TAKING JUDGING AND JUDGES SERIOUSLY: FACTS, FRAMEWORK AND FUNCTION IN AUSTRALIAN CONSTITUTIONAL LAW

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The key actors in the legal profession — judges, legal practitioners and the academy — each have roles to play in influencing and shaping the development of Australian constitutional law. This article addresses the importance of those key actors taking their own roles, and the roles of each other, seriously. It does so by examining three core themes — or threads — running through the fabric of Australian constitutional law: facts, framework and the judicial function. That examination reveals 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. In the end, judges, legal practitioners and academics travel the same road. Each brings unique contributions to the unceasing development and shaping of the mosaic which is Australian constitutional law.

I 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.

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

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 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.

II 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 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 '[i]t 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

2 John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 162–3.

3 Ibid 163.

4 Jane Stapleton, *Three Essays on Torts* (Oxford University Press, 2021) 1.

5 Sir Owen Dixon, 'Concerning Judicial Method' (1956) 29(9) *Australian Law Journal* 468, 470.

6 *Marbury v Madison*, 5 US 137, 177 (Marshall CJ) (1803); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262–3 (Fullagar J) ('*Communist Party Case*'); *Harris v*

about the facts presented or usually the way legal issues are framed; 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 the legal profession 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 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

Caladine (1991) 172 CLR 84, 134–5 (Toohey J); *A-G (WA) v Marquet* (2003) 217 CLR 545, 570 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Singh v Commonwealth* (2004) 222 CLR 322, 330 [7] (Gleeson CJ) ('*Singh*'); *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1, 48 [101] (Kirby J). See also *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 267–72 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

7 Stapleton (n 4) 3; Justice Gerard V La Forest, 'Who Is Listening to Whom? The Discourse between the Canadian Judiciary and Academics' in Basil S Markesinis (ed), *Law Making, Law Finding and Law Shaping: The Diverse Influences* (Oxford University Press, 1997) vol 2, 69, 69.

8 Chief Justice Robert French, 'Judges and Academics: Dialogue of the Hard of Hearing' (2013) 87(2) *Australian Law Journal* 96, 101.

9 Stapleton (n 4) 4. See also Dixon, 'Concerning Judicial Method' (n 5) 470.

10 Stapleton (n 4) 4.

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

12 *Brown v Allen*, 344 US 443, 540 (Jackson J) (4th Cir, 1953).

13 For example, legal practitioners appearing as amicus: see, eg, *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542, 550 [1] (Gleeson CJ), 557–9 [27]–[33] (Kirby J), 568 [68] (Hayne J), 580 [104] (Heydon J), 591–2 [149] (Crennan and Kiefel JJ) ('*Alinta*'); *Re Canavan* (2017) 263 CLR 284, 296 [7] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) ('*Re Canavan*').

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 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 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 bird's-eye view — 'a more detached and broader perspective'[19] — focused on the coherence of the law, rather than the outcome in

14 Stapleton (n 4) 3; Robert Goff, 'Appendix: The Search for Principle' in William Swadling and Gareth Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford University Press, 1999) 313, 325.

15 See, eg, Goff (n 14) 325; La Forest (n 7) 69; Justice Michel Bastarache, 'The Role of Academics and Legal Theory in Judicial Decision-Making' (1999) 37(3) *Alberta Law Review* 739, 746; Chief Justice Susan Kiefel, 'The Academy and the Courts: What Do They Mean to Each Other Today?' (2020) 44(1) *Melbourne University Law Review* 447, 448; Lord Dyson, *Justice: Continuity and Change* (Hart Publishing, 2018) 37–8.

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

17 Peter Cane, 'What a Nuisance!' (1997) 113 (October) *Law Quarterly Review* 515, 518. Cf ibid.

18 *Cordell* (n 16) 16 (Megarry J). See also Neil Duxbury, *Jurists and Judges: An Essay on Influence* (Hart Publishing, 2001) 76 ('*Jurists and Judges*').

19 La Forest (n 7) 69.

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 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, the Hon Sir Owen 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 desk.[24] For as the Hon Sir Owen Dixon said in the same speech, the High Court 'has always administered the law as a living instrument and not as an abstract study'.[25]

III 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.

20 Goff (n 14) 326–7.

21 Cane (n 17) 518.

22 Sir Owen Dixon, *Jesting Pilate: And Other Papers and Addresses* (Law Book, 1965) 251 ('*Jesting Pilate*').

23 See Duxbury, *Jurists and Judges* (n 18) 8–17; William Twining et al, 'The Role of Academics in the Legal System' in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2005) 920, 928–9; Lord Rodger, 'Judges and Academics in the United Kingdom' (2010) 29(1) *University of Queensland Law Journal* 29, 31–2.

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

25 Dixon, *Jesting Pilate* (n 22) 251.

26 David L Faigman, *Constitutional Fictions: A Unified Theory of Constitutional Facts* (Oxford University Press, 2008) 1.

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.

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, 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 discretion or judgment in determining what course of action to take'.[32] 'Constitutional facts are a species of legislative facts'.[33] They are 'matters of fact upon which … the constitutional validity of some general law may depend'.[34] Justice Callinan described constitutional facts 'in cases

27 Paul W Kahn, *Making the Case: The Art of the Judicial Opinion* (Yale University Press, 2016) 135.

28 See *Breen v Sneddon* (1961) 106 CLR 406, 411–12 (Dixon CJ) ('*Breen*'); *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, 478–9 [64]–[65] (McHugh J) ('*Woods*'); *Thomas v Mowbray* (2007) 233 CLR 307, 512 [614], 518–19 [632] (Heydon J) ('*Thomas*'); *Aytugrul v The Queen* (2012) 247 CLR 170, 200–1 [70] (Heydon J) ('*Aytugrul*'); *Maloney v The Queen* (2013) 252 CLR 168, 298–9 [351] (Gageler J) ('*Maloney*'); *Re Day* (2017) 91 ALJR 262, 268–9 [21] (Gordon J) ('*Re Day*'). Dividing facts into these categories was described in Kenneth Culp Davis, 'An Approach to Problems of Evidence in the Administrative Process' (1942) 55(3) *Harvard Law Review* 364, 402–3 ('An Approach to Problems of Evidence').

29 *Breen* (n 28) 411, quoted in *Aytugrul* (n 28) 200–1 [70] (Heydon J). See also *Woods* (n 28) 478–9 [65] (McHugh J), quoting JD Heydon, *Cross on Evidence* (Butterworths, 6th ed, 2000) 122 [3010]; *Re Day* (n 28) 268–9 [21] (Gordon J).

30 Kenneth Culp Davis, 'Judicial Notice' (1955) 55(7) *Columbia Law Review* 945, 952, quoted in *Re Day* (n 28) 268–9 [21] (Gordon J).

31 Davis, 'An Approach to Problems of Evidence' (n 28) 402.

32 *Woods* (n 28) 478 [65] (McHugh J), quoting Heydon, *Cross on Evidence* (n 29) 122 [3010].

