stapleton, *Three Essays on Torts* (2021) at 3; La Forest, "Who is Listening to Whom? The Discourse between the Canadian Judiciary and Academics", in Markesinis (ed), *Law Making, Law Finding and Law Shaping: The Diverse Influences – The Clifford Chance Lectures*, vol 2 (1997) 69 at 69.

8 French, "Judges and Academics: Dialogue of the Hard of Hearing" (2013) 87 *Australian Law Journal* 96 at 101.

9 Stapleton, *Three Essays on Torts* (2021) at 4. See also Dixon, "Concerning Judicial Method" (1956) 29 *Australian Law Journal* 468 at 470.

10 Stapleton, *Three Essays on Torts* (2021) at 4.

11 Gordon, "The Integrity of Courts: Political Culture and a Culture of Politics" (2021) 44(3) *Melbourne University Law Review* 863 at 868.

right. It is, in large part, up to legal practitioners and the academy to perform those roles. We are not infallible, not even those of us who sit at the apex[12]. We must have the opportunity to correct wrong turns that we (or our predecessors) have taken along the way. And we can only do so with help.

Legal practitioners – barristers and solicitors – shape the cases that come before the Court. With few exceptions[13], practitioners are focused only on achieving a desired result for their client in the particular case, advancing arguments to persuade the Court as to the state of the relevant law, or to modify, develop or qualify the law, in a way which would yield their desired result, irrespective of whether or not that result would promote principled and coherent development of the law[14]. They are primarily, usually solely, focused on the arguments to be put and met in the case before them.

Of course, there are some litigants whose interests extend well beyond the immediate subject of litigation. In constitutional litigation, the polities that make up the Federation are obvious examples and

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12 *Brown v Allen* (1953) 344 US 443 at 540 (Jackson J).

13 For example, legal practitioners appearing as amicus: see, eg, *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 550 [1] (Gleeson CJ), 557-559 [27]-[33] (Kirby J), 568 [68] (Hayne J), 580 [104] (Heydon J), 591-592 [149] (Crennan and Kiefel JJ) ('*Alinta*'); *Re Canavan* (2017) 263 CLR 284 at 296 [7] (the Court).

14 Stapleton, *Three Essays on Torts* (2021) at 3; Goff, "Appendix: The Search for Principle" (1983), republished in Swadling and Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (1999) 313 at 325.

hence the legal practitioners representing the polities can be expected to frame their arguments in the light of longer-term interests by seeking to take account of what would follow for the polity they represent from the Court accepting or rejecting particular arguments that might be advanced in the case at hand. That is no easy task. But it is a task that must be undertaken. And in the case of the States, it may be a task which reveals points of common interest between them that might affect the way in which the arguments should be framed. But, as will be explained, the unique role of the polities in constitutional litigation can also give rise to potential problems when it comes to the way in which arguments are presented to the Court.

What about the third group of key actors – the academy? The academy produces work that is an invaluable resource for both legal practitioners and judges[15]. Academics can spend lengthy periods of time conducting in depth research and analysing particular legal issues; they can have "a lengthy period of gestation, and intermittent opportunities for reconsideration"[16]. They can also look at and

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15 See, eg, Goff, "Appendix: The Search for Principle" (1983), republished in Swadling and Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (1999) 313 at 325; La Forest, "Who is Listening to Whom? The Discourse between the Canadian Judiciary and Academics", in Markesinis (ed), *Law Making, Law Finding and Law Shaping: The Diverse Influences – The Clifford Chance Lectures*, vol 2 (1997) 69 at 69; Bastarache, "The Role of Academics and Legal Theory in Judicial Decision-Making" (1999) 37 *Alberta Law Review* 739 at 746; Kiefel, "The Academy and the Courts – What Do They Mean to Each Other Today?" (2019) at 1, 7; Dyson, *Justice: Continuity and Change* (2018) at 37-38.

16 *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9 at 16 (Megarry J) ('*Cordell*').

analyse issues through different lenses. They can provide insights into and different ways of approaching legal problems. And because academics are not focused on any particular case before the Court in the way that practitioners and judges are, "they can afford to pay more attention ... to wider issues about the conceptual integrity and coherence of large areas of the law"[17]. In that sense, although the "sharpening of focus which the detailed facts of a particular case"[18] brings to the practitioners and judges involved in a dispute is certainly critical for the case-by-case development of the law, the fact that academics can consider issues at a higher level of generality than the issues that arise on the facts of a particular case presents certain advantages. It allows for a birds eye view – "a more detached and broader perspective"[19] – focused on the coherence of the law rather than the outcome in any given case[20]. Sometimes, of course, academics identify problems, without necessarily arriving at any one solution. But the best work often takes a problem and identifies available solutions and the considerations that the writer believes affect what choice might be made between them. Less helpful, and

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17 Cane, "What a Nuisance!" (1997) 113 *Law Quarterly Review* 515 at 518. cf *Cordell* [1969] 2 Ch 9 at 16 (Megarry J).

18 *Cordell* [1969] 2 Ch 9 at 16 (Megarry J). See also Duxbury, *Jurists and Judges: An Essay on Influence* (2001) at 76.

19 La Forest, "Who is Listening to Whom? The Discourse between the Canadian Judiciary and Academics", in Markesinis (ed), *Law Making, Law Finding and Law Shaping: The Diverse Influences – The Clifford Chance Lectures*, vol 2 (1997) 69 at 69.

20 Goff, "Appendix: The Search for Principle" (1983), republished in Swadling and Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (1999) 313 at 326-327.

less likely to be "taken seriously by judges" and practitioners, is work which expresses "opinions unsupported by analysis"[21] or work that consists only of criticism or complaint without identifying what other choice was open and why that other choice would be better for the principled development of the law.

The immense importance of academic work is clearly reflected in the submissions of parties to litigation in the High Court and the judgments of the Court. Seventy years ago, Chief Justice Dixon said that in the High Court "the use of academic[] writings [is] very great indeed"[22]. That remains so, particularly in the context of constitutional law. And the influence is not limited to the very frequent reference to academic work in submissions and judgments. Just because an article or book is not cited in a judgment that does not mean it was not of assistance[23]. Legal scholarship does and *should* cause each of us to think, to think critically and to think about issues, concepts and ideas that might not otherwise come across our

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21 Cane, "What a Nuisance!" (1997) 113 *Law Quarterly Review* 515 at 518.

22 Dixon, "Address upon the occasion of first presiding as Chief Justice at Melbourne on 7 May 1952", in Dixon, *Jesting Pilate and Other Papers and Addresses* (1965) at 254.

23 See Duxbury, *Jurists and Judges: An Essay on Influence* (2001) at 8-17; Twining et al, "The Role of Academics in the Legal System", in Cane and Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) 920 at 928-929; Rodger, "Judges and Academics in the United Kingdom" (2010) 29 *University of Queensland Law Journal* 29 at 31-32.

desk[24]. For as the Chief Justice said in the same speech, the High Court "has always administered the law as a living instrument and not as an abstract study"[25].

Facts in constitutional cases

That leads to the first theme – facts in constitutional cases – a matter of particular concern for legal practitioners and judges; but not irrelevant to the academy.

In the United States, one commentator observed that "[t]he proposition that facts comprise a large component of constitutional decision making will strike some ... as glaringly obvious and others as obviously mistaken"[26]. I sit in the former camp. Facts set the playing field for constitutional cases. They are critical for identifying the issues that *properly arise* for determination and in framing the questions to be resolved. Facts, or lack of them, often determine constitutional validity.

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24 Indeed, even if judges disagree with academic work they may still find that work to be of assistance: see, eg, *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 488 (Lord Goff) ('*Spiliada Maritime Corp*').

25 Dixon, "Address upon the occasion of first presiding as Chief Justice at Melbourne on 7 May 1952", in Dixon, *Jesting Pilate and Other Papers and Addresses* (1965) at 254.

26 Faigman, *Constitutional Fictions: A Unified Theory of Constitutional Facts* (2008) at 1.

When lawyers think about facts, they probably instinctively think of evidence adduced in a trial; "how to get information into, or kept out of, the record"[27]. While facts of that kind may be relevant in some constitutional cases, facts generally occupy a different space in constitutional cases, particularly cases before the High Court.

Three points will be developed about facts in constitutional cases. But, before doing so, it is necessary to start by noticing that a distinction is commonly drawn between what are termed "adjudicative facts" and "legislative facts"[28]. Chief Justice Dixon described "adjudicative facts" as "ordinary questions of fact which arise between the parties because one asserts and the other denies that events have occurred bringing one of them within some criterion of liability or excuse set up by the law"[29]. Adjudicative facts relate, for example, "to the parties, their activities, their properties,

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27 Kahn, *Making the Case: The Art of the Judicial Opinion* (2016) at 135.

28 See *Breen v Sneddon* (1961) 106 CLR 406 at 411 (Dixon CJ) ('*Breen*'); *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 478-479 [64]-[65] (McHugh J) ('*Woods*'); *Thomas v Mowbray* (2007) 233 CLR 307 at 512 [614], 518-519 [632] (Heydon J) ('*Thomas*'); *Aytugrul v The Queen* (2012) 247 CLR 170 at 200-201 [70] (Heydon J) ('*Aytugrul*'); *Maloney v The Queen* (2013) 252 CLR 168 at 298-299 [351] (Gageler J) ('*Maloney*'); *Re Day* (2017) 91 ALJR 262 at 268-269 [21] (Gordon J); 340 ALR 368 at 374-375. Dividing facts into these categories was described in Davis, "An Approach to Problems of Evidence in the Administrative Process" (1942) 55 *Harvard Law Review* 364 at 402-403.

29 *Breen* (1961) 106 CLR 406 at 411 (Dixon CJ). See also *Woods* (2002) 208 CLR 460 at 478 [65] (McHugh J); *Aytugrul* (2012) 247 CLR 170 at 200-201 [70] (Heydon J); *Re Day* (2017) 91 ALJR 262 at 269 [21] (Gordon J); 340 ALR 368 at 374-375.

their businesses"[30]; "what the parties did, what the circumstances were, what the background conditions were"[31].

By contrast, "legislative facts" are facts which assist the Court to determine the content of law and policy and to exercise its judgment in determining what course of action to take[32]. "Constitutional facts" are a species of legislative fact[33]. They are "matters of fact upon which ... the constitutional validity of some general law may depend"[34]. Callinan J described constitutional facts "in cases of contested constitutional powers ... [as] facts justifying, or calling for, the exercise of the relevant power, and as to which its exercise is reasonably capable of applying"[35].

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30 Davis, "Judicial Notice" (1955) 55 *Columbia Law Review* 945 at 952, quoted in *Re Day* (2017) 91 ALJR 262 at 269 [21] (Gordon J); 340 ALR 368 at 375.

31 Davis, "An Approach to Problems of Evidence in the Administrative Process" (1942) 55 *Harvard Law Review* 364 at 402.

32 *Woods* (2002) 208 CLR 460 at 478 [65] (McHugh J), quoting Heydon, *Cross on Evidence,* 6th ed (2000) at 122 [3010].

33 *Maloney* (2013) 252 CLR 168 at 299 [352] (Gageler J); *Re Day* (2017) 91 ALJR 262 at 269 [21] (Gordon J); 340 ALR 368 at 374-375.

34 *Breen* (1961) 106 CLR 406 at 411 (Dixon CJ). See also *Richardson v Forestry Commission* (1988) 164 CLR 261 at 294 (Mason CJ and Brennan J) ('*Richardson*').

35 *Thomas* (2007) 233 CLR 307 at 482 [526] (Callinan J). See also *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 292 (Dixon J) ('*Commonwealth Freighters*').

Procedures for placing facts before the Court

The first point to develop concerns the procedures that may be used to place facts – adjudicative and constitutional facts – before the High Court in constitutional matters brought in the Court's original jurisdiction. The position of facts in cases in the Court's appellate jurisdiction[36] can be put to one side for present purposes[37]. Identifying the procedures is important because each is significantly different – the chosen procedure affects what the Court can do.

Since the earliest days of the High Court's existence[38], the demurrer procedure was often chosen to argue issues of constitutional validity in the High Court[39]. By that procedure, the

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36 *Constitution*, s 73.

37 But see Lane, "Facts in Constitutional Law" (1963) 37 *Australian Law Journal* 108 at 118.

38 See *Levy v Victoria* (1997) 189 CLR 579 at 649 (Kirby J) ('*Levy*') and *Director of Public Prosecutions (Cth) v JM* (2013) 250 CLR 135 at 154 [32] (the Court) ('*JM*'), both citing *Bond v The Commonwealth* (1903) 1 CLR 13.

