THE LIMITS OF JUDICIAL POWER TO INTERPRET LEGISLATION

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This article reconsiders the limits of judicial power to interpret legislation. It is said that Australian courts have no power to choose the meaning of legislation. But that claim is inconsistent with other aspects of Australian constitutional law, and the standard account of vagueness. The article proposes two ways of reconciling this tension. The first is to rethink the scope of judicial power and recognise that courts have some authority to contribute to legislative content. The second is to rethink the scope of legislative power and recognise that there are some limits on the power of Australian parliaments to enact vague laws. The article concludes that both are plausible, and that the most compelling resolution involves some element of each.

CONTENTS

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I Introduction

What is the scope of judicial power to interpret legislation? The orthodox answer might go something like this: in Australia, as elsewhere, the judicial power vested in the courts extends to making binding determinations of what a statute means[1] and how it applies to resolve the legal dispute before them.[2] In doing so, courts are authorised to make 'constructional choices': that is, choose between the several meanings that a statute could reasonably bear.[3] However, there is an important line between interpreting and legislating. Australian courts have no power to contribute to the content of legislation — by giving a statute a meaning that its text *cannot* bear — because that would amount to legislating and not interpreting.[4]

This is how several members of the High Court explained their interpretive role in *Momcilovic v The Queen* ('*Momcilovic*')[5] — the case which is famous, if not infamous, for deciding that the interpretive powers conferred on Victorian courts by the *Charter of Human Rights and Responsibilities 2006* (Vic) ('*Victorian Charter*') more narrowly than some desired.[6] A majority concluded that s 32(1) of the *Victorian Charter* did not empower courts to change the meaning of legislation,[7] and indicated that it would be invalid if it did — for in giving a statute a meaning of their own making, courts would be impermissibly exercising legislative power.[8] This constitutional constraint on the judicial power to interpret statutes was said to operate the same at the state and federal levels, notwithstanding important differences in the way the separation of powers operates between the two.[9] And *Momcilovic* is no outlier. There are other cases

[1] *Momcilovic v The Queen* (2011) 245 CLR 1, 44 [37] (French CJ), 158 [398] (Heydon J) ('*Momcilovic*'); *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ) ('*Huddart Parker*').

[2] See *Huddart Parker* (n 1) 357 (Griffith CJ).

[3] See *Momcilovic* (n 1) 45 [39] (French CJ), quoting *Jones v DPP* [1962] AC 635, 662 (Lord Reid) ('*Jones*'). See also *Momcilovic* (n 1) 50 [50] (French CJ).

[4] See, eg, *Momcilovic* (n 1) 158 [398] (Heydon J).

[5] See, eg, ibid 45 [39]–[40] (French CJ), 158 [398] (Heydon J), 217 [566] (Crennan and Kiefel JJ).

[6] See, eg, Tim Vines and Thomas Faunce, 'A Bad Trip for Health-Related Human Rights: Implications of Momcilovic v The Queen (2011) 85 ALJR 957' (2012) 19(4) *Journal of Law and Medicine* 685, 693; Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the *Victorian Charter of Human Rights and Responsibilities*: The *Momcilovic* Litigation and Beyond' (2014) 40(2) *Monash University Law Review* 340, 387–8.

[7] *Momcilovic* (n 1) 50 [50]–[51] (French CJ), 92–3 [171]–[172] (Gummow J), 123 [280] (Hayne J), 217 [565]–[566] (Crennan and Kiefel JJ), 250 [684] (Bell J).

[8] See ibid 45 [39]–[40] (French CJ), 158 [398] (Heydon J).

[9] Ibid 92 [169] (Gummow J).

(discussed herein) in which the Court has explained the scope of its interpretive power in similar terms.[10]

But this position is difficult to reconcile with other aspects of Australian law, and the way that language and its interpretation are understood in mainstream legal theory. Many legal theorists tend to agree that legislative texts are often indeterminate, in the sense that they do not provide an answer to all the questions that might arise in interpreting or applying those texts.[11] They say that indeterminacy is not merely common, but ineradicable: no legislature could avoid it, even if they wanted to.[12] For present purposes, this phenomenon can be called 'vagueness'. It is accepted as a general principle of Australian constitutional law that parliaments have the power to make vague laws.[13] In other words, there is no 'void-for-vagueness' doctrine in Australia. As Dan Meagher recently observed, that position has been articulated in numerous cases dating back to Federation,[14] including recently in *Brown v Tasmania* ('*Brown*').[15] The standard reason offered for that stance is that void-for-vagueness is an outworking of constitutional rights to due process (of the kind conferred by the *United States Constitution*) which do not exist in Australian constitutional law.[16] The High Court has frequently said that when confronted with a statute, the meaning of which is unclear, the role of a court is to *make it clear* by applying the established principles of statutory interpretation.[17]