33 *Re Day* (n 28) 269 [21] (Gordon J), citing *Maloney* (n 28) 299 [352] (Gageler J), citing Davis, 'An Approach to Problems of Evidence' (n 28) 402–3 and Davis, 'Judicial Notice' (n 30) 952–3.

34 *Breen* (n 28) 411 (Dixon CJ). See also *Richardson v Forestry Commission* (1988) 164 CLR 261, 294 (Mason CJ and Brennan J) ('*Richardson*').

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]

A *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 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 *South Australia v Commonwealth* ('*Standard Railway Gauge Case*'), Dixon CJ said that 'the use of a demurrer … certainly has been found a speedy and not unsatisfactory procedure'.[42] But as Dixon CJ also said, 'what justifies demurrer as

35 *Thomas* (n 28) 482 [526]. See also *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280, 292 (Dixon J) ('*Commonwealth Freighters*').

36 *Australian Constitution* s 73.

37 But see PH Lane, 'Facts in Constitutional Law' (1963) 37(4) *Australian Law Journal* 108, 118.

38 See *Bond v Commonwealth* (1903) 1 CLR 13, cited in *Levy v Victoria* (1997) 189 CLR 579, 649 (Kirby J) ('*Levy*') and *DPP (Cth) v JM* (2013) 250 CLR 135, 154 [32] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ) ('*JM*').

39 *High Court Rules 2004* (Cth) r 27.07 ('*High Court Rules*'). See, eg, *A-G (Vic) ex rel Dale v Commonwealth* (1945) 71 CLR 237 ('*A-G (Vic) ex rel Dale*'); *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 ('*Melbourne Corporation*'); *Victoria v Commonwealth* (1957) 99 CLR 575; *A-G (Vic) v Commonwealth* (1962) 107 CLR 529 ('*Marriage Act Case*'); *Victoria v Commonwealth* (1971) 122 CLR 353 ('*Payroll Tax Case*'); *Victoria v Commonwealth* (1975) 134 CLR 338 ('*Australian Assistance Plan Case*'); *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; *Queensland v Commonwealth* (1977) 139 CLR 585; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 ('*Koowarta*'); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('*Australian Capital Television*'); *Levy* (n 38); *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 Commonwealth* (2006) 229 CLR 1 ('*Work Choices Case*'); *Wurridjal v Commonwealth* (2009) 237 CLR 309 ('*Wurridjal*').

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

41 *JM* (n 38) 154 [32] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

42 (1962) 108 CLR 130, 142 ('*Standard Railway Gauge Case*').

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 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 … an[y] 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* ('*Bass*'), '[t]he utility of demurrers is … heavily dependent on the pleadings containing all the relevant facts. When the parties are uncertain whether further investigation will reveal further factual material, the utility of the demurrer is diminished'.[49] 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

43 Ibid.

44 *Bass* (n 40) 357 [50] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

45 *Kathleen Investments* (n 40) 135 (Gibbs J) (emphasis added). See also *Wurridjal* (n 39) 368 [120] (Gummow and Hayne JJ).

46 *Standard Railway Gauge Case* (n 42) 142 (Dixon CJ), cited in *Levy* (n 38) 589 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). See also *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582, 589 [6] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ) ('*Plaintiff M96A/2016*').

47 *Standard Railway Gauge Case* (n 42) 142 (Dixon CJ).

48 *Kathleen Investments* (n 40) 135 (Gibbs J), 144 (Stephen J).

49 *Bass* (n 40) 357 [50] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also *Mining Act Case* (n 39) 446 [162] (Kirby J); *Wurridjal* (n 39) 368 [119] (Gummow and Hayne JJ).

50 Cf *Plaintiff M96A/2016* (n 46); *Gerner v Victoria* (2020) 270 CLR 412 ('*Gerner*').

51 The *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 131–2 ('*Engineers Case*') and the *Communist Party Case* (n 6) 5–18 were both argued on a case stated. *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 ('*Banking Case*') was argued on a motion for interlocutory injunction treated as the trial of the action: at 7 (Barwick KC) (during argument).

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

> 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 case stated procedure has been used, the material facts are succinctly identified by the Justice who states the case, sometimes consisting of 10 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 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,

53 *R v Rigby* (1956) 100 CLR 146, 150–1 (Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ), quoted in *Brisbane City Council v Valuer-General (Qld)* (1978) 140 CLR 41, 58 (Gibbs J). See also *Mack v Commissioner of Stamp Duties (NSW)* (1920) 28 CLR 373, 381 (Isaacs J); *Johanson v Dixon* (1979) 143 CLR 376, 382 (Mason J). Cf *New South Wales v Commonwealth* (1926) 38 CLR 74, 82 (Knox CJ, Gavan Duffy, Rich and Starke JJ).

54 See, eg, *Engineers Case* (n 51) 131–2; *Communist Party Case* (n 6) 6–9; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 35–6 (Brennan J).

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

56 *Judiciary Act* (n 52) s 18. See, eg, *Commonwealth v Tasmania* (1983) 158 CLR 1, 10–11.

57 *Mineralogy* (n 40) 845 [52] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

58 See, eg, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 516–17; *Palmer v Western Australia* (2021) 272 CLR 505, 516 [15] (Kiefel CJ and Keane J) ('*Palmer*').

59 See, eg, *Re Day* (n 28) 269 [25] (Gordon J); *Re Roberts* (2017) 91 ALJR 1018, 1020 [7] (Keane J).

60 *High Court Rules* (n 39) r 27.08.1. See *Bodruddaza* (n 55) 660 [10] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Mineralogy* (n 40) 846 [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

61 *High Court Rules* (n 39) r 27.08.3.

62 *Mineralogy* (n 40) 846 [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

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 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 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ('*Engineers Case*'),[65] or in *Australian Communist Party v Commonwealth* ('*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 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

63 *High Court Rules* (n 39) r 27.08.5. See also *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285, 292 [10]–[12] (Kiefel CJ, Keane, Nettle and Edelman JJ), 301–2 [44]–[49] (Bell, Gageler and Gordon JJ) ('*Plaintiff M47/2018*').

64 *Standard Railway Gauge Case* (n 42) 142 (Dixon CJ).

65 *Engineers Case* (n 51).

66 *Communist Party Case* (n 6).

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.

B *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 in informing the issues that *properly arise* for determination and the framing of questions to be resolved in constitutional cases.[67] In a number of constitutional cases in the last decade,[68] the Court has emphasised the point made in *Lambert v Weichelt* ('*Lambert*') 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.[69]

This practice of judicial restraint can be seen in a range of contexts, for example:

67 *Mineralogy* (n 40) 846 [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

68 See, eg, *Tajjour v New South Wales* (2014) 254 CLR 508, 587–8 [173] (Gageler J) ('*Tajjour*'); *Duncan v New South Wales* (2015) 255 CLR 388, 410 [52] (French CJ, Hayne, Kiefel, Bell, Gageler, Keane and Nettle JJ); *Knight v Victoria* (2017) 261 CLR 306, 324–5 [32]–[33] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) ('*Knight*'); *Clubb v Edwards* (2019) 267 CLR 171, 192–3 [32]–[36] (Kiefel CJ, Bell and Keane JJ), 216–17 [135]–[138] (Gageler J), 287–8 [332] (Gordon J) ('*Clubb*'); *Zhang v Commissioner of Police* (2021) 273 CLR 216, 229–30 [21]–[23] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ) ('*Zhang*'); *Mineralogy* (n 40) 846 [56] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). See also *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171, 189–90 [44] (French CJ, Hayne, Kiefel, Bell, Keane and Nettle JJ).