39 *High Court Rules 2004* (Cth), r 27.07. See, eg, *Attorney-General (Vic); Ex rel Dale v Commonwealth* (1945) 71 CLR 237; *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 ('*Melbourne Corporation*'); *Victoria v The Commonwealth (Second Uniform Tax Case)* (1957) 99 CLR 575; *Attorney-General (Vic) v The Commonwealth (Marriage Act Case)* (1962) 107 CLR 529; *Victoria v The Commonwealth (Payroll Tax Case)* (1971) 122 CLR 353; *Victoria v The Commonwealth (Australian Assistance Plan Case)* (1975) 134 CLR 338; *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1; *Queensland v The Commonwealth* (1977) 139 CLR 585; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 ('*Koowarta*'); *Australian Capital Television Pty Ltd v The Commonwealth*

demurring party admits, for the purposes of the demurrer, the facts pleaded by the other party, but asserts that those facts would not, if proved, establish the pleaded cause of action or defence[40]; in other words, the demurring party denies that the facts have the legal consequences asserted by the other party[41]. In the "Standard Railway Gauge Case", *South Australia v The Commonwealth*[42], Dixon CJ said that "the use of a demurrer ... certainly has been found a speedy and not unsatisfactory procedure". But as Dixon CJ also said, "what justifies demurrer as a means of determining a legal controversy is the supposition that the pleading will contain and contain only a statement of the material facts on which the party pleading relies" for their claim or defence[43]. Put differently, "a demurrer assumes that the pleadings exhaust the universe of

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(1992) 177 CLR 106 ('*Australian Capital Television*'); *Levy* (1997) 189 CLR 579; *The Commonwealth v Western Australia* (1999) 196 CLR 392 ('*Mining Act Case*'); *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1; *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 ('*Wurridjal*').

40 *Kathleen Investments (Aus) Ltd v Australian Atomic Energy Commission* (1997) 139 CLR 117 at 135 (Gibbs J) ('*Kathleen Investments*'); *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 at 845 [53] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); 393 ALR 551 at 564 ('*Mineralogy*'). See also *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 357 [50] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) ('*Bass*').

41 *JM* (2013) 250 CLR 135 at 154 [32] (the Court).

42 (1962) 108 CLR 130 at 142.

43 (1962) 108 CLR 130 at 142.

relevant factual material"[44]. The only facts that are taken to be admitted are those expressly or impliedly averred in the pleadings and the Court *cannot* take as admitted any inference from the facts pleaded[45]. The consequence is that, in deciding the demurrer, the Court should discard "all statements [in the pleading] which are no more than evidentiary and all statements involving some legal conclusion"[46].

Where pleadings are defective – where they do not "allege with distinctness and clearness the constituent facts of the cause of action or defence"[47] – the demurrer procedure is not ordinarily a satisfactory means of resolving issues of law[48]. As six members of the Court put it in *Bass v Permanent Trustee Co Ltd*[49], "[t]he utility of demurrers is … heavily dependent on the pleadings containing all the relevant

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44 *Bass* (1999) 198 CLR 334 at 357 [50] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

45 *Kathleen Investments* (1997) 139 CLR 117 at 135 (Gibbs J); *Wurridjal* (2009) 237 CLR 309 at 368 [120] (Gummow and Hayne JJ).

46 *South Australia v The Commonwealth* (1962) 108 CLR 130 at 142 (Dixon CJ) ('*South Australia*'). See also *Levy* (1997) 189 CLR 579 at 579 (Brennan CJ); *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at 589 [6] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ) ('*Plaintiff M96A/2016*').

47 *South Australia* (1962) 108 CLR 130 at 142 (Dixon CJ).

48 *Kathleen Investments* (1997) 139 CLR 117 at 135 (Gibbs J), 144 (Stephen J).

49 (1999) 198 CLR 334 at 357 [50] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also *Mining Act Case* (1999) 196 CLR 392 at 446 [162] (Kirby J); *Wurridjal* (2009) 237 CLR 309 at 368 [119] (Gummow and Hayne JJ).

facts. When the parties are uncertain whether further investigation will reveal further factual material, the utility of the demurrer is diminished". This may explain why the demurrer is now used less often[50].

But procedures other than demurrer have always been used in the Court[51]. Some well-known leading cases were decided by the case stated procedure, by which a Justice of the High Court may state the relevant facts and reserve questions for the determination of the Full Court[52]. "Upon a case stated the court cannot determine questions of fact and it cannot draw inferences of fact from what is stated in the case. Its authority is limited to ascertaining from the contents of the case stated what are the ultimate facts, and not the evidentiary facts, from which the legal consequences ensue that govern the determination of the rights of parties"[53]. Often, when the

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50 cf *Plaintiff M96A/2016* (2017) 261 CLR 582; *Gerner v Victoria* (2020) 270 CLR 412.

51 The *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers Case*') and the *Communist Party Case* (1951) 83 CLR 1 were both argued on a case stated. *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 ('*Banking Case*') was argued on a motion for interlocutory injunction treated as the trial of the action.

52 *Judiciary Act 1903* (Cth), s 18.

53 *R v Rigby* (1956) 100 CLR 146 at 150-151 (Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ). See also *Mack v Commissioner of Stamp Duties (NSW)* (1920) 28 CLR 373 at 381 (Isaacs J); *Brisbane City Council v Valuer-General (Qld)* (1978) 140 CLR 41 at 58 (Gibbs J); *Johanson v Dixon* (1979) 143 CLR 376 at 382 (Mason J). cf *New South Wales v The Commonwealth* (1926) 38 CLR 74 at 82 (Knox CJ, Gavan Duffy, Rich and Starke JJ).

case stated procedure has been used the material facts are succinctly identified by the Justice who states the case, sometimes consisting of ten or so paragraphs[54].

Alternatively, a Justice may reserve any "question"[55] for the determination of the Full Court (without stating a "case")[56] where they are satisfied that the question requires resolution, "in which event the Justice can be expected to make further directions to establish the basis, whether of fact or evidence or pleading, on which the Full Court is being asked by the Justice to resolve the question"[57]. Other infrequently used procedures for determining facts in a proceeding where questions are reserved for the Full Court, but the facts cannot be agreed, are the remittal of part of a matter to an

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54 See, eg, *Engineers Case* (1920) 28 CLR 129 at 131-132; *Communist Party Case* (1951) 83 CLR 1 at 6-9; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 35-36 (Brennan J).

55 See *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 at 378 (Kitto J). See also *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 660 [10] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ) ('*Bodruddaza*').

56 *Judiciary Act 1903* (Cth), s 18. See, eg, *The Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1.

57 *Mineralogy* (2021) 95 ALJR 832 at 845 [52] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); 393 ALR 551 at 564.

appropriate court to make findings of fact[58] and a trial of the facts before a single Justice of the High Court[59].

Recently, constitutional issues predominantly come to the Court by the parties agreeing in stating the questions of law arising in the proceeding in the form of a special case for the opinion of the Full Court[60]. A special case is the parties' case: it must "state the facts and identify the documents necessary to enable the Court to decide the questions raised"[61]. There may be many reasons for the increasing use of the special case procedure. Perhaps most obviously, it has proved to be an efficient way of bringing matters on for hearing in a timely manner[62]. In addition, because the Court is able to "draw from the facts stated and documents identified in the special case any inference, whether of fact or law, which might have been drawn from

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58 See, eg, *Newcrest Mining (WA) Ltd v BHP Minerals Ltd* (1997) 190 CLR 513; *Palmer v Western Australia* (2021) 95 ALJR 229 ('*Palmer*').

59 See, eg, *Re Day* (2017) 91 ALJR 262 at 269 [25] (Gordon J); 340 ALR 368 at 375; *Re Roberts* (2017) 91 ALJR 1018 at 1020 [7] (Keane J); 347 ALR 600 at 602.

60 *High Court Rules 2004*, r 27.08.1. See *Bodruddaza* (2007) 228 CLR 651 at 660 [10] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Mineralogy* (2021) 95 ALJR 832 at 846 [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); 393 ALR 551 at 565.

61 *High Court Rules 2004*, r 27.08.3.

62 *Mineralogy* (2021) 95 ALJR 832 at 846 [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); 393 ALR 551 at 565.

them if proved at a trial"[63], it provides parties with a degree of flexibility regarding the arguments that they may make that is lacking from the demurrer and case stated procedures. The parties may also prefer the special case procedure because it allows them to put before the Court many statements that are "no more than evidentiary" and many statements that involve "some legal conclusion"[64].

What is to be highlighted for present purposes, however, is that unlike the cases stated in the *Engineers Case*[65], or in the *Communist Party Case*[66], many special cases are now very long and are accompanied by extensive volumes of documents which form part of the special case. It may be that parties agree to the inclusion of material within a special case in the interests of ensuring that the case can come on quickly, rather than being tied down by debates about the content of the special case. There may be extensive background or historical material that is relevant to understanding the genesis of a provision and the mischief to which it is directed. The statute at the heart of the case may be very complex; it may have several different operations and applications about which the

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63 *High Court Rules 2004*, r 27.08.5. See also *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 at 292 [10]-[12] (Kiefel CJ, Keane, Nettle and Edelman JJ), 301-302 [44]-[49] (Bell, Gageler and Gordon JJ) ('*Plaintiff M47/2018*').

64 *South Australia* (1962) 108 CLR 130 at 142 (Dixon CJ).

65 (1920) 28 CLR 129.

66 (1951) 83 CLR 1.

parties seek to provide context. Frequently, the parties agree to the inclusion of documents within a special case without agreeing any facts about what the documents relevantly reveal – for example they might agree that a document such as a Parliamentary report was published on a particular date and then annex the entirety of the document. That may be because one party does not accept that the document supports the existence of a fact urged by the other party or because they wish to reserve their position about the relevance of the document.

I do not wish to criticise those practices; of course, compromises are important for the efficient conduct of litigation. But there are potential difficulties associated with the special case procedure that have become increasingly apparent to me in recent years. Two difficulties will be addressed.

The first is that, of their nature, constitutional cases commonly involve litigants who have vastly different resources: for example, an individual versus the Commonwealth or a small business versus a State. Often plaintiffs are represented by counsel acting on a pro bono basis. While this has consequences for the conduct of all constitutional litigation, it is particularly evident where the special case procedure is used. The plaintiff may not have access to information that a government party does about the operation or effect of a law; they may not have the resources to engage expert witnesses or obtain data about matters that may be relevant to the

validity of a law. This imbalance will be addressed again in relation to constitutional facts.

The second difficulty is that because a special case is the product of the parties' agreement, the consequence may sometimes be that the parties do not focus only upon the particular operations of the statute which are of immediate relevance to them. That is, it may lead to overly broad claims of invalidity. Yet the interests of the moving party may be to limit the immediate focus of attack to only some of those operations or applications. Further, the parties may not feel the need to identify as carefully as they otherwise might exactly what are the constitutional facts upon which they rely for their competing contentions. It is surprisingly common for parties to, apparently prematurely, agree to facts for the sake of expedience only to end up before the Full Court in dispute as to what are the relevant constitutional facts.

Role of adjudicative facts in framing issues for determination and judicial restraint

That leads to the next point: the important, sometimes critical, role of adjudicative facts[67] in informing the issues that *properly arise* for determination and the framing of questions to be resolved in constitutional cases. In a number of constitutional cases in the last

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67 See *Mineralogy* (2021) 95 ALJR 832 at 946 [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); 393 ALR 551 at 565.

decade[68], the Court has emphasised the point made in *Lambert v Weichelt*[69] that "[i]t is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties". This practice of judicial restraint can be seen in a range of contexts, for example:

- if a case can be resolved by statutory construction or on other grounds then it is unnecessary to address a constitutional issue[70];

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68 See *Tajjour v New South Wales* (2014) 254 CLR 508 at 587-588 [173] (Gageler J) ('*Tajjour*'); *Duncan v New South Wales* (2015) 255 CLR 388 at 410 [52] (the Court); *Knight v Victoria* (2017) 261 CLR 306 at 324-325 [32]-[33] (the Court) ('*Knight*'); *Clubb v Edwards* (2019) 267 CLR 171 at 192-193 [32]-[36] (Kiefel CJ, Bell and Keane JJ), 216-217 [135]-[138] (Gageler J), 287-288 [332] (Gordon J) ('*Clubb*'); *Zhang v Commissioner of Police* (2021) 95 ALJR 432 at 437-438 [21]-[23] (the Court) ('*Zhang*'); *Mineralogy* (2021) 95 ALJR 832 at 846 [56] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); 393 ALR 551 at 565. See also *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171 at 190 [44] (French CJ, Hayne, Kiefel, Bell, Keane and Nettle JJ).

69 (1954) 28 ALJ 282 at 283 (the Court).

70 *Universal Film Manufacturing Co (Australasia) Ltd v New South Wales* (1927) 40 CLR 333 at 342, 346-347 (Isaacs ACJ), 353 (Rich J); *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 510 [91] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *O'Donoghue v Ireland* (2008) 234 CLR 599 at 614 [14] (Gleeson CJ); *Wotton v Queensland* (2012) 246 CLR 1 at 14 [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ);

- if a party raises multiple constitutional issues, if one succeeds it may be unnecessary to address the others[71];

- the Court would not ordinarily "embark upon the reconsideration of an earlier decision where, for the resolution of the instant case, it is not necessary to do so"[72]; and

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Public Service Association of South Australia Inc v Industrial Relations Commission (SA) (2012) 249 CLR 398 at 419 [53] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 625-626 [149] (Keane J) ('*NAAJA*'); *Plaintiff S297/2013 v Minister for Immigration and Border Protection [No 2]* (2015) 255 CLR 231 at 244 [23] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ). See also *Ashwander v Tennessee Valley Authority* (1936) 297 US 288 at 347 (Brandeis J).

71 See, eg, *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 482 [123] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Wurridjal* (2009) 237 CLR 309 at 437 [354]-[355] (Crennan J); *Unions NSW v New South Wales* (2013) 252 CLR 530 at 561 [66] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Bell Group NV (In liq) v Western Australia* (2016) 260 CLR 500 at 528 [75] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ); *Unions NSW v New South Wales* (2019) 264 CLR 595 at 618 [54] (Gageler J); *Alexander v Minister for Home Affairs* [2022] HCA 19 at [132] (Gordon J) ('*Alexander*').