There is a significant tension between these two important principles of Australian constitutional law. If statutes are valid even if they are vague, and courts are always required to apply them, then statutory interpretation must sometimes involve contributing to the content of a statute. If courts cannot contribute to the content of a statute, then they cannot supply any of the content that a vague statute requires to work, and hence, a vague law must have no legal

[10] See, eg, *Western Australia v The Commonwealth* (1995) 183 CLR 373, 486 (Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ) ('*Native Title Act Case*'); *Brown v Tasmania* (2017) 261 CLR 328, 481 [489] (Edelman J) ('*Brown*').

[11] See below nn 146, 182–3.

[12] Ibid. See also, eg, Timothy AO Endicott, *Vagueness in Law* (Oxford University Press, 2000) 190.

[13] See below Part II.

[14] Dan Meagher, 'Does the *Australian Constitution* Preclude a Void-for-Vagueness Doctrine?' (2025) 49(1) *Melbourne University Law Review* 83–4, 96–8 ('Void-for-Vagueness Doctrine?').

[15] *Brown* (n 10) 373 [148]–[149] (Kiefel CJ, Bell and Keane JJ), 469–70 [446]–[448] (Gordon J), 487 [507] (Edelman J).

[16] See, eg, ibid. See also *King Gee Clothing Co Pty Ltd v Commonwealth* (1945) 71 CLR 184, 195 (Dixon J).

[17] See, eg, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*'); *Brown* (n 10) 471 [452] (Gordon J), 479 [484] (Edelman J).

effect to the extent that it is vague. This requires either a change to constitutional doctrine (the recognition of some constitutional constraint on legislative power to enact vague laws) or to our understanding of the constitutional parameters of statutory interpretation (the recognition that courts can contribute to the content of legislation, at least some of the time). This article examines this tension in pursuit of the broader aim of elucidating the scope of judicial power to interpret legislation and the choices that this legitimately entails.

Part II sets out the current position. First, I examine the case law in which the High Court has explained the limits of its power to interpret legislation, including *Momcilovic*. This case law concerns both state and federal legislation, and state and federal courts, but indicates that the different separation of powers principles that apply at the state and federal levels produce the same limits on judicial power in this context. I then introduce the concept of vagueness as it is commonly understood in the philosophy of law and language, and its implications under the *Australian Constitution*. In particular, I examine the case law in which the High Court has said that there are no justiciable limits on legislative power to enact vague statutes (of the kind that exist in the United States ('US')). At the end of this Part, I explain in more detail the tension described above: that is, why the Court's position on the validity of void laws is difficult to reconcile with the nature and ubiquity of vagueness on the one hand, and the claim that Australian courts cannot contribute to legislative content on the other.

In Part III, I present two possible paths to coherence. The first is to reconsider the constitutional parameters of statutory interpretation, and recognise that courts have some power to contribute legislative content of their own making. I suggest that a limited power to do so could be justified by the constitutional imperative that courts provide an effective mechanism of dispute resolution. The second is to recognise some legal limits on legislative power to enact vague laws, not derived from any constitutional right to due process, but rather from the constitutionally mandated separation of judicial and legislative power. Drawing on contemporary case law and commentary from the US, I suggest that a void-for-vagueness doctrine would not be entirely foreign to Australian constitutional law. While either approach would present challenges, they are both plausible. Indeed, the best resolution seems to involve some combination of the two: recognising that courts have some power to supply legislative content, but also, that there is a point at which an indeterminate law will fail.

II Constitutional Orthodoxy

A *The Constitutional Parameters of Statutory Interpretation*

The approach to interpreting statutes in Australian law is well settled, in broad outline.[18] But important questions remain about what precisely this approach entails[19] — including the question with which I am concerned, as to the kind of choices that courts are authorised to make.[20]

Courts routinely endorse the 'modern approach', which entails reading statutory texts in their context,[21] including evidence of their purpose, and the established canons of construction.[22] Courts recognise that legislative texts are often open to more than one interpretation, and say that their function is to make a determination as to which of these interpretations is legally binding — sometimes using the concept of 'constructional choice' to explain that role.[23] That phrase appears to have been coined by French CJ, who said (in *Momcilovic*):

> Constructional choice subsumes the concept of ambiguity but lacks its negative connotation. It reflects the plasticity and shades of meaning and nuance that are the natural attributes of language and the legal indeterminacy that is avoided only with difficulty in statutory drafting.[24]

Justice Gageler used the same phrase in *SZTAL v Minister for Immigration*, and explained:

[18] See, eg, *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) ('*CIC Insurance*'); *Project Blue Sky* (n 17) 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

[19] See below n 128 and accompanying text.