69 (1954) 28 ALJ 282, 283 (Dixon CJ for the Court) ('*Lambert*').

- if a case can be resolved by statutory construction or on other grounds then it is unnecessary to address a constitutional issue;[70]
- 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
- the Court should not determine constitutional issues that the parties have not sought to raise.[73]

70 *Universal Film Manufacturing Co (Australasia) Ltd v New South Wales* (1927) 40 CLR 333, 342, 346–7 (Isaacs ACJ), 353 (Rich J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 510 [91] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *O'Donoghue v Ireland* (2008) 234 CLR 599, 614 [14] (Gleeson CJ); *Wotton v Queensland* (2012) 246 CLR 1, 14 [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 249 CLR 398, 419 [53] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 625–6 [149] (Keane J) ('*NAAJA*'); *Plaintiff S297/2013 v Minister for Immigration and Border Protection [No 2]* (2015) 255 CLR 231, 244 [23] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ). See also *Ashwander v Tennessee Valley Authority*, 297 US 288, 347 (Brandeis J) (1936).

71 See, eg, *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 482 [123] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Wurridjal* (n 39) 437 [354]–[355] (Crennan J); *Unions NSW v New South Wales* (2013) 252 CLR 530, 561–2 [66] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Bell Group NV (in liq) v Western Australia* (2016) 260 CLR 500, 528 [75] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ); *Unions NSW v New South Wales* (2019) 264 CLR 595, 618 [54] (Kiefel CJ, Bell and Keane JJ) ('*Unions NSW [No 2]*'); *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560, 588–9 [132] (Gordon J) ('*Alexander*').

72 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 473 [249] (Gummow and Hayne JJ) ('*Re Patterson*'), quoted in *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30, 51 [37] (McHugh, Gummow and Hayne JJ) ('*British American Tobacco*') and *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1, 139 [352] (Heydon J). See also *Brownlee v The Queen* (2001) 207 CLR 278, 295 [48] (Gaudron, Gummow and Hayne JJ) ('*Brownlee*'); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 199 [141] (Hayne, Kiefel and Bell JJ), quoting *Lambert* (n 69) 283 (Dixon CJ for the Court); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 372 [148] (Crennan, Bell and Gageler JJ), quoting *Lambert* (n 69) 283 (Dixon CJ for the Court) and *Wurridjal* (n 39) 352 [70] (French CJ); *Plaintiff M47/2018* (n 63) 292 [11] (Kiefel CJ, Keane, Nettle and Edelman JJ), 302 [49] (Bell, Gageler and Gordon JJ).

73 *Re Patterson* (n 72) 473–4 [248]–[252] (Gummow and Hayne JJ), cited in *British American Tobacco* (n 72) 51 [38] (McHugh, Gummow and Hayne JJ) and *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159, 171 [28] (McHugh, Gummow, Hayne and Heydon JJ); *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388, 426 [97] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210, 234–5 [55] (Glesson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

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 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* ('*Knight*'), 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

74 Sometimes referred to as 'reading down' or 'disapplication': see *Thoms v Commonwealth* (2022) 96 ALJR 635, 651–2 [75] (Gordon and Edelman JJ).

75 See, eg, *Knight* (n 68) 324–5 [32]–[33] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *Clubb* (n 68) 221–2 [149] (Gageler J), 287 [329]–[330] (Gordon J), 323–4 [438]–[441] (Edelman J).

76 *Mineralogy* (n 40) 847 [59] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting *Knight* (n 68) 324 [33] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ), citing *British Medical Association v Commonwealth* (1949) 79 CLR 201, 258 (Rich J) and *Tajjour* (n 68) 585–9 [168]–[176] (Gageler J).

77 *Knight* (n 68) 324–5 [33] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ), quoting *Real Estate Institute of New South Wales v Blair* (1946) 73 CLR 213, 227 (Starke J), quoted in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 69 [156] (Gummow, Crennan and Bell JJ).

78 *Clubb* (n 68) 216–17 [136] (Gageler J), citing *Mellifont v A-G (Qld)* (1991) 173 CLR 289, 303 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ) ('*Mellifont*'), discussing *Re Judiciary Act* (1921) 29 CLR 257, 266–7 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ) ('*Re Judiciary and Navigation Acts*'). See also *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, 612 (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ); *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234, 245 [29] (Kiefel CJ, Keane and Gordon JJ) ('*Hobart International Airport*').

context of resolving a controversy about a legal right or liability, based on facts found or 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 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' and the formulation of rules of constitutional law that are 'broader than required by the precise facts to which

79 See *Re Judiciary and Navigation Acts* (n 78) 265–6 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); *Luna Park Ltd v Commonwealth* (1923) 32 CLR 596, 600 (Knox CJ, Isaacs J agreeing at 600, Higgins J agreeing at 600–1, Rich J agreeing at 601, Starke J agreeing at 601); *A-G (Vic) ex rel Dale* (n 39) 272 (Dixon J); *Commonwealth v Queensland* (1987) 62 ALJR 1, 1–2 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581–2 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Bass* (n 40) 354–9 [43]–[56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 389 [5] (Gleeson CJ); *Kuczborksi v Queensland* (2014) 254 CLR 51, 109 [186] (Crennan, Kiefel, Gageler and Keane JJ) ('*Kuczborksi*'); *Palmer v Ayres* (2017) 259 CLR 478, 491 [27] (Kiefel, Keane, Nettle and Gordon JJ) ('*Ayres*').

80 *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 671 (Deane J).

81 *Australian Boot Trade Employees' Federation v Commonwealth* (1954) 90 CLR 24, 50–1 (Kitto J) ('*Australian Boot Trade Employees' Federation*').

82 *Mineralogy* (n 40) 846 [58] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting *Poe v Ullman*, 367 US 467, 503 (Frankfurter J) (1961) ('*Poe*').

83 *United States v Fruehauf*, 365 US 146, 157 (Frankfurter J) (1961) (emphasis added), quoted in *Zhang* (n 68) 231 [25] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ). See also *Chicago & Grand Trunk Railway Co v Wellman*, 143 US 339, 345 (Brewer J for the Court) (1892); *Baker v Carr*, 369 US 186, 204 (Brennan J) (1962); *Mellifont* (n 78) 318 (Brennan J); *Kuczborksi* (n 79) 109 [186] (Crennan, Kiefel, Gageler and Keane JJ); *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, 171 [127] (Gageler and Gordon JJ); *Clubb* (n 68) 217 [137] (Gageler J); *Mineralogy* (n 40) 846 [58] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting *Poe* (n 82) 503 (Frankfurter J).