72 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 473 [249] (Gummow and Hayne JJ). See also *Brownlee v The Queen* (2001) 207 CLR 278 at 295 [48] (Gaudron, Gummow and Hayne JJ) ('*Brownlee*'); *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 51 [37] (McHugh, Gummow and Hayne JJ) ('*British American Tobacco*'); *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 199 [141] (Hayne, Kiefel and Bell JJ); *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 139 [352] (Heydon J); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 372 [148] (Kiefel and Keane JJ); *Plaintiff M47/2018* (2019) 265 CLR 285 at 292 [11] (Kiefel CJ, Keane, Nettle and Edelman JJ), 302 [49] (Bell, Gageler and Gordon JJ).

- the Court should not determine constitutional issues that the parties have not sought to raise[73].

And it is the same practice of judicial restraint which explains why the Court has, in some cases, treated severance[74] as a "threshold question"[75], on the basis that it is ordinarily inappropriate for the Court "to be drawn into a consideration of whether a legislative provision would have an invalid operation in circumstances which have not arisen and which may never arise if the provision, if invalid in that operation, would be severable and otherwise valid"[76]. For example, if a party challenges a law on the basis that it infringes the implied freedom of political communication, if they have not established that they have in the past, or would in future, engage in political communication that would be affected by the law, then the

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73 *British American Tobacco* (2003) 217 CLR 30 at 51 [38] (McHugh, Gummow and Hayne JJ); *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388 at 426 [97] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159 at 171 [28] (McHugh, Gummow, Hayne and Heydon JJ); *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 234-235 [55] (the Court).

74 Sometimes referred to as "reading down" or "disapplication": see *Thoms v The Commonwealth* [2022] HCA 20 at [75] (Gordon and Edelman JJ).

75 See, eg, *Knight* (2017) 261 CLR 306 at 324-325 [32]-[33] (the Court); *Clubb* (2019) 267 CLR 171 at 221-222 [149] (Gageler J), 287 [329]-[330] (Gordon J), 323-324 [438]-[441] (Edelman J).

76 *Knight* (2017) 261 CLR 306 at 324 [33] (the Court), quoted with approval in *Mineralogy* (2021) 95 ALJR 832 at 847 [59] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); 393 ALR 551 at 566.

Court may refrain from determining whether that operation of the law would be invalid if that invalid operation would in any event be severable. As the Court explained in *Knight v Victoria*, that approach ensures that "a party [is] not ... permitted to 'roam at large' but [is] confined to advancing those grounds of challenge which bear on the validity of the provision in its application to that party"[77].

Fundamentally, the Court's reticence to resolve constitutional issues that do not properly arise on the facts of the particular case is underpinned by prudential considerations that are based on an understanding about the proper role of the High Court within our adversarial system of justice. In particular, it is founded on "the same basal understanding of the nature of the judicial function as that which has informed" the constitutional doctrine that the High Court lacks jurisdiction to determine questions of law divorced from the administration of the law[78]. The Court cannot, and will not, declare the content of the law otherwise than in the context of resolving a controversy about a legal right or liability, based on facts found or

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77 *Knight* (2017) 261 CLR 306 at 325 [33] (the Court).

78 *Clubb* (2019) 267 CLR 171 at 216-217 [136] (Gageler J). See also *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266-267 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 303 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ) ('*Mellifont*'); *North Ganalanja Corp; Ex parte Queensland* (1996) 185 CLR 595 at 612 (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ); *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234 at 245 [29] (Kiefel CJ, Keane and Gordon JJ); 399 ALR 214 at 223 [29] ('*Hobart International Airport*').

agreed[79]. To do that would be to give an advisory or hypothetical opinion.

Put in different terms, "[l]aw cannot exist in a vacuum"[80]. Our adversarial system of justice places high importance on the development and honing of legal principles by application to real life controversies[81] – the elucidation of legal principles proceeds best, and is "most securely founded"[82], when it takes place within the concrete parameters of a dispute in which "a question emerges *precisely framed and necessary for decision* from a clash of adversary

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79 See *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-266 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); *Luna Park Ltd v The Commonwealth* (1923) 32 CLR 596 at 600 (Knox CJ); *Attorney-General (Vic) v The Commonwealth* (1945) 71 CLR 237 at 272 (Dixon J); *The Commonwealth v Queensland* (1987) 62 ALJR 1 at 1-2 (the Court); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Bass* (1999) 198 CLR 334 at 355-359 [43]-[56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 389 at [5] (Gleeson CJ); *Kuczborksi v Queensland* (2014) 254 CLR 51 at 109 [186] (Crennan, Kiefel, Gageler and Keane JJ) ('*Kuczborksi*'); *Palmer v Ayres* (2017) 259 CLR 458 at 491 [27] (Kiefel, Keane, Nettle and Gordon JJ) ('*Ayres*').

80 *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645 at 671 (Deane J).

81 *Australian Boot Trade Employees Federation v The Commonwealth* (1954) 90 CLR 24 at 50-51 (Kitto J) ('*Australian Boot Trade Employees Federation*').

82 *Mineralogy* (2021) 95 ALJR 832 at 846 [58] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); 393 ALR 551 at 566.

argument"[83]. The words of a statute operate "in and upon matters of fact"[84].

Refraining from deciding constitutional questions when the questions do not properly arise on the facts before the Court (no matter how important or interesting the questions might be) removes "the need for a court to consider hypothetical or speculative applications of [a statutory] provision in order to determine the rights of the parties"[85]. It avoids premature interpretation of statutes "on the basis of inadequate appreciation of their practical operation"[86] and the formulation of rules of constitutional law that are "broader than

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83 *United States v Fruehauf* (1960) 365 US 146 at 157 (the Court) (emphasis added), quoted in *Zhang* (2021) 95 ALJR 432 at 438 [25] (the Court). See also *Chicago & Railway Co v Wellman* (1892) 143 US 339 at 345 (the Court); *Baker v Carr* (1962) 369 US 186 at 204 (the Court); *Mellifont* (1991) 173 CLR 289 at 318 (Brennan J); *Kuczborksi* (2014) 254 CLR 51 at 109 [186] (Crennan, Kiefel, Gageler and Keane JJ); *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at 171 [127] (Gageler and Gordon JJ); *Clubb* (2019) 267 CLR 171 at 217 [137] (Gageler J); *Mineralogy* (2021) 95 ALJR 832 at 846 [58] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); 393 ALR 551 at 566, quoting *Poe v Ullmann* (1961) 367 US 497 at 503 (Frankfurter J).

84 *North Eastern Dairy Co Ltd v Dairy Industry Authority (NSW)* (1975) 134 CLR 559 at 588 (Barwick CJ) ('*North Eastern Dairy Co Ltd*').

85 *Tajjour* (2014) 254 CLR 508 at 587 [172] (Gageler J). See also *Clubb* (2019) 267 CLR 171 at 216 [135] (Gageler J), 289 [336] (Gordon J). See also *Carter v Potato Marketing Board* (1951) 84 CLR 460 at 478 (Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ) ('*Carter*').

86 *Zhang* (2021) 95 ALJR 432 at 438 [22] (the Court), quoting *Tajjour* (2014) 254 CLR 508 at 588 [174] (Gageler J).

required by the precise facts to which [they are] to be applied"[87]. It ensures that "[l]egal analysis is then directed only to issues that are real and not imagined"[88].

It is important to recognise that one of the difficulties that arises acutely (and perhaps uniquely) in constitutional cases is that a plaintiff seeking to challenge the validity of a statutory provision tends to have an incentive to attribute to the provision "as wide an operation as possible" because that assists in "show[ing] that it reaches beyond the limits of legislative power", while the government (or other) party defending the validity of a provision is naturally disposed to advance "a substantially narrower interpretation" in order to demonstrate that it is within power[89]. A consequence of these competing interests is that parties to constitutional litigation

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87 *Zhang* (2021) 95 ALJR 432 at 438 [22] (the Court), quoting *Tajjour* (2014) 254 CLR 508 at 588 [174] (Gageler J); see also *Knight* (2017) 261 CLR 306 at 326 [37] (the Court); *Clubb* (2019) 267 CLR 171 at 215-216 [135] (Gageler J).

88 *Clubb* (2019) 267 CLR 171 at 217 [137] (Gageler J).

89 *Australian Boot Trade Employees Federation* (1954) 90 CLR 24 at 50 (Kitto J). See also *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 525-526 [71], 527 [77] (French CJ); *South Australia v Totani* (2010) 242 CLR 1 at 98-99 [252] (Heydon J); *Wainohu v New South Wales* (2011) 243 CLR 181 at 238 [146] (Heydon J) ('*Wainohu*'); *NAAJA* (2015) 256 CLR 569 at 604 [75] (Gageler J), 626-627 [150], 627-628 [152] (Keane J); *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 258 [83] (Bell, Keane, Nettle and Edelman JJ) ('*Vella*'); *Nguyen v Director of Public Prosecutions* (2019) 59 VR 27 at 50 [61] fn 69 (Tate JA); *Zhang* (2021) 95 ALJR 432 at 438-439 [26]-[27] (the Court); *A Judicial Officer v Judicial Conduct Commissioner* [2022] SASCA 42 at 60 [250] (Livesey P).

frequently present "highly abstracted all-or-nothing argument[s] for or against invalidity"[90] which are artificial. The Court may be faced with, on the one hand, a plaintiff in favour of a broad, literal and draconian construction of a provision that would be detrimental to – against the interests of – persons actually affected by the law if it was held valid, and, on the other hand, a defendant urging a narrow construction, notwithstanding that a more expansive view would be more efficacious to – in the interests of – an entity seeking to enforce the statute[91]. Sometimes it may seem as if a government party is seeking to "concede into validity" as they advance arguments about the construction of an impugned law in an effort "to steer their vessels so as to avoid a constitutional shipwreck, or as they search for life-belts which will help them save something from that shipwreck"[92]. The Court is left in an undesirable position in such cases.

This is a problem that is becoming more pronounced in large part due to the increasing complexity, scope and reach of statute law and delegated or subordinate legislation[93]. As Justice McHugh

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90 *Tajjour* (2014) 254 CLR 508 at 588 [175] (Gageler J); *NAAJA* (2015) 256 CLR 569 at 604 [75] (Gageler J).

91 See Aitken, "Division of Constitutional Power and Responsibilities and Coherence in the Interpretation of Statutes", in Barnes (ed), *The Coherence of Statutory Interpretation* (2019) 22 at 31.

92 *Wainohu* (2011) 243 CLR 181 at 238 [146] (Heydon J).

93 Crawford, "The Rule of Law in the Age of Statutes" (2020) 48 *Federal Law Review* 159. See also *Buck v Comcare* (1996) 66 FCR 359 at 364-365 (Finn J); Pearce and Argument, *Delegated*

observed writing extra curially, "[l]egislation is the cornerstone of the modern legal system"[94]. Over the last century there has been a major expansion in relation to the subject matters of legislation, with Parliaments legislating to control an ever-increasing array of social, economic, political and other activities and conduct[95]; indeed, it is difficult to think of any area of modern society that is not affected by statute[96]. Statutes have also grown in length and complexity. A particular provision may have multiple permutations or operations[97]. If an impugned provision does have multiple operations, that makes it all the more important for the particular operation or operations of immediate relevance to be sufficiently illuminated by the facts so that

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Legislation in Australia, 4th ed (2012) at 15 [1.14], 16-18 [1.17]; Connolly and Stewart, "Public Law and a Public Lawyer in the Age of Statutes", in Connolly and Stewart (eds), *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce* (2015) 1 at 1-3.

94 McHugh, "The Growth of Legislation and Litigation" (1995) 69 *Australian Law Journal* 37 at 37.

95 McHugh, "The Growth of Legislation and Litigation" (1995) 69 *Australian Law Journal* 37 at 37. See *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 595 [48] (Gummow, Hayne and Crennan JJ).

96 See Connolly and Stewart, "Public Law and a Public Lawyer in the Age of Statutes", in Connolly and Stewart (eds), *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce* (2015) 1 at 1.

97 See, eg, *Zhang* (2021) 95 ALJR 432 at 436-437 [17] (the Court).

the Court is able to understand "the real significance, effect and operation" of the provision[98].

Litigants and legal practitioners might be frustrated by expending resources, time and energy arguing a case in which the Court does not ultimately resolve the issues that they agitated. Equally, academics might be disappointed when interesting issues are not considered by the Court. To take the recent case of *Zhang v Commissioner of Police*[99] as an example, one commentator descried the case as "a fizzer"[100]. The potential frustrations of litigants and academics are, however, small prices to pay for adhering to an approach that ensures that constitutional validity is not decided "in abstracto"[101] and that constitutional principles of great importance to our society are not developed and refined in a vacuum. And hopefully what has been said serves as a reminder for legal practitioners both to focus close attention on limiting their challenges to provisions that have been demonstrated to have some real application to the party and to ensure that all relevant adjudicative facts are before the

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98 *Wilcox Mofflin Ltd v New South Wales* (1952) 85 CLR 488 at 507 (Dixon, McTiernan and Fullagar JJ).

99 (2021) 95 ALJR 432.