[20] See, eg, Meagher, 'Void-for-Vagueness Doctrine?' (n 14) 84–5.

[21] Jeffrey Barnes, 'Contextualism: "The Modern Approach to Statutory Interpretation"' (2018) 41(4) *University of New South Wales Law Journal* 1083, 1084–5; Lisa Burton Crawford and Dan Meagher, 'Statutory Precedents under the "Modern Approach" to Statutory Interpretation' (2020) 42(2) *Sydney Law Review* 209, 216–18 (who write that 'this approach is now interpretive orthodoxy': at 210).

[22] See, eg, *Project Blue Sky* (n 17) 384 [78] (McHugh, Gummow, Kirby and Hayne JJ); *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531, 556–7 [65]–[66] (Gageler and Keane JJ) ('*Taylor*').

[23] See below nn 24–5. See also *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 605 [78] (Gageler J), 645–6 [212]–[214] (Nettle and Gordon JJ); *SAS Trustee Corporation v Miles* (2018) 265 CLR 137, 139 [1], 148–9 [17]–[19] (Kiefel CJ, Bell and Nettle JJ), 157 [41] (Gageler J).

[24] *Momcilovic* (n 1) 50 [50] (French CJ). See also *Chief Executive Officer of Customs v WMC Resources Ltd* (1998) 87 FCR 482, 494 (French J).

> The constructional choice presented by a statutory text read in context is sometimes between one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised. More commonly, the choice is from 'a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural', in which case the choice 'turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies'.[25]

However, courts frequently say that the permissible range of constructional choices is limited.[26] An impermissible choice is often described as a meaning that the statutory text (read in context) 'cannot bear'.[27] This limit is a constitutional one: it is said to be beyond the judicial power to contribute to or change the meaning of a statute, or in other words, to choose a meaning *other than* those which the statute can possibly bear.[28] The apparent basis for this is that such a meaning would be a judicial construct, and so amount to an impermissible exercise of legislative power by the judicial branch.[29]

This position was put most clearly in the case of *Momcilovic*, which concerned (amongst other things) the nature of the interpretive canon mandated by s 32(1) of the *Victorian Charter*, and whether it was valid.[30] This provision provided that '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'.[31] It was argued that this directed Victorian courts to apply a 'remedial' interpretive approach[32] — of the kind understood to be mandated by

[25] (2017) 262 CLR 362, 375 [38] ('*SZTAL*'), quoting *Taylor* (n 22) 557 [66] (Gageler and Keane JJ).

[26] See, eg, *Momcilovic* (n 1) 45 [39]–[40] (French CJ), quoting *Jones* (n 3) 662 (Lord Reid).

[27] See, eg, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 504 [68] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) ('*Plaintiff S157*'); *Kohn v Sallman* (1965) 113 CLR 628, 632 (Barwick CJ).

[28] See above nn 3–4. See also *Native Title Act Case* (n 10) 486 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

[29] See, eg, *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 164 (Latham CJ), 252 (Rich and Williams JJ), 372 (Dixon J); *Thomas v Mowbray* (2007) 233 CLR 307, 344–5 [71] (Gummow and Crennan JJ) ('*Thomas*'); *Plaintiff S157* (n 27) 512–13 [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[30] *Momcilovic* (n 1) 30 [2], (French CJ), 164–70 [411]–[427], 175 [440] (Heydon J).

[31] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1) ('*Victorian Charter*').