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

85 *Tajjour* (n 68) 586–7 [172] (Gageler J). See also *Clubb* (n 68) 216 [135] (Gageler J), 289 [336] (Gordon J); *Carter v Potato Marketing Board* (1951) 84 CLR 460, 478 (Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ) ('*Carter*').

[they are] to be applied'.[86] It ensures that '[l]egal analysis is then directed only to issues that are real and not imagined'.[87]

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.[88] A consequence of these competing interests is that parties to constitutional litigation frequently present 'highly abstracted all-or-nothing argument[s] for or against invalidity' which are artificial.[89] 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.[90] 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'.[91] 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

86 *Zhang* (n 68) 230 [22] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ), quoting *Tajjour* (n 68) 588 [174] (Gageler J). See also *Knight* (n 68) 326 [37] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *Clubb* (n 68) 216 [135] (Gageler J), quoting *Liverpool, New York & Philadelphia Steamship Co v Commissioners of Emigration* 113 US 33, 39 (Matthews J) (1885).

87 *Clubb* (n 68) 217 [137] (Gageler J).

88 *Australian Boot Trade Employees' Federation* (n 81) 50 (Kitto J). See, eg, *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 525–6 [71], 527 [77] (French CJ); *South Australia v Totani* (2010) 242 CLR 1, 99 [252] (Heydon J); *Wainohu v New South Wales* (2011) 243 CLR 181, 238 [146] (Heydon J) ('*Wainohu*'); *NAAJA* (n 70) 604 [75] (Gageler J), 626–7 [150], 627–8 [152] (Keane J), discussed in *Zhang* (n 68) 231–2 [26]–[27] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ); *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 257–8 [83] (Bell, Keane, Nettle and Edelman JJ) ('*Vella*'); *Nguyen v DPP (Vic)* (2019) 59 VR 27, 50 [61] n 69 (Tate JA); *A Judicial Officer v Judicial Conduct Commissioner* (2022) 368 FLR 462, 515 [250] (Livesey P).

89 *Tajjour* (n 68) 588 [175] (Gageler J). See also *NAAJA* (n 70) 604 [75] (Gageler J).

90 *NAAJA* (n 70) 604 [75] (Gageler J). See Guy Aitken, 'Division of Constitutional Power and Responsibilities and Coherence in the Interpretation of Statutes' in Jeffrey Barnes (ed), *The Coherence of Statutory Interpretation* (Federation Press, 2019) 22, 31.

91 *Wainohu* (n 88) 238 [146] (Heydon J).

legislation.[92] As Justice McHugh observed writing extra-curially, '[l]egislation is the cornerstone of the modern legal system'.[93] 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;[94] indeed, it is difficult to think of any area of modern society that is not affected by statute.[95] Statutes have also grown in length and complexity. A particular provision may have multiple permutations or operations.[96] 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 the Court is able to understand 'the real significance, effect and operation' of the provision.[97]

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* ('*Zhang*')[98] as an example, one commentator decried the case as 'a fizzer'.[99] 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' and that constitutional principles of great importance to our society are not developed and refined in a vacuum.[100] 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

92 Lisa B Crawford, 'The Rule of Law in the Age of Statutes' (2020) 48(2) *Federal Law Review* 159, 159–60. See also *Buck v Comcare* (1996) 66 FCR 359, 364–5 (Finn J); Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4th ed, 2012) 15 [1.14], 16–18 [1.17]; Anthony J Connolly and Daniel Stewart, 'Public Law and a Public Lawyer in the Age of Statutes', in Anthony J Connolly and Daniel Stewart (eds), *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce* (Federation Press, 2015) 1, 1–3.

93 Justice MH McHugh, 'The Growth of Legislation and Litigation' (1995) 69(1) *Australian Law Journal* 37, 37.

94 Ibid. See *White v Director of Military Prosecutions* (2007) 231 CLR 570, 595 [48] (Gummow, Hayne and Crennan JJ).

95 See Connolly and Stewart (n 92) 1.

96 See, eg, *Zhang* (n 68) 228 [17] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ).

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

98 *Zhang* (n 68).

99 Belinda Baker, '"A Court Should Be Wary": *Zhang v Commissioner of Police* [2021] HCA 16', *Australian Public Law* (Blog Post, 16 June 2021) <https://www.auspublaw.org/blog/2021/06/a-court-should-be-wary-zhang-v-commissioner-of-police-2021-hca-16>.

100 *Carter* (n 85) 478 (Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ).

relevant adjudicative facts are before the Court[101] — they should not be an afterthought raised during oral argument.

C *Constitutional Facts*

Constitutional facts are facts upon which constitutional validity may depend.[102] They are important and need better and more considered attention.[103] 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'.[104] 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 the judicial power of the Commonwealth'.[105]

As Dixon CJ said in *Commonwealth Freighters Pty Ltd v Sneddon* ('*Commonwealth Freighters*') (a s 92 case):

> Highly 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.[106]

Constitutional facts are particularly important in determining whether purposive powers (like the defence power) are engaged[107] 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 Representatives be 'directly chosen by the

101 Cf *Re Day* (n 28) 268–9 [21] (Gordon J).

102 *Breen* (n 28) 411 (Dixon CJ). See also Lane, 'Facts in Constitutional Law' (n 37) 108; *Richardson* (n 34) 294 (Mason CJ and Brennan J).

103 Justice Michelle Gordon, 'Communist Party Case: Core Themes and Legacy' (2022) 32(4) *Public Law Review* 291, 302–4.

104 *Communist Party Case* (n 6) 222 (Williams J).

105 *Thomas* (n 28) 516 [626] (Heydon J), quoting *Sue v Hill* (1999) 199 CLR 462, 484 [38] (Gleeson CJ, Gummow and Hayne JJ). See also *Gerhardy v Brown* (1985) 159 CLR 70, 142 (Brennan J) ('*Gerhardy*'); *Unions NSW [No 2]* (n 71) 631–2 [94]–[95] (Gageler J).

106 *Commonwealth Freighters* (n 35) 292.

107 *Thomas* (n 28) 386–7 [227] (Kirby J); *Queensland v Commonwealth* (1989) 167 CLR 232, 239 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). See also Stephen Gageler, 'Fact and Law' (2008) 11 *Newcastle Law Review* 1, 10.

people'.[108] Constitutional facts may be relevant whenever a constitutional issue requires consideration of the 'operation' of a law.[109] 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'[110] 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 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 11th 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 consideration of a court in the context of

108 See, eg, *Cole v Whitfield* (1988) 165 CLR 360, 409 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ) ('*Cole*'); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 ('*Rowe*'); *McCloy v New South Wales* (2015) 257 CLR 178, 201 [24] (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*'); *Brown v Tasmania* (2017) 261 CLR 328, 370 [131] (Kiefel CJ, Bell and Keane JJ) ('*Brown*'); *Unions NSW [No 2]* (n 71) 632 [95] (Gageler J), 649–51 [150]–[152] (Gordon J); *Palmer v Australian Electoral Commission* (2019) 269 CLR 196, 214 [52]–[53] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); *Palmer* (n 58); *Ruddick v Commonwealth* (2022) 96 ALJR 367. See also Gageler (n 107) 10–11; James Stellios, *Zines's the High Court and the Constitution* (Federation Press, 6th ed, 2015) 682–94; Anne Carter, *Proportionality and Facts in Constitutional Adjudication* (Hart Publishing, 2021).