100 Baker, "'A court should be wary' – Zhang v Commissioner of Police [2021] HCA 16" (Auspublaw) 16 June 2021, available at <https://www.auspublaw.org/blog/2021/06/a-court-should-be-wary-zhang-v-commissioner-of-police-2021-hca-16>.

101 *Carter* (1951) 84 CLR 460 at 478 (Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ).

Court[102] – they should not be an afterthought raised during oral argument.

Constitutional facts

Constitutional facts are facts upon which constitutional validity may depend[103]. They are important and need better and more considered attention[104]. It was said in the *Communist Party Case* that "it is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation"[105]. More recently, it was said that because the High Court "has ultimate responsibility for the enforcement of the *Constitution*, it has ultimate responsibility for the resolution of challenges to the constitutional validity of legislation, one way or the other, and cannot allow the validity of challenged statutes to remain in limbo. It therefore has the ultimate responsibility for the determination of constitutional facts which are crucial to validity. That determination 'is a central concern of the exercise of

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102 cf *Re Day* (2017) 91 ALJR 262 at 268-269 [21] (Gordon J); 340 ALR 368 at 374-375.

103 *Breen* (1961) 106 CLR 406 at 411 (Dixon CJ). See also Lane, "Facts in Constitutional Law" (1963) 37 *Australian Law Journal* 108 at 108; *Richardson* (1988) 164 CLR 261 at 294 (Mason CJ and Brennan J).

104 Gordon, "Communist Party Case: Core Themes and Legacy" (2022) 32 *Public Law Review* 291 at 302-304.

105 (1951) 83 CLR 1 at 222 (Williams J).

the judicial power of the Commonwealth'"[106]. As Dixon CJ said in *Commonwealth Freighters Pty Ltd v Sneddon*[107] (a section 92 case), "[h]ighly inconvenient as it may be, it is true of some legislative powers limited by definition, whether according to subject matter, to purpose or otherwise, that the validity of the exercise of the power must sometimes depend on facts, facts which somehow must be ascertained by the court responsible for deciding the validity of the law".

Constitutional facts are particularly important in determining whether purposive powers (like the defence power) are engaged[108] and whether a law burdens the freedom of "trade, commerce and intercourse among the States" guaranteed by s 92 of the *Constitution*, infringes the implied freedom of political communication or infringes the constitutional mandate in ss 7 and 24 of the *Constitution* that Senators and members of the House of

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106 *Thomas* (2007) 233 CLR 307 at 516 [626] (Heydon J), quoting *Sue v Hill* (1999) 199 CLR 462 at 484 [38] (Gleeson CJ, Gummow and Hayne JJ). See also *Gerhardy v Brown* (1985) 159 CLR 70 at 142 (Brennan J) ('*Gerhardy*'); *Unions NSW v New South Wales* (2019) 264 CLR 595 at 631-632 [94]-[95] (Gageler J).

107 (1959) 102 CLR 280 at 292 (Dixon CJ).

108 *Thomas* (2007) 233 CLR 307 at 386-387 [227] (Kirby J); *Queensland* (1989) 167 CLR 232 at 239 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). See also Gageler, "Fact and Law" (2009) 11 *Newcastle Law Review* 1 at 10.

Representatives be "directly chosen by the people"[109]. Constitutional facts may be relevant whenever a constitutional issue requires consideration of the "operation" of a law[110]. In all of those contexts, as well as others, cases may be won or lost on the facts.

The High Court has adopted a flexible approach to ascertaining constitutional facts; it recognises that the Court must find constitutional facts "as best it can" and that constitutional validity cannot be made to depend upon the conduct of parties to private litigation[111]. Nonetheless, the Court's duty to be satisfied of the

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109 *Cole v Whitfield* (1988) 165 CLR 360 at 409 (the Court); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 ('*Rowe*'); *McCloy v New South Wales* (2015) 257 CLR 178 at 201 [24] (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*'); *Brown v Tasmania* (2017) 261 CLR 328 at 370 [131] (Kiefel CJ, Bell and Keane JJ); *Unions NSW v New South Wales* (2019) 264 CLR 595 at 632 [95] (Gageler J), 649-651 [150]-[152] (Gordon J); *Palmer v Australian Electoral Commission* (2019) 269 CLR 196 at 214 [52]-[53] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); *Palmer* (2021) 95 ALJR 229; 388 ALR 180; *Ruddick v The Commonwealth* (2022) 96 ALJR 367; 399 ALR 476. See also Gageler, "Fact and Law" (2009) 11 *Newcastle Law Review* 1 at 10-11; Stellios, *Zines's The High Court and the Constitution*, 6th ed (2015) at 682-694; Carter, *Proportionality and Facts in Constitutional Adjudication* (2021).

110 See, eg, *Austin v The Commonwealth* (2003) 215 CLR 185 at 249 [124] (Gaudron, Gummow and Hayne JJ) ('*Austin*').

111 See, eg, *Commonwealth Freighters* (1959) 102 CLR 280 at 292 (Dixon CJ); *Breen* (1961) 106 CLR 406 at 411-412 (Dixon CJ); *Gerhardy* (1985) 159 CLR 70 at 141-142 (Brennan J); *Woods* (2002) 208 CLR 460 at 478-479 [65] (McHugh J); *Thomas* (2007) 233 CLR 307 at 481-484 [523]-[529] (Callinan J), 512 [614], 513 [618], 514-522 [620]-[639] (Heydon J); *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 146-147 [427] (Heydon J) ('*Pape*'); *Maloney* (2013) 252 CLR 168 at 193 [45] (French CJ), 298-299 [351]-[353] (Gageler J); *Re Day* (2017) 91 ALJR 262 at 268-269 [21]-[24] (Gordon J); 340 ALR 368 at

existence of constitutional facts has significant practical implications for the conduct of constitutional litigation. Although strict evidentiary rules and ordinary notions of onus and burden of proof are inapposite in relation to questions of constitutional fact[112], that does not mean that legal practitioners should adopt a laissez-faire attitude. Legal practitioners have an important role to play in ensuring that appropriate and sufficient constitutional facts are put before the Court to enable the proper determination of constitutional issues; the role should be pursued with rigour, not as an afterthought at the eleventh hour[113].

There are three critical considerations when parties ask the Court to find constitutional facts: the relevance of the material, the nature of the relevant material and the procedure to be adopted[114].

The material that may be relevant depends on the constitutional issue raised and the legislation or Executive conduct that is challenged: questions about constitutional facts "always arise for the

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374-375 [21]-[24]; *Clubb* (2019) 267 CLR 171 at 222 [152] (Gageler J).

112 *Clubb* (2019) 267 CLR 171 at 222 [152] (Gageler J), 292 [347] (Gordon J). See also *North Eastern Dairy Co Ltd* (1975) 134 CLR 559 at 622 (Jacobs J); *South Australia v Tanner* (1989) 166 CLR 161 at 179 (Brennan J) ('*Tanner*'); *Maloney* (2013) 252 CLR 168 at 193 [45] (French CJ), 298-300 [349]-[355] (Gageler J).

113 See, eg, *Unions NSW v New South Wales* (2019) 264 CLR 595 at 648-651 [145]-[153] (Gordon J).

114 *Re Day* (2017) 91 ALJR 262 at 269 [22] (Gordon J); 340 ALR 368 at 375.

consideration of a court in the context of *a specific case*"[115]. At the very least, material must have probative value; it must "tend logically to show the existence or non-existence of [constitutional] *facts* relevant to the issue to be determined"[116]. Having ascertained the facts relevant to the issue to be determined, the nature of the material which the Court has had regard to in establishing those constitutional facts has varied widely[117]. Examples include but are not limited to historical writings[118], contemporary academic work, "parliamentary reports, explanatory memoranda, Second Reading Speeches, reports and findings of Commissions of Inquiry"[119], foreign

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115 Gageler, "Fact and Law" (2009) 11 *Newcastle Law Review* 1 at 26 (emphasis added).

116 Gageler, "Fact and Law" (2009) 11 *Newcastle Law Review* 1 at 25 (emphasis added), quoted in *Re Day* (2017) 91 ALJR 262 at 269 [23] (Gordon J); 340 ALR 368 at 375. See also Hogg, "Proof of Facts in Constitutional Cases" (1976) 26 *University of Toronto Law Journal* 386 at 396; *Maloney* (2013) 252 CLR 168 at 299 [353] (Gageler J).

117 See *Maloney* (2013) 252 CLR 168 at 299 [353] (Gageler J).

118 See *Communist Party Case* (1951) 83 CLR 1 at 196 (Dixon J); *Thomas* (2007) 233 CLR 307 at 482-483 [526] (Callinan J).

119 *Thomas* (2007) 233 CLR 307 at 482-483 [526] (Callinan J).

and international law[120], international and national events, affairs and crises[121], expert reports[122] and "knowledge of ... society"[123].

The procedure then to be adopted by a Court in ascertaining constitutional facts depends on the nature of the particular facts[124]. Often, particularly where the special case procedure is used, many constitutional facts will be agreed by the parties. Where constitutional facts are not agreed, the parties may urge the Court to draw inferences based on material annexed to a special case, they might adduce constitutional facts according to the ordinary rules of evidence or they may ask that the Court take the facts on judicial notice[125]. The appropriate procedure may depend, among other things

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120 See, eg, *XYZ v The Commonwealth* [2005] HCATrans 957 at lines 2615-2662; *XYZ v The Commonwealth* (2006) 227 CLR 532 at 555-556 [61]-[64], 578 [138] (Kirby J); cf 608-609 [219] (Callinan and Heydon JJ); *Wurridjal* (2009) 237 CLR 309 at 412 [271] (Kirby J).

121 See, eg, *Communist Party Case* (1951) 83 CLR 1 at 196 (Dixon J); *Pape* (2009) 238 CLR 1 at 89 [233] (Gummow, Crennan and Bell JJ).

122 See *Rowe* (2010) 243 CLR 1 at 134 [438] (Kiefel J); *Palmer* (2021) 95 ALJR 229 at 237 [16] (Kiefel CJ and Keane J); 388 ALR 180 at 185-186.

123 See *North Eastern Dairy Co Ltd* (1975) 134 CLR 559 at 622 (Jacobs J), quoted with approval in *Maloney* (2013) 252 CLR 168 at 299 [351] (Gageler J).

124 *Re Day* (2017) 91 ALJR 262 at 269 [22] (Gordon J); 340 ALR 368 at 375.

125 See Gageler, "Fact and Law" (2009) 11 *Newcastle Law Review* 1 at 15; Heydon, "Developing the Common Law", in Gleeson and Higgins (eds), *Constituting Law: Legal Argument and Social Values* (2011) 93 at 99. See also *Thomas* (2007) 233 CLR 307 at 524-525 [646] (Heydon J).

on "the centrality or marginality of those facts; whether they are specific or general; whether they are historical, contemporary or predictive; whether they are concrete or evaluative; how much they might be controversial; how much they might be known to or knowable by a party; whether and, if so, how they may be capable of proof or disproof by a party"[126]. To that list it might be added, whether they are "official"[127] or "authoritative"[128] and whether they are susceptible of being "established by objective methods in curial proceedings"[129].

Practitioners should think carefully about whether it is in their client's interests to agree constitutional facts. While it may be more time consuming and increase costs, sometimes remittal to an appropriate court to make factual findings, or a trial of discrete factual issues before a single Justice of the High Court, may ultimately result in findings of constitutional fact that are critical to their success in the proceeding.

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126 Gageler, "Fact and Law" (2009) 11 *Newcastle Law Review* 1 at 26, quoted in *Re Day* (2017) 91 ALJR 262 at 269 [24] (Gordon J); 340 ALR 368 at 375.

127 *Thomas* (2007) 233 CLR 307 at 482-483 [526] (Callinan J). See also Heydon, "Developing the Common Law", in Gleeson and Higgins (eds), *Constituting Law: Legal Argument and Social Values* (2011) 93 at 117-118.

128 *Gerhardy* (1985) 159 CLR 70 at 142 (Brennan J); *Thomas* (2007) 233 CLR 307 at 522 [639] (Heydon J).

129 *Austin* (2003) 215 CLR 185 at 249 [124] (Gaudron, Gummow and Hayne JJ), citing *New York v United States* (1946) 326 US 572 at 581 (Frankfurter J).

That leads back to a point raised earlier – the imbalance between the parties to constitutional litigation. There is often a significant difference between the resources of the parties in constitutional cases and their access to relevant information that can be put before the Court to ascertain constitutional facts. It should also be added that those representing the parties often have differing degrees of experience. The legal practitioners representing the polities that make up the Federation typically have extensive experience in relation to constitutional law because of being repeat players in constitutional litigation. Legal practitioners representing plaintiffs often have far less experience; indeed, sometimes they may have never run a constitutional matter in the High Court before. As a result of these circumstances, the government party defending the validity of a law or Executive conduct often has a distinct advantage over the party alleging invalidity as regards the ability to place constitutional facts before the Court. The scales are tipped in their favour. And those scales are tipped even further when a party challenging the validity of a law is not just opposed by one party, but by a multitude of Solicitors-General[130], as frequently occurs in constitutional cases.