[32] See *Momcilovic* (n 1) 22–3.

s 3 of the *Human Rights Act 1998* (UK)[33] — and change the meaning of legislation to make it rights compliant. But six members of the High Court held that s 32(1) did not empower Victorian courts to go so far.[34] These judgments have since been interpreted by Victorian courts to mean that s 32(1) requires an interpretive approach akin to the principle of legality, 'but with a wider field of application'.[35]

That is a cogent interpretation of *Momcilovic*, despite some differences in the way the judges expressed their conclusion.[36] Chief Justice French most explicitly likened s 32(1) to the principle of legality. His Honour said that it 'mandates an attempt to interpret statutory provisions compatibly with human rights', but does not direct courts to engage in a method of interpretation that 'departs from established understandings of that process'.[37] The Chief Justice

[33] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 571–2 [32] (Lord Nicholls), 577 [49] (Lord Steyn) ('*Ghaidan*'). There are some limits to this remedial approach, eg, the courts cannot remove 'the very core and essence' of the statute: at 596–7 [111] (Lord Rodger). See also Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford University Press, 2nd ed, 2009) vol 1, 175–7 [4.01]–[4.08], 190 [4.32], 197–9 [4.44]–[4.45]. As Bell J noted, a similar power is also exercised by the Hong Kong Court of Final Appeal: *Momcilovic* (n 1) 250 [684].

[34] *Momcilovic* (n 1) 50 [50]–[51] (French CJ), 85 [146] (Gummow J), 123 [280] (Hayne J), 210 [545], 217 [565]–[566] (Crennan and Kiefel JJ), 250 [684]–[685] (Bell J). Justice Heydon held that s 32(1) attempted to confer such power on the courts but was invalid for that reason: at 184 [454].

[35] See especially *Slaveski v Smith* (2012) VR 206, 219 [45] (Warren CJ, Nettle and Redlich JJA). See also the other case law discussed by Bruce Chen in Bruce Chen, 'Making Sense of *Momcilovic*: The Court of Appeal, Statutory Interpretation and the *Charter of Human Rights and Responsibilities Act 2006*' [2013] 74 *AIAL Forum* 64, 65–70. The High Court endorsed this approach in *DPP (Vic) v Smith* (2024) 419 ALR 212, 224–5 [57] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ); with the majority stating that '[t]he general operation of the interpretive principle in s 32(1) of the *Charter* need not be resolved in this appeal': at 1176 [58]; and quoting passages from the judgments of French CJ and Gummow J in *Momcilovic* with approval: at 1176 [58] (citations omitted). Justice Edelman also likened the effect of s 32(1) to the common law principle of legality, but incorporated post-*Momcilovic* developments as to how the principle of legality works — specifically, the idea that the strength of that presumption varies depending on 'the importance of the right' and the extent of the abrogation: at 1191 [134]. His Honour has now applied this idea in several cases: see, eg, *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, 654 [212]; *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, 623 [159]; *Federal Commissioner of Taxation v Tomaras* (2018) 265 CLR 434, 467–8 [101]–[102]. The language of rights being given variable 'weight' in the making of interpretative choices is consistent with some of the arguments presented in Lisa Burton Crawford, 'An Institutional Justification for the Principle of Legality' (2022) 45(2) *Melbourne University Law Review* 511: see especially at 541–8.

[36] And bracketing the question of whether interpretation was informed by proportionality analysis, which divided the Court but is mercifully tangential for present purposes: *Momcilovic* (n 1) 43–4 [34] (French CJ), 91–2 [166]–[168] (Gummow J), 123 [280] (Hayne J), 170 [427] (Heydon J), 219–20 [573]–[576] (Crennan and Kiefel JJ), 249–50 [682]–[685] (Bell J).

[37] *Momcilovic* (n 1) 50 [50].

did not elaborate on what the 'established understandings of that process' are, but did make clear that it does not entail giving a statute a meaning that its text cannot bear. As he phrased it:

> [S]tatutory language may leave open only an interpretation or interpretations which infringe one or more rights or freedoms. The principle of legality, expressed as it is in terms of presumed legislative intention, is of no avail against such language.[38]

Section 32(1) was, in his Honour's view, similarly constrained: it 'operates upon constructional choices which the language of the statutory provision permits'.[39] Justice Gummow and Justice Hayne agreed with the outer limits of s 32(1) so described. Their Honours did not employ French CJ's concept of 'constructional choice', relying instead on the canonical statement from *Project Blue Sky v Australian Broadcasting Authority* ('*Project Blue Sky*') that a canon of construction can legitimately direct a court to conclude that the legal meaning of a statute is different from the 'ordinary meaning' of the words on the page.[40] But this does not seem to be a significant distinction. Chief Justice French elsewhere uses the language of 'reading down',[41] and his broader jurisprudence makes clear that he is willing to adopt strained constructions to preserve fundamental rights and principles.[42] His Honour's understanding of the range of constructional choices that are legitimately open to a court clearly ranges beyond the semantic meaning of the text.