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

110 *Commonwealth Freighters* (n 35) 292 (Dixon CJ), quoted in *Breen* (n 28) 411–12 (Dixon CJ).

111 See, eg, *Gerhardy* (n 105) 141–2 (Brennan J), quoted in *Woods* (n 28) 478–9 [65] (McHugh J); *Thomas* (n 28) 481–4 [523]–[529] (Callinan J), 512 [614], 513 [618], 514–22 [620]–[639] (Heydon J); *Pape* (n 77) 146–7 [427] (Heydon J); *Maloney* (n 28) 193 [45] (French CJ), 298–9 [351]–[353] (Gageler J); *Re Day* (n 28) 268–9 [21]–[24] (Gordon J); *Clubb* (n 68) 222 [152] (Gageler J).

112 *Clubb* (n 68) 222 [152] (Gageler J), 292 [347] (Gordon J). See also *North Eastern Dairy Co Ltd* (n 84) 622 (Jacobs J); *South Australia v Tanner* (1989) 166 CLR 161, 179 (Brennan J) ('*Tanner*'); *Maloney* (n 28) 193 [45] (French CJ), 298–300 [349]–[355] (Gageler J).

113 See, eg, *Unions NSW [No 2]* (n 71) 648–51 [145]–[153] (Gordon J).

114 *Re Day* (n 28) 269 [22] (Gordon J).

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 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 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]

115 Gageler (n 107) 26 (emphasis added).

116 Ibid 25 (emphasis added), quoted in *Re Day* (n 28) 269 [23] (Gordon J). See also PW Hogg, 'Proof of Facts in Constitutional Cases' (1976) 26(4) *University of Toronto Law Journal* 386, 396 ('Proof of Facts'); *Maloney* (n 28) 299 [353] (Gageler J).

117 See *Maloney* (n 28) 299 [353] (Gageler J).

118 See *Communist Party Case* (n 6) 196 (Dixon J); *Thomas* (n 28) 482–3 [526] (Callinan J).

119 *Thomas* (n 28) 483 [526] (Callinan J).

120 See, eg, Transcript of Proceedings, *XYZ v Commonwealth* [2005] HCATrans 957, 2615–62 (Callinan J and DMJ Bennett QC); *XYZ v Commonwealth* (2006) 227 CLR 532, 555–6 [61]–[64], 578 [138] (Kirby J). Cf at 608–9 [219] (Callinan and Heydon JJ); *Wurridjal* (n 39) 412 [271] (Kirby J).

121 See, eg, *Communist Party Case* (n 6) 196 (Dixon J); *Pape* (n 77) 89 [233] (Gummow, Crennan and Bell JJ).

122 See, eg, *Rowe* (n 108) 134 [438] (Kiefel J); *Palmer* (n 58) 516 [16] (Kiefel CJ and Keane J).

123 *North Eastern Dairy Co Ltd* (n 84) 622 (Jacobs J), quoted in *Maloney* (n 28) 299 [351] (Gageler J).

124 *Re Day* (n 28) 269 [24] (Gordon J), citing Gageler (n 107) 26.

125 Gageler (n 107) 15; Justice JD Heydon, 'Developing the Common Law' in Justin T Gleeson and Ruth CA Higgins (eds), *Constituting Law: Legal Argument and Social Values* (Federation Press, 2011) 93, 99 ('Developing Common Law'). See also *Thomas* (n 28) 524–5 [646] (Heydon J).

126 Gageler (n 107) 26, quoted in *Re Day* (n 28) 269 [24] (Gordon J).

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.

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 may be 'narrowly focused and controlled by the issues' in contest between them.[131] 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

127 *Thomas* (n 28) 482–3 [526] (Callinan J). See also Heydon, 'Developing Common Law' (n 125) 117–18.

128 *Gerhardy* (n 105) 142 (Brennan J), quoted in *Thomas* (n 28) 522 [639] (Heydon J).

129 *Austin* (n 109) 249 [124] (Gaudron, Gummow and Hayne JJ), citing *New York v United States*, 326 US 572, 581 (Frankfurter J) (1946).

130 Cf Sir Anthony Mason, 'Interveners and Amici Curiae in the High Court: A Comment' (1998) 20(1) *Adelaide Law Review* 173, 175.

131 *A-G (Cth) v Breckler* (1999) 197 CLR 83, 137 [108] (Kirby J) ('*Breckler*').

132 *Tajjour* (n 68) 588 [175] (Gageler J); *NAAJA* (n 70) 604 [75] (Gageler J).

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 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'; the interpretation of the *Constitution* affects all Australians.[138] 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 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', and where the issues have profound significance for the Australian polity, in those circumstances.[141] 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

133 *Breckler* (n 131) 136–7 [108] (Kirby J).

134 *Commonwealth Freighters* (n 35) 292 (Dixon CJ), quoted in *Breen* (n 28) 412 (Dixon CJ) and *Gerhardy* (n 105) 142 (Brennan J).

135 *Gerhardy* (n 105) 141–2 (Brennan J), quoted in *Thomas* (n 28) 515 [621] (Heydon J).

136 See *Thomas* (n 28) 515 [622] (Heydon J).

137 *Wurridjal* (n 39) 313 (Kirby J). See also *Re Aird; Ex parte Alpert* (2004) 220 CLR 308, 335 [83] (Kirby J).

138 Ernst Willheim, 'Amici Curiae and Access to Constitutional Justice in the High Court of Australia' (2011) 22(3) *Bond Law Review* 126, 126.

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

140 *Zhang* (n 68) 230 [22] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ), quoting *Tajjour* (n 68) 588 [174] (Gageler J).

141 *Breckler* (n 131) 134 [104] (Kirby J). See also *Levy* n (38) 651 (Kirby J).

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 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 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] Stephen 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

142 See *Thomas* (n 28) 515 [624] (Heydon J).

143 See Lane, 'Facts in Constitutional Law' (n 37) 117; *Gerhardy* (n 105) 142 (Brennan J). See also *High Court Procedure Act 1903* (Cth) ord XXVIII r 2.

144 Lane, 'Facts in Constitutional Law' (n 37) 109.

145 Ibid 117–18; *Thomas* (n 28) 481 [523] (Callinan J), 513 [618] (Heydon J); *Maloney* (n 28) 299 [353] (Gageler J); *Re Day* (n 28) 269 [26] (Gordon J).