And, even where there is no imbalance between the parties, the nature of adversarial litigation is such that the parties to a proceeding

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130 cf Mason, "Interveners and Amici Curiae in the High Court: A Comment" (1998) 20 *Adelaide Law Review* 173 at 175.

may be "narrowly focused and controlled by the issues"[131] in contest between them. The parties and their legal representatives are, after all, naturally concerned with achieving success in the case at hand. And, as explained earlier, that sometimes leads to "highly abstracted all-or-nothing argument[s] for or against invalidity"[132]. Such cases are precisely the kind where assistance from non-parties with special interest in the subject matter may be particularly helpful; they may identify material that the parties consciously omit, or merely overlook or neglect[133].

In practice, this can produce a tension. On the one hand, the Court must ascertain constitutional facts "as best it can"[134]. The High Court, as custodian of the *Constitution*, has a duty to enforce the *Constitution*, and fulfilment of that duty (and, therefore determining the validity of a law or Executive conduct) "cannot be made to depend on the course of private litigation"[135] and which

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131 *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 137 [108] (Kirby J) ('*Breckler*').

132 *Tajjour* (2014) 254 CLR 508 at 588 [175] (Gageler J); *NAAJA* (2015) 256 CLR 569 at 604 [75] (Gageler J).

133 cf *Breckler* (1999) 197 CLR 83 at 136-137 [108] (Kirby J).

134 *Commonwealth Freighters* (1959) 102 CLR 280 at 292 (Dixon J); *Breen* (1961) 106 CLR 406 at 412 (Dixon CJ); *Gerhardy* (1985) 159 CLR 70 at 142 (Brennan J).

135 *Gerhardy* (1985) 159 CLR 70 at 141-142 (Brennan J), quoted with approval in *Thomas* (2007) 233 CLR 307 at 515 [621] (Heydon J).

litigant is better prepared or better resourced[136]. The duty of the Court in constitutional cases "necessarily goes beyond the interests and submissions of the particular parties to litigation"[137]. Indeed, "once litigating parties put the meaning of the *Constitution* in issue" in a sense "the matter is no longer the exclusive concern of the litigating parties"[138]; the interpretation of the *Constitution* affects all Australians. There are obvious benefits associated with the Court being provided with all material that is relevant to, or may have a bearing on, the validity of a law or Executive conduct that is challenged; not just those that the particular parties before the Court are minded to provide. Yet, on the other hand, it is undesirable for the Court to "embark on an attempt to illuminate with a flickering lamp constitutional facts only discernible from shadowy materials"[139].

As observed earlier, the Court's reticence to decide constitutional issues that do not properly arise on the facts of the particular case reflects concerns, among other things, about ensuring that constitutional issues are not decided in a vacuum and avoiding premature interpretation of statutes "on the basis of inadequate

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136 See *Thomas* (2007) 233 CLR 307 at 515 [622] (Heydon J).

137 *Wurridjal* (2009) 237 CLR 309 at 313 (Kirby J). See also *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 335 [83] (Kirby J).

138 Willheim, "Amici Curiae and Access to Constitutional Justice in the High Court of Australia" (2010) 22 *Bond Law Review* 126 at 126.

139 *Betfair Pty Ltd v Racing NSW* (2012) 249 CLR 217 at 275 [70] (Heydon J).

appreciation of their practical operation"[140]. Precisely the same concerns apply where the Court has an incomplete understanding of the constitutional facts that may be relevant to validity; it is undesirable to decide constitutional cases "where large issues of legal principle and legal policy are at stake"[141], and where the issues have profound significance for the Australian polity, in those circumstances. Bad facts – absent facts – can make bad law. But where a party has standing to challenge a law and the facts establish that that party's rights or interests are affected by the law, such that the determination of the constitutional issue properly arises for determination, it is this Court's duty to resolve the issue[142].

What then is the Court to do about this tension? In some cases, it may be that it is appropriate and convenient for the Court to conduct its own inquiries[143]. But the Court's ability to do so is likely to depend on the nature of the material from which facts may be ascertained, as well as the time and resources required to locate the relevant material. For example, it might be said that, without assistance, "the court has neither the knowledge nor the time to

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140 *Zhang* (2021) 95 ALJR 432 at 438 [22] the Court), quoting *Tajjour* (2014) 254 CLR 508 at 588 [174] (Gageler J).

141 *Breckler* (1999) 197 CLR 83 at 134 [104] (Kirby J). See also *Levy* (1997) 189 CLR 579 at 651 (Kirby J).

142 See *Thomas* (2007) 233 CLR 307 at 515 [624] (Heydon J).

143 See Lane, "Facts in Constitutional Law" (1963) 37 *Australian Law Journal* 108 at 117; *Gerhardy* (1985) 159 CLR 70 at 142. See also *High Court Rules 1903* (Cth), O 38.

become enmeshed in 'sheer' factual investigations into economics, highway engineering, hygiene theories and so on"[144]. Concerns about procedural fairness may also arise where the Court undertakes its own factual inquiries[145].

These difficulties are partly alleviated in the United States and in Canada by the practice of permitting non-parties with a strong interest in the subject matter of the litigation, as amici curiae, to file briefs[146]; much like what is commonly known in the United States as a "Brandeis brief"[147]. Amicus curiae ("friend of the court") briefs are "legal briefs submitted by entities other than the parties to litigation

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144 Lane, "Facts in Constitutional Law" (1963) 37 *Australian Law Journal* 108 at 109.

145 See Lane, "Facts in Constitutional Law" (1963) 37 *Australian Law Journal* 108 at 117-118; *Thomas* (2007) 233 CLR 307 at 481 [523] (Callinan J), 513 [618] (Heydon J); *Maloney* (2013) 252 CLR 168 at 299 [353] (Gageler J); *Re Day* (2017) 91 ALJR 262 at 269 [26] (Gordon J); 340 ALR 368 at 374-375.

146 See Breyer, "The Interdependence of Science and Law" (1998) 82 *Judicature* 24 at 26; Kearney and Merrill, "The Influence of Amicus Curiae Briefs on the Supreme Court" (2000) 148 *University of Pennsylvania Law Review* 743; Williams, "The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis" (2000) 28 *Federal Law Review* 365; Keyzer, "Participation of Non-Party Interveners and Amici Curiae in Constitutional Cases in Canadian Provincial Courts: Guidance for Australia?", in Cardinal and Headon (eds), *Shaping Nations: Constitutionalism and Society in Australia and Canada* (2002) 273; Collins, "Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation" (2004) 38 *Law & Society Review* 807 at 807; Collins, *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (2008) at 41-45.

147 See Hogg, "Proof of Facts in Constitutional Cases" (1976) 26 *University of Toronto Law Journal* 386 at 395-396.

that aim to persuade the justices to rule in the manner advocated in the briefs"[148]. Amicus briefs are extremely common in the United States Supreme Court; indeed, a case in 2003 attracted over 100 amicus briefs[149]. Justice Breyer has observed that amicus briefs "play an important role in educating the judges on potentially relevant technical matters, helping make [them] not experts, but moderately educated lay persons, and that education helps to improve the quality of [their] decisions"[150].

There is no doubt that the High Court is able to receive equivalent briefs from non-parties. As Brennan CJ observed in *Levy v Victoria*[151]:

> "The hearing of an amicus curiae is entirely in the Court's discretion. That discretion is exercised on a different basis from that which governs the allowance of intervention. The footing on which an amicus curiae is heard is that that person is willing to offer the Court a submission on law or *relevant fact*[152] which will assist

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148 Collins, *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (2008) at 2.

149 See *Gratz v Bollinger* (2003) 539 US 244. See also Collins, *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (2008) at 49.

150 Breyer, "The Interdependence of Science and Law" (1998) 82 *Judicature* 24 at 26.

151 (1997) 189 CLR 579 at 604 (Brennan CJ) (emphasis added; citation omitted). See also *Roadshow Films Pty Ltd v iiNet [No 1]* (2011) 248 CLR 37 at 39 [4] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

152 See, eg, a matter of fact relevant to a question of constitutional validity: see *Tanner* (1989) 166 CLR 161 at 179-180.

> the Court in a way in which the Court would not otherwise have been assisted".

His Honour added that "[i]t is not possible to identify in advance the situations in which the Court will be assisted by submissions that will not or may not be presented by one of the parties nor to identify the requisite capacities of an amicus who is willing to offer assistance. All that can be said is that an amicus will be heard when the Court is of the opinion that it will be significantly assisted thereby, provided that any cost to the parties or any delay consequent on agreeing to hear the amicus is not disproportionate to the assistance that is expected"[153].

The High Court can receive written and oral submissions from non-parties on law *or relevant fact*. It is not uncommon for the High Court to permit non-parties to make submissions (usually written, sometimes oral) as amicus curiae in constitutional matters[154]. But the

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153 *Levy* (1997) 189 CLR 579 at 604-605 (Brennan CJ); see also 651 (Kirby J).

154 See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 523, 549 ('*Lange*'); *Levy* (1997) 189 CLR 579 at 650 (Kirby J); *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 373; *Alinta* (2008) 233 CLR 542 at 546; *Momcilovic v The Queen* (2011) 245 CLR 1 at 23, 29 (French CJ), 75 [114] (Gummow J), 247 [677] (Bell J); *Williams v The Commonwealth* (2012) 248 CLR 156 at 217 [85] (Gummow and Bell JJ), 337 [456] (Crennan J); *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 449, 452 [2] (the Court); *Magaming v The Queen* (2013) 252 CLR 381 at 385, 387 (French CJ, Hayne, Crennan, Kiefel and Bell J) ('*Magaming*'); *Tajjour* (2014) 254 CLR 508 at 518, 572 [117] (Crennan, Kiefel and Bell JJ); *NAAJA* (2015) 256 CLR 569 at 578; *Clubb* (2019) 267 CLR 171 at 173, 182-184; *Comcare v Banerji* (2019) 267 CLR 373 at 388, 408 [51]

grant of leave to a non-party to file or adduce factual material is extremely uncommon[155]. Indeed, not one example of a constitutional case involving an amicus or intervener (other than an Attorney-General[156]) where this has occurred could be found. On the other hand, there are numerous examples of cases where the Court has refused the introduction of factual material by a non-party[157].

The liberal approach to amici curiae adopted in the United States "[s]o far, ... has not recommended itself to [the High] Court"[158]. In 2009,

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(Gageler J); *Re Canavan* (2017) 263 CLR 284 at 296 [7] (the Court); *Smethurst v Commissioner of Police* (Cth) (2020) 94 ALJR 502 at 513; 376 ALR 575 at 578; *Citta Hobart Pty Ltd v Cawthorn* (2022) 400 ALR 1 at 3.

155 See generally *Bropho v Tickner* (1993) 40 FCR 165 at 172-173 (Wilcox J).

156 An Attorney-General intervening in a proceeding that relates to a matter arising under the Constitution or involving its interpretation is "taken to be a party to the proceedings": see *Judiciary Act 1903* (Cth), s 78A(3). See also, eg, *Palmer v Western Australia (No 4)* [2020] FCA 1221 at [6]-[7], [9]-[10], [43] (Rangiah J).

157 See, eg, *Breckler* (1999) 197 CLR 83 at 134 [102] (Kirby J); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 381 [127] (Gummow J) ('*APLA Ltd*'); *Wurridjal* (2009) 237 CLR 309 at 312-314 (French CJ); *Unions NSW v New South Wales* (2019) 264 CLR 595 at 619 [57] (Kiefel CJ, Bell and Keane JJ).

158 *Levy* (1997) 189 CLR 579 at 651 (Kirby J). See also Kenny, "Interveners and Amici Curiae in the High Court" (1998) 20 *Adelaide Law Review* 159 at 160; Keyzer, "Participation of Non-Party Interveners and Amici Curiae in Constitutional Cases in Canadian Provincial Courts: Guidance for Australia?", in Cardinal and Headon (eds), *Shaping Nations: Constitutionalism and Society in Australia and Canada* (2002) 273 at 274; Walker, "Amici Curiae and Access to Constitutional Justice: A Practical Perspective" (2011) 22 *Bond Law Review* 111; Willheim, "Amici Curiae and Access to Constitutional Justice in the High Court of Australia" (2010) 22 *Bond Law Review* 126; Hopper, "*Amici*

in *Wurridjal v Commonwealth*[159], in refusing to grant leave to two academics to appear as amicus, French CJ observed that a majority of the Court did not consider that the submissions "and material offered" was "likely to be of any assistance", although his Honour noted that "[i]n some cases it may be in the interests of the administration of justice that the Court have the benefit of a larger view of the matter before it than the parties are able or willing to offer"[160].

In 2019, in *Unions NSW v New South Wales*[161], in refusing to grant leave to the University of New South Wales Grand Challenge on Inequality, three members of the Court observed that while "it is possible that in a particular case additional constitutional facts may provide a wider perspective and facilitate the Court's determination of constitutional issues", "[i]t is to be expected that this will occur only rarely and that the Court will be cautious about what would amount

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Curiae in the United States Supreme Court and the Australian High Court: A Lesson in Balancing Amicability" (2017) 51 *John Marshall Law Review* 81.

159 (2009) 237 CLR 309.

160 (2009) 237 CLR 309 at 312; see also 408 [260] (Kirby J).

161 (2019) 264 CLR 595 at 619 [57] (Kiefel CJ, Bell and Keane JJ); see also 641 [122] (Gordon J agreeing). See also *Kruger v The Commonwealth* [1996] HCATrans 69 ("The Court must be cautious in considering applications to be heard by persons who would be amicus curiae lest the efficient operation of the Court be prejudiced"); Walker, "Amici Curiae and Access to Constitutional Justice: A Practical Perspective" (2011) 22 *Bond Law Review* 111 at 117.

to an expansion of a case agreed by the parties by permitting an intrusion of new facts or issues".