Of significance for present purposes is the constitutional issue that loomed in the background. That is, if s 32(1) *did* authorise courts to change the meaning of legislation, it would very likely have been held constitutionally invalid for that reason. Justice Gummow was emphatic, stating that there is '[n]o doubt the Parliament of the Commonwealth cannot delegate to courts exercising the judicial power an authority conferring a *discretion or choice* as to the content of a federal law'.[43] Though the separation of powers applies with different stringency at the state level, Gummow J stated that a state law that directed courts to choose its content would be invalid too, as it would 'require the [s]tate courts

[38] Ibid 47 [45].

[39] Ibid 50 [51].

[40] As discussed by Gummow J in ibid 92 [170]. Justice Hayne agreed: at 123 [280].

[41] Ibid 52 [56].

[42] See, eg, *Lacey v A-G (Qld)* (2011) 242 CLR 573, 583–4 [20], 597–8 [60] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1, 27–8 [54] (French CJ, Hayne, Kiefel and Nettle JJ).

[43] *Momcilovic* (n 1) 92 [169] (emphasis added).

to act in a fashion incompatible with the proper discharge of their federal judicial responsibilities and with their institutional integrity'.[44]

The use of the word 'choice' here is potentially confusing, given the aforementioned case law in which the High Court has said that it can make 'constructional choices'.[45] But Gummow J's substantive position is tolerably clear. His Honour does not deny that statutes may be open to more than one interpretation; only, that courts cannot be empowered to craft legislative content on their own by giving a statute a meaning and effect that is not derived from the text read in accordance with established interpretative principles. In support of that position, his Honour cited the *Native Title Act Case*.[46] This case concerned s 12 of the *Native Title Act 1993* (Cth), which gave 'the common law of Australia in respect of native title' the force of the law of the Commonwealth.[47] It was held invalid, for it 'delegated to the judicial branch of government a legislative power to make law'.[48]

Chief Justice French expressed a similar view, explaining that while courts could 'choose between those meanings' which a statutory text could 'reasonably bear', they could go no further.[49] In other words, courts are 'not … authorised to legislate'.[50] Likewise, Heydon J stated that 'determining "the content of a law as a rule of conduct or a declaration as to power, right or duty"' is an 'essentially legislative task' that cannot be validly conferred upon a court.[51] Indeed, his Honour concluded that this is what s 32(1) attempted to do, and that it was invalid for that reason.[52]

The constitutional principles articulated here are consistent with the High Court's explanation of the limits of reading down and severance (which two

[44] Ibid. Justice Hayne agreed with Gummow J's reasons in this regard: at 123 [280]. Briefly put, the courts established by or under ch III of the *Australian Constitution* cannot exercise any power that is not judicial, or incidental to the exercise thereof. State courts can exercise non-judicial power, provided it does not impair their institutional integrity: *Kable v DPP (NSW)* (1996) 189 CLR 51, 118–19, 121 (McHugh J), 127–8 (Gummow J).

[45] See above nn 23–7 and accompanying text.

[46] *Momcilovic* (n 1) 92 [169], citing *Native Title Act Case* (n 10) 486 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). His Honour also referred to the accepted parameters of reading down and severance, which I discuss below: see below n 53 and accompanying text.

[47] *Momcilovic* (n 1) 159 [399] (Heydon J).

[48] Ibid.

[49] *Momcilovic* (n 1) 45 [39]–[40], quoting *Jones* (n 3) 662 (Lord Reid).

[50] *Momcilovic* (n 1) 45 [40] (French CJ).

[51] Ibid 159 [400], quoting *Thomas* (n 29) 344–5 [71] (Gummow and Crennan JJ), quoting *Commonwealth v Grunseit* (1943) 67 CLR 58, 82 (Latham CJ) ('*Grunseit*').

[52] *Momcilovic* (n 1) 184 [454].

judges in *Momcilovic* referred to, to support their conclusions[53]).[54] It is accepted that courts should read legislation in light of constitutional law. This is now mandated by interpretation acts at the state and federal levels.[55] And though the validity of that direction has never been doubted, it too is constrained by the separation of powers, and hence the range of constructional choices presented by the statute. As Heydon J explained in *Wainohu v New South Wales*: 'No doubt a construction of legislation which is favourable to validity can be preferred to a construction which would produce invalidity, but only if the former construction is open on the language and not inconsistent with it.'[56] Otherwise, Gummow, Hayne, Crennan and Bell JJ said in that same case, courts would be 'rewriting' the legislation, which they have no authority to do.[57]