146 See Stephen Breyer, 'The Interdependence of Science and Law' (1998) 82(1) *Judicature* 24, 26 ('Interdependence of Science and Law'); Joseph D Kearney and Thomas W Merrill, 'The Influence of Amicus Curiae Briefs on the Supreme Court' (2000) 148(3) *University of Pennsylvania Law Review* 743, 745; George Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis' (2000) 28(3) *Federal Law Review* 365, 365; Patrick Keyzer, 'Participation of Non-Party Interveners and *Amici Curiae* in Constitutional Cases in Canadian Provincial Courts: Guidance for Australia?' in Linda Cardinal and David Headon (eds), *Shaping Nations: Constitutionalism and Society in Australia and Canada* (University of Ottawa Press, 2002) 273, 274 ('Participation of Non-Party Interveners'); Paul M Collins Jr, 'Friends of the Court: Examining the Influence of Amicus Curiae Participation in US Supreme Court Litigation' (2004) 38(4) *Law and Society Review* 807, 807 ('Friends of the Court'); Paul M Collins Jr, *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (Oxford University Press, 2008), 41–5 ('*Friends of the Supreme Court*').

147 Hogg, 'Proof of Facts' (n 116) 395–6.

148 Collins Jr, *Friends of the Supreme Court* (n 146) 2.

149 *Gratz v Bollinger*, 539 US 244 (2003); ibid 49 n 53.

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* ('*Levy*'):

> 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*[151] which will assist the Court in a way in which the Court would not otherwise have been assisted.[152]

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 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-

150 Breyer, 'Interdependence of Science and Law' (n 146) 26.

151 For an example of a matter of fact relevant to a question of constitutional validity, see *Tanner* (n 112) 179–80 (Brennan J).

152 *Levy* (n 38) 604 (emphasis added) (citations omitted). See also *Roadshow Films Pty Ltd v iiNet [No 1]* (2011) 248 CLR 37, 39 [4] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

153 *Levy* (n 38) 604–5. See also at 651–2 (Kirby J).

154 See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 523, 549 ('*Lange*'); *Levy* (n 38) 650 (Kirby J); *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365, 373; *Alinta* (n 13) 546; *Momcilovic v The Queen* (2011) 245 CLR 1, 23, 29, 75 [114] (Gummow J), 247 [677] (Bell J); *Williams v Commonwealth* (2012) 248 CLR 156, 217 [85] (Gummow and Bell JJ), 337 [456] (Crennan J); *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 449, 452 [2] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Magaming v The Queen* (2013) 252 CLR 381, 385, 387 [10] (French CJ, Hayne, Crennan, Kiefel and Bell J) ('*Magaming*'); *Tajjour* (n 68) 518, 572 [117] (Crennan, Kiefel and Bell JJ); *NAAJA* (n 70) 578; *Clubb* (n 68) 173, 182–4; *Comcare v Banerji* (2019) 267 CLR 373, 388, 408 [51] (Gageler J) ('*Comcare*'); *Re Canavan* (n 13) 296 [7] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *Smethurst v Commissioner of Police* (2020) 272 CLR 177, 189; *Citta Hobart Pty Ltd v Cawthorn* (2022) 400 ALR 1, 3.

155 See generally *Bropho v Tickner* (1993) 40 FCR 165, 172–3 (Wilcox J).

General) where this has occurred could be found.[156] 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, in *Wurridjal v Commonwealth* ('*Wurridjal*'),[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* ('*Unions NSW [No 2]*'), 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 to an expansion of a case agreed by the parties by permitting an intrusion of new facts or issues.[161]

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

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': *Judiciary Act 1903* (Cth) s 78A(3). See also *Palmer v Western Australia [No 4]* [2020] FCA 1221, [6]–[7], [9]–[10], [43] (Rangiah J).

157 See, eg, *Breckler* (n 131) 134 [102] (Kirby J); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 381 [127] (Gummow J) ('*APLA Ltd*'); *Wurridjal* (n 39) 312–4 (French CJ); *Unions NSW [No 2]* (n 71) 619 [57] (Kiefel CJ, Bell and Keane JJ).

158 *Levy* (n 38) 651 (Kirby J). See also Justice Susan Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20(1) *Adelaide Law Review* 159, 160; Keyzer, 'Participation of Non-Party Interveners' (n 146) 274; Kristen Walker, 'Amici Curiae and Access to Constitutional Justice: A Practical Perspective' (2011) 22(3) *Bond Law Review* 111, 113; Willheim (n 138) 126–7; Benjamin Robert Hopper, '*Amici Curiae* in the United States Supreme Court and the Australian High Court: A Lesson in Balancing Amicability' (2017) 51(1) *John Marshall Law Review* 81, 85.

159 *Wurridjal* (n 39).

160 Ibid 312. See also at 408 [260] (Kirby J).

161 *Unions NSW [No 2]* (n 71) 619 [57] (Kiefel CJ, Bell and Keane JJ, Gordon J agreeing at 641 [122]). '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': Transcript of Proceedings, *Kruger v Commonwealth* (High Court of Australia, 69, Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ, 12 February 1996) 8 (Brennan CJ). See also Walker (n 158) 117.

162 Collins Jr, 'Friends of the Court' (n 146) 810; Walker (n 158) 113.

163 See, eg, *Wurridjal* (n 39) 312–3 (French CJ).

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.

D *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 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.

IV 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 existence'.[167] Context of that kind is frequently the subject of judicial consideration in constitutional cases[168] and its relevance for the purposes

164 *Breckler* (n 131) 134–5 [104] (Kirby J).

165 Cf *APLA Ltd* (n 157) 417–18 [275] (Kirby J).

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

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

168 See, eg, *Engineers Case* (n 51) 152 (Knox CJ, Isaacs, Rich and Starke JJ); *Re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 521 (Latham CJ); *Cole* (n 108); *Cheatle v The Queen* (1993) 177 CLR 541; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 457 (McHugh J); *Lange* (n 154) 564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Brownlee* (n 72) 286 [10] (Gleeson CJ and McHugh J), quoting *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 143–4 (Brennan J) ('*Theophanous*'); *Singh* (n 6) 335 [18] (Gleeson CJ); *Ayres* (n

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 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] recognis[e] 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 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

79); *Private R v Cowen* (2020) 271 CLR 316; *Gerner* (n 50) 428–429 [32]–[34] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

169 See, eg, Carl McCamish, 'The Use of Historical Materials in Interpreting the Commonwealth Constitution' (1996) 70(8) *Australian Law Journal* 638; Bradley Selway, 'The Use of History and Other Facts in the Reasoning of the High Court of Australia' (2001) 20(2) *University of Tasmania Law Review* 129; Jeffrey Goldsworthy, 'Original Meanings and Contemporary Understandings in Constitutional Interpretation' in HP Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 245; Justice William MC Gummow, 'Law and the Use of History' in Justin T Gleeson and Ruth CA Higgins (eds), *Constituting Law: Legal Argument and Social Values* (Federation Press, 2011) 61, 72–6; Helen Irving, 'Constitutional Interpretation, the High Court, and the Discipline of History' (2013) 41(1) *Federal Law Review* 95; Sir Owen Dixon, 'Sources of Legal Authority' in Susan Crennan and William Gummow (eds), *Jesting Pilate and Other Papers and Addresses* (Federation Press, 3rd ed, 2019) 246, 247.