Of course, the likelihood of an amicus brief containing constitutional facts that are of assistance to the Court will depend on the particular case at hand[162] and the nature of the material proffered[163]. And it would always be necessary to ensure that the provision of relevant facts by non-parties does not cause procedural unfairness to a party[164]. But, with that said, there may at present be some unutilised potential for assistance by non-parties in complex cases in which constitutional facts play a significant role[165]. That is particularly so because, as touched upon earlier, statute law is ever increasing in its complexity, scope and reach.

Conclusion

In constitutional cases, as in all forms of litigation, the facts are of critical importance. No matter what procedure is chosen – demurrer, case stated or special case – what must be identified are

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162 Collins, "Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation" (2004) 38 *Law & Society Review* 807 at 810; Walker, "Amici Curiae and Access to Constitutional Justice: A Practical Perspective" (2011) 22 *Bond Law Review* 111 at 113.

163 See *Wurridjal* (2009) 237 CLR 309 at 312-313 (French CJ).

164 *Breckler* (1999) 197 CLR 83 at 134-135 [104] (Kirby J).

165 cf *APLA Ltd* (2005) 224 CLR 322 at 417-418 [275] (Kirby J).

the relevant adjudicative and constitutional facts. In constitutional cases the facts will show whether the issue that the parties seek to agitate is one which truly does fall for decision. No less importantly, the proper identification of the relevant constitutional facts is often an essential step in determining any issue of validity that does arise. Legal practitioners should take the role of judging seriously when it comes to facts – they should frame cases in a way that recognises what the judge's role is within our adversarial system of justice.

Framework – wider legal context

The next theme to address is what might loosely be described as the "framework" of constitutional cases – the wider legal context within which the facts of the particular case and the constitutional issue or issues arising must be considered and understood.

Lord Steyn has observed that "[i]n law context is everything"[166]. I could not agree more. And it is particularly true of constitutional law.

When one thinks of the "wider context" that is relevant in constitutional cases, one might instinctively think of the *historical* context surrounding the framing of the *Constitution* itself – the "historical facts surrounding the bringing [of] the [*Constitution*] into

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166 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 548 [28].

existence"[167]. Context of that kind is frequently the subject of judicial consideration in constitutional cases[168] and its relevance for the purposes of constitutional interpretation has been the subject of much academic consideration[169]. Although important, that is not the context being referred to. So, what do I mean?

By its very nature, constitutional law intersects with innumerable other areas of law: it intersects with criminal law, private law, international law, migration law and electoral law, just to name a

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167 *Tasmania v The Commonwealth* (1904) 1 CLR 329 at 359 (O'Connor J).

168 See, eg, *Engineers Case* (1920) 28 CLR 129 at 152 (Knox CJ, Isaacs, Rich and Starke JJ); *In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 521 (Latham CJ); *Cole v Whitfield* (1988) 165 CLR 360; *Cheatle v The Queen* (1993) 177 CLR 541; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 457 (McHugh J); *Lange* (1997) 189 CLR 520 at 564 (the Court); *Brownlee* (2001) 207 CLR 278 at 286 [10] (Gleeson CJ and McHugh J); *Singh* (2004) 222 CLR 322 at 335 [18] (Gleeson CJ); *Ayres* (2017) 259 CLR 478; *Private R v Cowen* (2020) 94 ALJR 849; *Gerner* (2020) 270 CLR 412 at 428-429 [32]-[34] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

169 See, eg, McCamish, "Use of Historical Materials in Interpreting the Commonwealth Constitution" (1996) 70 *Australian Law Journal* 638; Selway, "The Use of History and Other Facts in the Reasoning of the High Court of Australia" (2001) 20 *University of Tasmania Law Review* 129; Goldsworthy, "Original Meanings and Contemporary Understandings in Constitutional Interpretation", in Lee and Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (2009) 245; Gummow, "Law and the Use of History", in Gleeson and Higgins (eds), *Constituting Law: Legal Argument and Social Values* (2011) 61 at 72-76; Irving, "Constitutional Interpretation, the High Court, and the Discipline of History" (2013) 41 *Federal Law Review* 95; Dixon, "Sources of Legal Authority", in Crennan and Gummow (eds), *Jesting Pilate And Other Papers and Addresses*, 3rd ed (2019) 246 at 247.

few. And constitutional issues can arise in any type of judicial proceedings, whether they be criminal prosecutions, civil penalty proceedings, general civil proceedings, judicial review proceedings; you get the point. Constitutional issues can also arise in relation to the conduct of non-judicial bodies such as administrative tribunals and inquisitorial bodies. All of that is important.

It means that judges, legal practitioners and academics cannot consider constitutional law problems in silos. It is inevitable that members of the profession and the academy will often specialise in one or two fields. And perhaps they are increasingly driven to do so because the growth and complexity of legislation and the modern legal landscape has rendered it "more difficult for legal practitioners to develop broad-ranging practices"[170]. But specialisation presents problems. It can cause tunnel-vision and in-the-box thinking. It is essential for members of the legal profession to know what is happening outside of their field of specialisation and to recognise that what is happening in other areas may affect that field[171]. For members of the profession (practitioners and academics) who specialise in public law, and particularly constitutional law, it is

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170 McHugh, "The Growth of Legislation and Litigation" (1995) 69 *Australian Law Journal* 37 at 40. See also Posner, *Divergent Paths: The Academy and the Judiciary* (2016) at 7.

171 cf Hayne, "Sir Owen Dixon", in Gleeson, Watson and Higgins (eds), *Historical Foundations of Australian Law*, vol I (2013) 372 at 396. See also McHugh, "The Growth of Legislation and Litigation" (1995) 69 *Australian Law Journal* 37 at 41.

important to keep firmly in mind the wider legal context – the playing field – within which the particular case and issue at hand arises.

And that playing field is not just determined by the different areas of law that constitutional law may intersect with; it also captures the unwritten constitutional concepts, norms and values which might be thought of as forming part of or permeating the very "fabric on which the written words of the Constitution are superimposed"[172]. For example, constitutional cases raise issues that require consideration of fundamental concepts such as representative

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172 *The Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393. See also *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 561 [46] (Kirby J).

and responsible government[173], federalism[174], the liberty of individuals[175] and, the "rule of law"[176].

All of that context, and more, constitutes the framework within which constitutional principles are, and often must be, developed. This has a number of consequences.

Statutes not to be construed in isolation from wider legal context

One consequence is that "no statute can be construed as if it stands isolated from the wider legal context within which it must

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173 See, eg, *Australian Capital Television* (1992) 177 CLR 106 at 135 (Mason CJ), 210-212 (Gaudron J); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 200 (McHugh J); *McGinty v Western Australia* (1996) 186 CLR 140 at 201 (Toohey J); *Lange* (1997) 189 CLR 520 at 559 (the Court); *Egan v Willis* (1998) 195 CLR 424 at 451 [42] (Gaudron, Gummow and Hayne JJ); *Coleman v Power* (2004) 220 CLR 1 at 48 [89] (McHugh J); *Muldowney v South Australia* (1996) 186 CLR 352 at 386-387 (Gummow J); *McCloy* (2015) 257 CLR 178 at 224-226 [106]-[111] (Gageler J), 279 [301], 283 [315], 290-291 [348] (Gordon J); *Comcare v Banerji* (2019) 267 CLR 373 at 436-437 [146]-[149] (Gordon J).

174 See, eg, *Spratt v Hermes* (1965) 114 CLR 226 at 274 (Windeyer J) ('*Spratt*'); *Koowarta* (1982) 153 CLR 168 at 200 (Gibbs CJ); *Australian Capital Television* (1992) 177 CLR 106 at 210 (Gaudron J).

175 See, eg, *R v Davison* (1954) 90 CLR 353 at 381-382 (Kitto J); *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11 (Jacobs J); *Magaming* (2013) 252 CLR 381 at 400-401 [63]-[67] (Gageler J); *NAAJA* (2015) 256 CLR 569 at 610-611 [94]-[97] (Gageler J); *Vella* (2019) 269 CLR 219 at 276 [141]-[142] (Gageler J); *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 202 [138] (Gordon J); (2021) 388 ALR 1 at 41 ('*Benbrika*').

176 See, generally, *Palmer* (2021) 95 ALJR 868 at 872 [8] (Kiefel CJ, Gageler, Keane, Gordon and Steward JJ); 394 ALR 1 at 4.

operate"[177]. This is particularly important when constitutional questions turn on the legal operation and practical effect of a law.

To take one example, when the validity of a law is challenged on the basis that it infringes the implied freedom of political communication, it is only the "incremental burden"[178] that must be justified as reasonably appropriate and adapted to advance a legitimate purpose in a manner consistent with the maintenance of the constitutionally prescribed system of government[179]. If an impugned provision prohibits precisely the same conduct that is already unlawful under the existing law, and a plaintiff does not challenge the existing law, there is no burden on political

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177 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 551 [89] (Hayne and Bell JJ). See also *Hogan v Hinch* (2011) 243 CLR 506 at 537 [32] (French CJ).

178 *Brown* (2017) 261 CLR 328 at 365 [109] (Kiefel CJ, Bell and Keane JJ), 383 [181], 384 [186], 385-386 [188] (Gageler J), 408-409 [259] (Nettle J), 456 [397], 460 [411], 462 [420]-[421], 463 [424] (Gordon J), 502-503 [557]-[558], 506 [563] (Edelman J); *Comcare v Banerji* (2019) 267 CLR 373 at 420 [89] (Gageler J); *Farm Transparency International Ltd v New South Wales* [2022] HCA 23 at [158], [165]-[168], [178] (Gordon J), [224] (Edelman J).

179 See the test identified in *Lange* (1997) 189 CLR 520 at 561-562, 567-568 (the Court), as modified and refined in *Coleman v Power* (2004) 220 CLR 1 at 50 [93], 51 [95]-[96] (McHugh J), *McCloy* (2015) 257 CLR 178 at 193-195 [2] (French CJ, Kiefel, Bell and Keane JJ) and *Brown* (2017) 261 CLR 328 at 359 [88], 363-364 [104] (Kiefel CJ, Bell and Keane JJ), 375-376 [156] (Gageler J), 398 [236], 413 [271], 416-417 [277]-[278] (Nettle J), 432-433 [319]-[325] (Gordon J). See also *LibertyWorks Inc v The Commonwealth* (2021) 95 ALJR 490 at 503-504 [44]-[46] (Kiefel CJ, Keane and Gleeson JJ), 512 [93] (Gageler J), 520-521 [131]-[134] (Gordon J); 391 ALR 188 at 199-200, 210-211, 222-223.

communication relative to the wider legal context in which the impugned provision has legal effect and practical operation.

Judgments not to be read divorced from wider legal context

Another consequence is that statements of principle in judgments must be read and understood *within the legal context in which they were written*. It has three aspects.

The first is that reasoning backwards by reference to statements of principle in earlier decisions made in different contexts is dangerous[180]. To give a recent example, several members of the Court in *Alexander v Minister for Home Affairs*[181] observed that statements in cases in which the Court held that statutory powers to revoke or suspend licenses or other statutory privileges did not involve the adjudgment of guilt or imposition of punishment for the purposes of Ch III of the *Constitution* could not be picked up and applied by analogy in the entirely different context of a statutory regime for stripping citizenship.

The second, and related, aspect is that judges, legal practitioners and academics alike should read judgments with a view

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180 cf *Spratt* (1965) 114 CLR 226 at 272 (Windeyer J). See also *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 388 [219] (Kirby J).

181 *Alexander* [2022] HCA 19 at [77] (Kiefel CJ, Keane and Gleeson JJ), [108]-[110] (Gageler J); see also [248] (Edelman J).

to understanding the exposition of legal principles "in relation to the circumstances of each case and to the arguments which were then adduced": "[t]o select passages from [cases] and to subject their words to detailed analysis as if they provided a definitive exegesis of [the metes and bounds of a constitutional issue] can be most misleading"[182]. It is important to "eschew the temptation to attempt to reduce what are complex ideas into a six-second sound bite"; it is essential to "stop to inquire"[183].

The third aspect is that caution should be exercised in attempting to transfer legal tests adopted in one particular constitutional context into another context[184]. By way of example, the fact that a structured proportionality analysis has been adopted in determining the validity of laws challenged as contrary to the implied freedom of political communication does not mean that it is necessarily an appropriate test for determining the validity of laws challenged on the basis that they infringe the constitutional mandate

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182 *Ex parte Professional Engineers' Association* (1959) 107 CLR 208 at 268 (Windeyer J).

183 Hayne, "Sir Owen Dixon" in Gleeson, Watson and Higgins (eds), *Historical Foundations of Australian Law*, vol I (2013) 372 at 407.

184 See, eg, *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 72 [101]-[102] (Gageler J), 122 [296] (Gordon J) ('*Murphy*').

that senators and members of the House of Representatives be "directly chosen by the people"[185].

Conclusion

In sum, the point is simple: constitutional issues do not arise in the abstract. Do not treat them as if they do. Ground them within their wider legal context. We must not be so focused on the particular legal issue arising in a case that we become utterly divorced from the reality in which that law operates.