170 McHugh (n 93) 40. See also Richard A Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, 2016) 7.

171 KM Hayne, 'Sir Owen Dixon' in JT Gleeson, JA Watson and RCA Higgins (eds), *Historical Foundations of Australian Law* (Federation Press, 2013) vol 1, 372, 396. See also McHugh (n 93) 41.

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 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.

A *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 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

172 *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393, 413 (Isaacs J). See also *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 561 [46] (Kirby J).

173 See, eg, *Australian Capital Television* (n 39) 135 (Mason CJ), 210–12 (Gaudron J); *Theophanous* (n 168) 200 (McHugh J); *McGinty v Western Australia* (1996) 186 CLR 140, 201 (Toohey J); *Lange* (n 154) 559 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Egan v Willis* (1998) 195 CLR 424, 451 [42] (Gaudron, Gummow and Hayne JJ); *Coleman v Power* (2004) 220 CLR 1, 48 [89] (McHugh J) ('*Coleman*'); *Muldowney v South Australia* (1996) 186 CLR 352, 386–7 (Gummow J); *McCloy* (n 108) 224–6 [106]–[111] (Gageler J), 279 [301], 283 [315], 290–1 [348] (Gordon J); *Comcare* (n 154) 436–7 [146]–[149] (Gordon J).

174 See, eg, *Spratt v Hermes* (1965) 114 CLR 226, 274 (Windeyer J) ('*Spratt*'); *Koowarta* (n 39) 200 (Gibbs CJ); *Australian Capital Television* (n 39) 210 (Gaudron J).

175 See, eg, *R v Davison* (1954) 90 CLR 353, 381–2 (Kitto J); *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 11 (Jacobs J); *Magaming* (n 154) 400–1 [63]–[67] (Gageler J); *NAAJA* (n 70) 610–11 [94]–[97] (Gageler J); *Vella* (n 88) 276 [141]–[142] (Gageler J); *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 132 [138] (Gordon J) ('*Benbrika*').

176 See generally *Palmer* (2021) 95 ALJR 868, 872 [8] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

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

178 *Brown* (n 108) 365 [109] (Kiefel CJ, Bell and Keane JJ), 383 [181], 384 [186], 385–6 [188] (Gageler J), 408–9 [259] (Nettle J), 456 [397], 460 [411], 462 [420]–[421], 463 [424] (Gordon J), 502–3 [557]–[558], 506 [563] (Edelman J); *Comcare* (n 154) 420 [89] (Gageler J); *Farm Transparency International Ltd v New South Wales* (2022) 96 ALJR 655, 687 [158], 689 [165]–[168], 691 [178] (Gordon J), 698 [224] (Edelman J).

179 See the test identified in *Lange* (n 154) 561–2, 567–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), as modified and refined in *Coleman* (n 173) 50 [93], 51 [95]–

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

B *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* ('*Alexander*') 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.[181]

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

[96] (McHugh J), *McCloy* (n 108) 193–5 [2] (French CJ, Kiefel, Bell and Keane JJ) and *Brown* (n 108) 359 [88], 363–4 [104] (Kiefel CJ, Bell and Keane JJ), 375–6 [156] (Gageler J), 398 [236], 413 [271], 416–17 [277]–[278] (Nettle J), 432–3 [319]–[325] (Gordon J). See also *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 503–4 [44]–[46] (Kiefel CJ, Keane and Gleeson JJ), 512 [93] (Gageler J), 520–1 [131]–[134] (Gordon J).

180 Cf *Spratt* (n 174) 272 (Windeyer J). See also *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 388 [219] (Kirby J).

181 *Alexander* (n 71) 579 [77] (Kiefel CJ, Keane and Gleeson JJ), 585 [108]–[110] (Gageler J), 613 [248] (Edelman J).

182 *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Professional Engineers' Association* (1959) 107 CLR 208, 268 (Windeyer J).

183 Hayne (n 171) 407.

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

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

C *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.

V 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 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 Gageler J and I explained in *Prince Alfred College Inc v ADC*, '[i]dentification, modification or even clarification of some general principle or

185 See, eg, ibid 53 [38] (French CJ and Bell J), 72 [101]–[102] (Gageler J), 122–4 [297]–[305] (Gordon J). See also *Roach v Electoral Commissioner* (2007) 233 CLR 162, 178–9 [17] (Gleeson CJ); Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020) 190–3.

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

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

188 See *Re Judiciary and Navigation Acts* (n 78) 265–7 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ), cited in *Mellifont* (n 78) 303 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ); *Fencott v Muller* (1983) 152 CLR 570, 603, 606, 608 (Mason, Murphy, Brennan and Deane JJ); *Abebe v Commonwealth* (1999) 197 CLR 510, 523–4 [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, 606 [31] (Gaudron J); *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1, 21–2 [54] (French CJ, Kiefel, Bell, Gageler and Gordon JJ); *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339, 350 [26], 351 [27], 352 [29] (French CJ, Kiefel, Bell and Keane JJ); *Ayres* (n 79) 490–1 [26]–[27] (Kiefel, Keane, Nettle and Gordon JJ); *Hobart International Airport* (n 78) 245 [26] (Kiefel CJ, Keane and Gordon JJ).

189 *Clubb* (n 68) 309 [403] (Gordon J).

test requires that judgments be made', but '[t]hose judgments are best made in the context of, and by reference to, contestable and contested questions'.[190]

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 described as 'the hallmark' of the common law,[195] 'woven into the essential fabric of [a] common law country's constitutional ethos'.[196] The task of judges is to 'fit' what has *gone* before with what *comes* before them in a given case.[197] 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' of precedent.[198]

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.

A *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 …

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

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

192 Dixon, 'Concerning Judicial Method' (n 5) 472. See also *CSR Ltd v Eddy* (2005) 226 CLR 1, 40 [96] (McHugh J) ('*CSR*').

193 GC Lindsay, 'Building a Nation: The Doctrine of Precedent in Australian Legal History' in JT Gleeson, JA Watson and RCA Higgins (eds), *Historical Foundations of Australian Law* (Federation Press, 2013) vol 1, 267, 282. See also Dixon, 'Concerning Judicial Method' (n 5) 470.

194 Dixon, 'Concerning Judicial Method' (n 5) 470.

195 Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4(2) *Australian Bar Review* 93, 93.

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

197 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 593 (McHugh J); *Williams* (n 191) 115 (Gaudron and McHugh JJ).

198 Kahn (n 27) 135.

with the rich resource of principle 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.[201]

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 applied to its particular facts'.[202] 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'.[203]

While incrementalism may be a source of frustration for litigants and the academy at times, and 'its tentativeness may seem messy',[204] 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:

> [E]xperience 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.[205]

199 Stapleton (n 4) 13 (emphasis added).

200 Lindsay (n 193) 287, citing *Street v Queensland Bar Association* (1989) 168 CLR 461, 489 (Mason CJ), 518–9 (Brennan J), 560 (Toohey J), 588 (McHugh J).

201 *Singh* (n 6) 383 [152] (Gummow, Hayne and Heydon JJ). See also *Mellifont* (n 78) 303 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ); *Clubb* (n 68) 216–17 [136] (Gageler J); *Zhang* (n 68) 231 [25] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ); *Mineralogy* (n 40) 846 [58] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

202 Stapleton (n 4) 13.

203 Ibid (emphasis added).

204 Ibid.

205 Jeremy Kirk, 'Justiciability' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 510, 528.

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'.[206]

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 predetermines 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.

B *'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).[207]

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'.[208] 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.[209] 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.[210]

206 Ibid.

207 See EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, 2005) 159.

208 Roscoe Pound, *The Spirit of the Common Law* (Marshall Jones, 1931) 105–6.

209 Ibid 106.

210 Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008) 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* ('*SGH*'), 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.[211]

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.

Both of those points can be considered by reference to *Melbourne Corporation v Commonwealth* ('*Melbourne Corporation*').[212] The whole of the reasons of Dixon J 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'.[213] 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'.[214] But this he dismissed. As he said, '[t]he Constitution is a political instrument. It deals with government and governmental powers'.[215] The notion that the doctrine depended on political rather than legal considerations was said to have 'a specious plausibility' but really

211 (2002) 210 CLR 51, 75 [41]–[42] ('*SGH*').

212 *Melbourne Corporation* (n 39).

213 Ibid 82 (Dixon J).

214 Ibid.

215 Ibid.

to be meaningless.[216] And that is no doubt 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'.[217]

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.[218] 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'.[219] Because they are complex and diverse, and 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 Dixon J, 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

216 Ibid.

217 Goff (n 14) 328.

218 *Melbourne Corporation* (n 39) 55–6, 61 (Latham CJ), 99–100 (Williams J).

219 *SGH* (n 211) 75 [42].

behalf of a State and not … the State as … customer of a bank'.[220] But 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.[221] And it is beyond power because it is '[t]he federal system itself [which] is the foundation of the restraint upon the use of [a] power to control the States'.[222]

The point is simple: although we strive for certainty in our exposition of principle, law is inherently uncertain.[223] 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,[224] but legal principles cannot always be put into neat and discrete boxes. To adopt the words of Fullagar J, we ought to resist 'the temptation, which is so apt to assail us, to import a meretricious symmetry into the law'.[225] Or, as Lane put it, there is a 'danger … that comfortable stability becomes unreal rigidity'.[226] Be wary of 'black-and-white distinctions', 'water-tight categories' and 'uncompromising iron frames'.[227]

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'.[228] 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 reflections in [his] own vacillating mind and conscience'.[229] Judge 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

220 *Melbourne Corporation* (n 39) 78. See also *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 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, 225–6 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ).

221 *Melbourne Corporation* (n 39) 79 (Dixon J).

222 Ibid 81 (Dixon J).

223 Thomas (n 207) 115.

224 PH Lane, *The Australian Federal System* (Law Book, 2nd ed, 1979) 1177 ('*Australian Federal System*'); *CSR* (n 192) 40 [96] (McHugh J).

225 *A-G (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237, 285.

226 Lane, *Australian Federal System* (n 224) 1177.

227 Ibid.

228 Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) 166.

229 Ibid.

process 'in its highest reaches is not discovery, but creation'.[230] Such is the common law system that principles are 'produced by the judges case by case'; not always perfectly ordered, indeed sometimes seemingly 'ad hoc and higgledy-piggledy'.[231] The search for principle can take time; some cases 'yield up their kernel slowly and painfully'.[232]

C *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' by reference to precedent.[233] 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',[234] argue that 'by parity of reasoning' the provisions impugned in the proceedings before the Court are also valid or invalid.[235] A word of caution — proceed with the utmost care.

As I explained in *Vella v Commissioner of Police (NSW)* ('*Vella*'),

> [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*.[236]

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"'.[237] By adopting 'unmerited adherence to precedent' a judge's 'horizons are forever confined by an essentially static view of the law'; 'never doing anything

230 Ibid.

231 FAR Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford University Press, 2001) 2.

232 Cardozo (n 228) 29.

233 *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* (2013) 253 CLR 284, 327 [80] (Hayne J). See also *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 94 [137] (Hayne, Crennan, Kiefel and Bell JJ) ('*Pompano*'); *Vella* (n 88) 278 [146] (Gageler J), 292 [188] (Gordon J); *Benbrika* (n 175) 138–9 [152] (Gordon J).

234 *Pompano* (n 233) 94 [137] (Hayne, Crennan, Kiefel and Bell JJ).

235 *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510, 523 [40] (Kiefel CJ, Bell, Gageler and Keane JJ). See, eg, *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375, 399 [77] (Nettle J); *Love v Commonwealth* (2020) 270 CLR 152, 289 [396] (Edelman J); *Walton v ACN 004410833 Ltd (in liq)* (2022) 96 ALJR 166, 190 [115] (Gageler J); *Alexander* (n 71) 585 [109] (Gageler J).

236 *Vella* (n 88) 292 [188] (citations omitted) (emphasis added).

237 Thomas (n 207) 140, quoting Sir Stephen Sedley, 'On Never Doing Anything for the First Time', (Atkin Lecture, The Reform Club, 6 November 2001).

for a first time becomes a recipe for injustice in the individual case and stagnancy in the law generally. Rigidity in judicial thinking becomes a virus'.[238]

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'.[239] 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.[240]

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.

D *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

238 Thomas (n 207) 140.

239 Hayne (n 171) 390 (emphasis in original).

240 Cf ibid.

> 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.[241]

Stapleton describes that kind of scholarship as 'reflexive tort scholarship' ('reflexive', in the sense of signalling a 'two-way conversation between legal academics and the Bench'; not addressed to other academics).[242] 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"'.[243] Professor Stapleton has suggested that the former, reflexive scholarship, is of greater assistance to judges.[244] 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 'different enterprises'.[245] The development of constitutional law suffers when judges and academics operate within silos; as 'ships which pass[] each other in the night'.[246] After all, as Lord Goff put it, both judges and academics 'attempt, in their respective roles, to formulate principles of law':[247] they have complementary roles founded upon a common interest in the 'search for principle'.[248]

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 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?

241 Stapleton (n 4) 2.

242 Ibid.

243 Ibid 1–2, quoting Ernest Weinrib, *The Idea of Private Law* (Oxford University Press, 1995) 35.

244 Stapleton (n 4) 2.

245 Duxbury, *Jurists and Judges* (n 18) 74.

246 Lord Neuberger, 'Judges and Professors: Ships Passing in the Night?' (Speech, Max Planck Institute, 9 July 2012) 28 [54].

247 Goff (n 14) 325.

248 Ibid 329.

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.

VI 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: 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.[249]

249 Ibid. See also *Spiliada* (n 24) 488 (Lord Goff).