Judicial function

Judicial function or method necessarily intersects with the discussion about facts and framework in constitutional law. Two points should be made at the outset.

First, the work of the Court in identifying, developing and refining constitutional law and principles must take place within the limits of judicial power[186]. The Court can only exercise its function of determining the meaning of the *Constitution* "as an incident of the

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185 See, eg, *Murphy* (2016) 261 CLR 28 at 72 [101]-[102] (Gageler J), 122-124 [297]-[305] (Gordon J); see also 53 [38] (French CJ and Bell J). See also *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 178-179 [17] (Gleeson CJ); Chordia, *Proportionality in Australian Constitutional Law* (2020) at 190-193.

186 *Dietrich v The Queen* (1992) 177 CLR 292 at 320 (Brennan J) (' *Dietrich*').

adjudication of *particular disputes*"[187] – in the context of a "matter", involving a "justiciable controversy"[188].

"Each case is fact-specific; each analysis is necessarily case-specific"[189]. It is only by deciding the cases that come before the Court that new legal principles and the proper application of existing principles to new circumstances are gradually teased out and refined. As Justice Gageler and I explained in *Prince Alfred College Inc v ADC*[190], "[i]dentification, modification or even clarification of some general principle or test requires that judgments be made",

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187 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at 185 [19] (French CJ, Bell and Keane JJ) (emphasis added).

188 See *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-267 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); *Fencott v Muller* (1983) 152 CLR 570 at 603, 606, 608 (Mason, Murphy, Brennan and Deane JJ); *Mellifont* (1991) 173 CLR 289 at 303 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ); *Abebe v The Commonwealth* (1999) 197 CLR 510 at 523-524 [22]-[25] (Gleeson CJ and McHugh J), 561 [140] (Gummow and Hayne JJ), 585 [215] (Kirby J); *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 606 [31] (Gaudron J); *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at 21-22 [54] (French CJ, Kiefel, Bell, Gageler and Gordon JJ); *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at 350 [26], 351 [27], 352 [29] (French CJ, Kiefel, Bell and Keane JJ); *Ayres* (2017) 259 CLR 478 at 490-491 [26]-[27] (Kiefel, Keane, Nettle and Gordon JJ); *Hobart International Airport* (2022) 96 ALJR 234 at 245 [26] (Kiefel CJ, Keane and Gordon JJ); 399 ALR 214 at 222.

189 *Clubb* (2019) 267 CLR 171 at 309 [403] (Gordon J).

190 (2016) 258 CLR 134 at 171 [127].

but "[t]hose judgments are best made in the context of, and by reference to, contestable and contested questions".

The second point is that judges are not free to make decisions according to their values or whims. They cannot "make it up" as they go along[191]. A judge who is "discontented with a result held to flow from a long accepted legal principle" must not deliberately "abandon the principle in the name of justice or of social necessity or of social convenience"[192]. "The law is, and should be, greater than the subjective opinions of anyone or merely a few"[193]. As Chief Justice Dixon put it, "[t]he court would feel that the function it performed had lost its meaning and purpose, if there were no external standard of legal correctness"[194].

In particular, judges are constrained by precedent – previously decided cases – which provide the principles, ideas and examples that inform subsequent cases. The doctrine of precedent has been

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191 *Breen v Williams* (1996) 186 CLR 71 at 115 (Gaudron and McHugh JJ) ('*Williams*'). See also *Dietrich* (1992) 177 CLR 292 at 320 (Brennan J).

192 Dixon, "Concerning Judicial Method" (1956) 29 *Australian Law Journal* 468 at 472. See also *CSR Ltd v Eddy* (2005) 226 CLR 1 at 40 [96] (McHugh J) ('*CSR*').

193 Lindsay, "Building a Nation: The Doctrine of Precedent in Australian Legal History", in Gleeson, Watson and Higgins (eds), *Historical Foundations of Australian Law*, vol I (2013) 267 at 282. See also Dixon, "Concerning Judicial Method" (1956) 29 *Australian Law Journal* 468 at 470.

194 Dixon, "Concerning Judicial Method" (1956) 29 *Australian Law Journal* 468 at 470.

described as "the hallmark"[195] of the common law; "woven into the essential fabric of [a] common law country's constitutional ethos"[196]. The task of judges is to "fit"[197] what has *gone* before with what *comes* before them in a given case. In that way, judges' decision-making is anchored to history and the past, and it speaks to the future: "[e]very case is embedded in a larger context"[198] of precedent.

Of present relevance, those points provide a principled basis for judges adopting an approach to the development of constitutional law that is incremental – proceeding case-by-case, by reference to the concrete facts before the Court.

Incrementalism

As Professor Jane Stapleton has explained, "in most cases when judges are asked to identify developments in the common law, *they proceed cautiously*, starting ... with the rich resource of principle

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195 Mason, "The Use and Abuse of Precedent" (1988) 4 *Australian Bar Review* 93 at 93.

196 Harris, "Final Appellate Courts Overruling Their Own 'Wrong' Precedents: The Ongoing Search for Principle" (2002) 118 *Law Quarterly Review* 408 at 412.

197 See *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 593 (McHugh J); *Williams* (1996) 186 CLR 71 at 115 (Gaudron and McHugh JJ).

198 Kahn, *Making the Case: The Art of the Judicial Opinion* (2016) at 135.

anchored in precedent", while accommodating the evolutionary process of the development of the law[199]. This approach to the development of the common law is known as "incrementalism".

Of course, cases raising questions about the meaning and construction of the *Constitution* are different from non-constitutional cases involving common law legal principles. The central difference is that the Court's primary obligation in constitutional cases is to give effect to the *Constitution*[200]. But, consistent with the orthodox common law approach in non-constitutional cases, members of this Court have endorsed a judicial method involving only incremental change, articulating and developing constitutional law in the context of the range of real-world disputes that come before the Court.

As stated earlier, judges' decision-making is anchored, by precedent, to history and the past. History – precedent – is both a limit and a foundation for change. One way to look at decisions recognising an incremental development of constitutional law is as "opening a door of opportunity for later courts to elaborate on these developments further than the strict ratio of the individual case

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199 Stapleton, *Three Essays on Torts* (2021) at 13 (emphasis added).

200 Lindsay, "Building a Nation: The Doctrine of Precedent in Australian Legal History", in Gleeson, Watson and Higgins (eds), *Historical Foundations of Australian Law*, vol I (2013) 267 at 287, citing *Street v Queensland Bar Association* (1989) 168 CLR 461 at 489 (Mason CJ), 518-519 (Brennan J), 560 (Toohey J), 588 (McHugh J).

applied to its particular facts"[201]. As Stapleton has put it, in this sense, "incrementalism is a posture that a court uses *to offer later courts freedom to choose* how broadly to construe the proposition the court is expounding. In a very real sense every appellate court is in dialogue with later appellate courts"[202].

While incrementalism may be a source of frustration for litigants and the academy at times, and "its tentativeness may seem messy"[203], the importance both of deciding the particular case before the Court (and only that case) and providing later courts with decisional choice cannot be overstated. Jeremy Kirk put it well when he said: "experience teaches that particular fact situations ... throw light on competing imperatives. They may reveal new complexities not previously foreseen. The common law method of determining legal issues on a case-by-case basis is premised on these facts"[204]. On the other hand, "[d]etermination of legal questions abstracted from real facts and controversies, raised by parties to whom the resolution matters, increases the likelihood of oversight and error"[205].

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201 Stapleton, *Three Essays on Torts* (2021) at 13.

202 Stapleton, *Three Essays on Torts* (2021) at 13 (emphasis added).

203 Stapleton, *Three Essays on Torts* (2021) at 13.

204 Kirk, "Justiciability", in Saunders and Stone (eds), *The Oxford Handbook of The Australian Constitution* (2018) 510 at 528.

205 Kirk, "Justiciability", in Saunders and Stone (eds), *The Oxford Handbook of The Australian Constitution* (2018) 510 at 528.

That is not to deny that there is a time and place for judges to set down general principles of wide application. But even so, expressing general principles should always be approached with caution; a principle should not be laid down in a way that pre-determines or restricts the future development of the law or in a way which seeks to identify the metes and bounds of its potential application in the future.

In short, judgments should (and usually do) have a small footprint – they should, except in the rarest of cases, decide only the issues in dispute, recognising that even then a decision may well have an impact beyond the parties to the case.

"Demolish" and "define" – antitheses of incrementalism

The antitheses of incrementalism are what might be termed the "demolish" and "define" approaches to constitutional law.

A "demolish" approach is what might be used to describe cases where the Court overreaches and decides principles that are broader than those which are necessary to determine the case before it, or where the Court confines a principle in unnecessarily narrow terms

that make it difficult to apply to the facts of later cases (for example, stating that a particular principle goes only so far and no further)[206].

By adopting that approach the Court "demolishes" the prospects of future legal developments. To put it more neutrally, deciding cases in that way forecloses or at least seriously impedes the ability of future courts to develop, change or adjust the law, even when cases are brought that might have otherwise provided appropriate vehicles to do so. Roscoe Pound expressed the point eloquently when he observed that "legal machinery may defeat its own ends when one age conceives it has said the final word and assumes to prescribe unalterable rules for time to come"[207].
I embrace that sentiment wholeheartedly. Surely Pound was right to doubt judicial capacity to foresee what the future may hold, decades after the Court decides a case. And if that is right, Pound was surely right to say that the legal system defeats its own ends if one age conceives it has said the final word. After all, "[t]he primary objective of [a] court which produced ... precedent *was to decide a dispute*, not issue an edict" which forecloses the development of the law by later courts[208].

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206 See Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (2005) at 159.

207 Pound, *The Spirit of the Common Law* (1931) at 105-106.

208 Duxbury, *The Nature and Authority of Precedent* (2008) at 150 (emphasis added).

What might be called the "demolish" approach is one form of judicial method which will stunt, even prevent, future legal development. Another is the "define" approach – it captures the use of "grand theories" and all embracing "taxonomies". These are not sound approaches to determining the meaning of the *Constitution* and should be avoided. Justice Gummow made the point well in *SGH Ltd v Commissioner of Taxation*[209], where he said that:

> "[q]uestions of construction of the Constitution are not to be answered by the adoption and application of any particular, all-embracing and revelatory theory or doctrine of interpretation. Nor are they answered by the resolution of a perceived conflict between rival theories, with the placing of the victorious theory upon a high ground occupied by the modern, the enlightened and the elect. The provisions of the Constitution, as an instrument of federal government, and the issues which arise thereunder from time to time for judicial determination are too complex and diverse for [those] courses to be a satisfactory means of discharging the mandate which the Constitution itself entrusts to the judicial power of the Commonwealth".

Two related reasons are stated in this passage as requiring rejection of grand theories and, to which might be added, the rejection of all-embracing taxonomies. Those reasons are that the *Constitution* is an instrument of federal government and that the issues which arise under it are too complex and diverse to allow for single all-embracing theories or explanations.

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209 (2002) 210 CLR 51 at 75 [41]-[42].

Both of those points can be considered by reference to *Melbourne Corporation v The Commonwealth*[210]. The whole of the reasons of Justice Dixon in that case repay re-reading. But let me emphasise two points – each of them disarmingly simple. The first is about the debate that extended over so many decades about what restraints were implied in the *Constitution* against any exercise of power by the Commonwealth against the State and the State against the Commonwealth "calculated to destroy or detract from the independent exercise of the functions of the one or the other"[211]. That debate was sometimes seen as sufficiently captured by notions like an implied immunity of instrumentalities. That is, they were notions expressed as if they proceeded from a particular theory of constitutional understanding. Justice Dixon said of this debate that it had often been said that "political rather than legal considerations provide[d] the ground of which the restraint [was] the consequence"[212]. But this he dismissed. As he said, "[t]he *Constitution* is a political instrument. It deals with government and governmental powers"[213]. The notion that the doctrine depended on political rather than legal considerations was said to have "a specious plausibility" but really to be meaningless[214]. And that is no doubt

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210 (1947) 74 CLR 31.

211 *Melbourne Corporation* (1947) 74 CLR 31 at 82.

212 *Melbourne Corporation* (1947) 74 CLR 31 at 82.

213 *Melbourne Corporation* (1947) 74 CLR 31 at 82.

214 *Melbourne Corporation* (1947) 74 CLR 31 at 82.

right. But rejecting this also entailed rejecting the adoption of any overarching theory of constitutional construction or application.

The "define" approach far too easily distracts attention from the need to grapple with how the *Constitution* applies *to the particular law and circumstances of the case*. Any all-embracing theory or taxonomy invites attention to the content of the apparatus which it is said may be used to solve the problem, when the real question is how the *Constitution* applies to the particular facts and circumstances. And the reasons in *Melbourne Corporation* stand as a remarkable example of focusing upon and dealing with that real question without any resort to any singular or all-embracing theory of constitutional construction or taxonomy of issues or questions about constitutional design or operation. The reasons do not go through any "check list" of issues to be considered. Indeed, the very same considerations that underpin the common law method of case-by-case development of the law by reference to individual factual situations (rather than the development of legal principles in the abstract) also reveal the dangers associated with all embracing taxonomies of the law. Put simply, "[l]ife is a far more fertile creator of legal problems than the most ingenious drafts[person] of moots, and theories are not necessarily drawn sufficiently widely or accurately to accommodate all these unforeseen and unforeseeable contingencies"[215].

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215 Goff, "Appendix: The Search for Principle" (1983), republished in Swadling and Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (1999) 313 at 328.

The second point is closely related to the first. Because the *Constitution* is an instrument of government, because it is a political instrument that deals with government and governmental powers, the issues that arise are often novel in some important respect. The issues raised in *Melbourne Corporation* were novel. Hindsight may show that the answer given in the case had roots in earlier decisions. That is surely unsurprising. But the particular issues were novel. And that will frequently be so in constitutional litigation. As Gummow J said in *SGH*, the issues that arise in such litigation are complex and diverse[216]. Because they are complex and diverse, because they are frequently novel, trying to apply some overarching theory or explanation to the problem at hand assumes that the theory or explanation *can* be applied to that case. And often, very often, that is the central point to be decided. Can what has been said before be applied as a solution to the new case?

In *Melbourne Corporation* we see Justice Dixon, for example, applying the well-established principle that the powers given by s 51 of the *Constitution* (there the power with respect to banking in s 51(xiii)) should be given an ample meaning and a wide operation and that the exception with respect to State banking should be understood as referring to the operations of a banker conducted by or on behalf of a State and not the State as customer of a bank[217]. But

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216 (2002) 210 CLR 51 at 75 [42].

217 *Melbourne Corporation* (1947) 74 CLR 31 at 78. See also *Grain Pool of Western Australia v The Commonwealth* (2000) 202

the decisive point (not stated in this way before) was that a law which discriminates against States, or places a particular disability or burden on an operation or activity of a State, especially in the execution of its constitutional powers, is beyond power[218]. And it is beyond power because it is the federal system itself which is the foundation of the restraint upon the use of a power to control the States[219].

The point is simple: although we strive for certainty in our exposition of principle, law is inherently uncertain[220]. Constitutional principles cannot always be placed in boxes or categories; and it is not possible in each case to predict how a principle might need to be modified or adjusted in response to circumstances that were not and could not have been foreseen when the principle was first stated. Of course judges should strive to achieve coherence, certainty and stability in the law[221], but legal principles cannot always be put into

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CLR 479 at 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), quoting *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-226 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ).

218 *Melbourne Corporation* (1947) 74 CLR 31 at 79.

219 *Melbourne Corporation* (1947) 74 CLR 31 at 81.

220 Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (2005) at 115.

221 See Lane, *The Australian Federal System*, 2nd ed (1979) at 1177; *CSR* (2005) 226 CLR 1 at 40 [96] (McHugh J).

neat and discrete boxes. To adopt the words of Justice Fullagar[222], we ought to resist "the temptation, which is so apt to assail us, to import a meretricious symmetry into the law". Or, as Lane put it, there is a danger that "comfortable stability becomes unreal rigidity"[223]. Be wary of "black-and-white distinctions", "water-tight categories" and "uncompromising iron frames"[224].

Judge Cardozo, writing extra-judicially, remarked upon how, during his first years upon the bench, he was "much troubled in spirit ... to find how trackless was the ocean on which [he] had embarked"[225]. He "sought for certainty" and was "oppressed and disheartened" when he found "that the quest for it was futile"; he was "trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflection in [his] own vacillating mind and conscience"[226]. Cardozo explained, however, that as the years went by and he "reflected more and more upon the nature of the judicial process" he became "reconciled to the uncertainty", growing to see it as inevitable; he came to see that the judicial process "in its highest reaches is not discovery, but

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222 *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 at 285.

223 Lane, *The Australian Federal System*, 2nd ed (1979) at 1177.

224 Lane, *The Australian Federal System*, 2nd ed (1979) at 1177.

225 Cardozo, *The Nature of the Judicial Process* (1921) at 166.

226 Cardozo, *The Nature of the Judicial Process* (1921) at 166.

creation"[227]. Such is the common law system that principles are "produced by judges case by case"; not always perfectly ordered, indeed sometimes seemingly "ad hoc and higgledy-piggledy"[228]. The search for principle can take time; some cases "yield up their kernel slowly and painfully"[229].

Incrementalism does not entail "domino" reasoning or gradual whittling away of substantive effect of principles

It is important also to be clear about what incrementalism does not entail. Two matters should be emphasised. The first is that members of this Court have had cause to emphasise on a number of occasions over the last decade that "there are limits to the proper use of analogical reasoning"[230] by reference to precedent. Not infrequently, parties seek to take statements made in previous cases explaining why the legislation under consideration in issue was valid or invalid and, "joining them together in a logical sequence", argue that "by parity of reasoning" the provisions impugned in the

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227 Cardozo, *The Nature of the Judicial Process* (1921) at 166.

228 Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (2001) at 2.

229 Cardozo, *The Nature of the Judicial Process* (1921) at 29.

230 *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* (2013) 253 CLR 284 at 327 [80] (Hayne J). See also *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 94 [137] (Hayne, Crennan, Kiefel and Bell JJ) ('*Pompano*'); *Vella* (2019) 269 CLR 219 at 278 [146] (Gageler J), 292 [188] (Gordon J); *Benbrika* (2021) 95 ALJR 166 at 205 [152] (Gordon J); 388 ALR 1 at 45-46.

proceedings before the Court are also valid or invalid[231]. A word of caution – proceed with the utmost care.

As I explained in *Vella v Commissioner of Police (NSW)*[232], "[i]t is necessary to be wary of what might be called the "domino" effect of cases that have distinguished *Kable*. *It is a mistake to take what was said in other cases about other legislation and apply those statements without close attention to the principle at stake*". In the hands of the judge who applies a "domino" method of reasoning, "precedent becomes the famously articulated principle: 'Never do anything for a first time'"[233]. By adopting "unmerited adherence to precedent" a judge's "horizons are forever confined by an essentially static view of the law"; "never doing anything for a first time

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231 See *Pompano Pty* (2013) 252 CLR 38 at 94 [137]; *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375 at 399 [77] (Nettle J); *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510 at 523 [40] (Kiefel CJ, Bell, Gageler and Keane JJ); *Love v The Commonwealth* (2020) 270 CLR 152 at 289 [396] (Edelman J); *Walton v ACN 004 410 833 Ltd (in liq)* (2022) 96 ALJR 166 at 190 [115] (Gageler J); 399 ALR 1 at 30; *Alexander* [2022] HCA 19 at [109] (Gageler J).

232 (2019) 269 CLR 219 at 292 [188] (citation omitted) (emphasis added).

233 Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (2005) at 140, quoting the Rt Hon Sir Stephen Sedley, "On Never Doing Anything For the First Time", (Speech, the 16th Atkin Lecture, The Reform Club, 6 November 2001).

becomes a recipe for injustice in the individual case and stagnancy in the law generally. Rigidity in judicial thinking becomes a virus"[234].

When reading cases, it is necessary to bear in mind that what is the principle identified or established in a case, and "more importantly how it might apply to a new and different problem" cannot ordinarily "be satisfactorily understood without knowing *why* the reasons were framed and expressed as they were"[235]. That is why it is always essential, when considering any decision, to have regard to more than the particular way in which the reasons are expressed. As was observed earlier, it is always necessary to read and understand those words in the light of what had been said in cases that preceded the one you are reading and in the light of what were the arguments that were put to the court in the case you are reading. You cannot take what you say is the golden passage in the judgment on which you rely and treat it as though that is all you need to read. What is said in any case can be understood only in the context in which it appears. And almost always that requires you to think about the overall context of the decision and the building blocks for the reasoning[236].

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234 Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (2005) at 140.

235 Hayne, "Sir Owen Dixon" in Gleeson, Watson and Higgins (eds), *Historical Foundations of Australian Law*, vol I (2013) 372 at 390 (emphasis in original).

236 cf Hayne, "Sir Owen Dixon" in Gleeson, Watson and Higgins (eds), *Historical Foundations of Australian Law*, vol I (2013) 372 at 390.

Incremental development of the law can see expansion or contraction of the field in which principles established in one case applied in subsequent cases. Exceptions may be created and qualifications made to the principle. Those exceptions and qualifications may be necessary and desirable. But it is always necessary to be careful lest they are used to swallow the rule and render it meaningless. The care that must be exercised has at least two features. First, it is always necessary to deal squarely and directly with what will be the effect of modifying the rule by exception or qualification and why doing so is necessary. But second, it is always necessary to deal squarely and directly with whether what is being done is really just a modification or whether it is hollowing the rule out to the point where it is either abandoned or turned into something it never was. Incrementalism should not operate as a tool to whittle away or diminish the substantive effect of principles developed in earlier cases. Judges must be transparent and overt about what they are doing not hide behind the facts of a particular case to render principles hollow. If the Court is to overturn a principle it must squarely confront what it is doing.

What does this mean for the academy and legal practitioners?

These matters of judicial function – judicial method – are not just of concern for judges; they should also be front of mind for the academy and legal practitioners.

The *utility* of academic work in shaping the development of the law varies considerably. In the context of tort law, Stapleton has described a style of scholarship that "seeks a creative interactive conversation with judges … [which is] capable of smoothly absorbing legal developments signalled by courts but … can also help prompt them by, for example, influencing courts to confront tensions in judicial reasoning and doctrinal outcomes, to re-structure precedents and reassess terminology"[237]. Stapleton describes that kind of scholarship as "reflexive tort scholarship"[238] ("reflexive", in the sense of signalling a "two-way conversation between legal academics and the Bench"; not addressed to other academics[239]). Professor Stapleton contrasts reflexive tort scholarship with what she terms "Grand Theories", referring to scholarship that conceives of an area of law as being "all about one thing" or that is "only normatively coherent if springing from 'a single integrated justification'"[240] Professor Stapleton has suggested that the former, reflexive scholarship, is of greater assistance to judges. I suggest that her point is well made. And it is not confined to tort law scholarship – it is apt in respect of constitutional law scholarship too. Approaching scholarship in this reflexive way ensures that judges and academics do not "inhabit [two] distinct legal worlds" or engage in wholly

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237 Stapleton, *Three Essays on Torts* (2021) at 2.

238 Stapleton, *Three Essays on Torts* (2021) at 2.

239 Stapleton, *Three Essays on Torts* (2021) at 2.

240 Stapleton, *Three Essays on Torts* (2021) at 1-2.

"different enterprises"[241]. The development of constitutional law suffers when judges and academics operate within silos; as "ships which pass[] each other in the night"[242]. After all, as Lord Goff put it, both judges and academics "attempt, in their respective roles, to formulate principles of law"[243]; they have complementary roles founded upon a common interest in the "search for principle"[244].

As for legal practitioners, they should present cases in a way that takes the role of judges seriously – they should frame cases in a way that recognises what the common law judge's role is. The practitioner's task in a court of final appeal is not the same as the task the practitioner has in other courts. The practitioner may well be asking the Court to develop the law. But what exactly is the development that is sought? When the practitioner says that their case is "governed" by earlier decisions of the Court, what exactly is being said? Is it more than that some isolated passages of earlier reasons for judgment can be said to support, even require, the outcome that side of the litigation seeks? That assumes that the

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241 Duxbury, *Jurists and Judges: An Essay on Influence* (2001) at 74.

242 Neuberger, "Judges and Professors – Ships Passing in the Night?" (Speech, Max Planck Institute, 9 July 2012) at 28 [54].

243 Goff, "Appendix: The Search for Principle" (1983), republished in Swadling and Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (1999) 313 at 325.

244 Goff, "Appendix: The Search for Principle" (1983), republished in Swadling and Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (1999) 313 at 329.

chosen passages are a sufficient statement of the applicable principle. But are they? Or does the submission seek some expansion or modification of the applicable principle?

Answering questions of that kind demands careful thought and intellectually rigorous analysis. It demands identification and proof of the relevant and necessary facts – adjudicative and constitutional. And it demands consideration of what may be said in answer, not only by an opponent, but also by a judge anxious to test the validity of the submission. No less importantly, it demands consideration of how the judge might frame reasons for judgment that seek to explain and justify the particular order the practitioner seeks.

Conclusion

The title of this article – Taking *Judging* and *Judges* Seriously: Facts, Framework and Function in Australian Constitutional Law – was intended to provoke debate and thought about how and why judges decide constitutional cases and how and why other participants in our common law system – legal practitioners and the academy – can, some may say should, assist judges to decide constitutional cases. I have emphasised three different matters: the importance of facts in constitutional cases, especially in identifying the issues that properly arise for consideration and for the purposes of determining the validity of laws; the need to read what judges write in the light of the broader context in which those reasons for judgment must be understood; and lastly judicial method

in constitutional cases. All this must be done recognising that our judicial system is a common law adversarial system in which the judges determine cases by applying principles and standards that are external to the judge to the live controversy presented to them. That will occur best if the content of those principles and standards is informed by and developed in the light of the work that is done by practitioners and the academy who have thought about issues of the kind raised in this article. The street on which we all live and work cannot be a one way street. To adapt the words of Lord Goff[245]: judges, legal practitioners and academics must "recognize that the road which we travel together stretches out into the distance to the horizon. We should welcome each other's assistance in our work; and, while doubtless conscious of each other's shortcomings, recognize and appreciate each other's strength and the nature of our respective contributions" in the unceasing development and shaping of the mosaic which is Australian constitutional law.

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245 Goff, "Appendix: The Search for Principle" (1983), republished in Swadling and Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (1999) 313 at 329. See also *Spiliada Maritime Corp* [1987] AC 460 at 488 (Lord Goff).