There is another important case that supports the constitutional principle articulated in *Momcilovic*, that courts cannot choose the content of legislation: that is, *Department of Public Prosecutions (Vic) v Walters* ('*Walters*').[58] It concerned Victorian legislation that identified certain 'baseline offences',[59] and specified a sentence length 'that the Parliament intends to be the median sentence' for those crimes.[60] This case concerned the crime of incest,[61] the median sentence for which Parliament had stipulated should be 10 years' imprisonment.[62] The Act specified that '[i]n sentencing an offender for a baseline offence, a court … must do so in a manner compatible with Parliament's intention' as to

53 Ibid 97 [189], 105 [224] (Gummow J), 159 [399] (Heydon J).

54 See, eg, *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 93–4 [248]–[252] (Gummow, Crennan and Bell JJ); *Pidoto v Victoria* (1943) 68 CLR 87, 109–11 (Latham CJ); *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 485–6 (Brennan and Toohey JJ); *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 339, 349 (Brennan J), 355 (Toohey J), 372 (McHugh J).

55 *Acts Interpretation Act 1901* (Cth) s 15A; *Interpretation Act 1987* (NSW) s 31; *Acts Interpretation Act 1954* (Qld) s 9; *Legislation Interpretation Act 2021* (SA) s 15; *Acts Interpretation Act 1931* (Tas) s 3; *Interpretation of Legislation Act 1984* (Vic) s 6; *Interpretation Act 1984* (WA) s 7. See also Perry Herzfeld and Thomas Prince, *Interpretation* (Thomas Reuters, 2nd ed, 2020) 211; Susan Kenny, 'Constitutional Role of the Judge: Statutory Interpretation' (2014) 1 *Judicial College of Victoria Online Journal* 4, 10.

56 (2011) 243 CLR 181, 238 [146].

57 Ibid 228 [102]. Chief Justice French and Kiefel J expressed their agreement with this point: at 216 [59] n 173. See also *New South Wales v Commonwealth* (2006) 229 CLR 1, 241–2 [595]–[596] (Kirby J) ('*Work Choices*').

58 (2015) 49 VR 356, 372–3 [59]–[62] (Maxwell P, Redlich, Tate and Priest JJA) ('*Walters*').

59 Ibid 362 [17]–[18], quoting *Sentencing Act 1991* (Vic) s 3(1), as repealed by *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic) s 3.

60 *Walters* (n 58) 362 [19], quoting *Sentencing Act 1991* (Vic) s 5A(1)(b), as repealed by *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic) s 5.

61 *Walters* (n 58) 366 [32] (Maxwell P, Redlich, Tate and Priest JJA).

62 Ibid 359 [5] (Maxwell P, Redlich, Tate and Priest JJA).

what the median sentence should be.[63] Extrinsic material made clear that members of Parliament intended these provisions to increase the severity of punishment for certain crimes.[64]

The problem with this legislation, the majority reasoned, was that it gave the court an impossible task. In the absence of any indication to the contrary, 'median' was 'to be given the technical meaning attributed to it in the discipline of statistics'.[65] Thus, it is 'the middle point of a set of numbers, in which half of the numbers are above the median and half are below'.[66] When applied in the realm of sentencing, '[t]he median sentence … is the statistical end product of the series of sentences for the relevant offence over the specified period'.[67] But in setting an individual sentence it was impossible for a court to know how it would affect the median. For one, it was impossible for the court to know *how many* offences of that kind would occur, not least because the legislation did not specify the period over which the median should be calculated.[68] This meant that it was impossible for the court to do what the statute required, to act 'in a manner compatible with Parliament's intention' as to what the median sentence should be.[69] The legislation effectively gave 'no guidance of any kind as to what a sentencing judge must do' to fulfil the specified duty; it was a duty of 'no content'.[70]

Having found that the statute lacked content, the majority concluded that a court simply could not apply it.[71] That was described as an implication of the separation of powers and the resulting limits on the judicial power to interpret statute law.[72] As their Honours phrased it: 'Parliament's stated intention cannot be given effect to because the provisions contain no mechanism for its implementation and *it is beyond the function of the Court to devise one*.'[73]

The majority did note that 'in extremely limited circumstances' the courts can 'fill a gap in a statute or otherwise read in words which the legislature has

[63] *Sentencing Act 1991* (Vic) s 5A(3)(a), as repealed by *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic) s 5.

[64] Victoria, *Parliamentary Debates*, Legislative Assembly, 3 April 2014, 1276–7 (Robert Clark, Attorney-General).

[65] *Walters* (n 58) 363 [22] (Maxwell P, Redlich, Tate and Priest JJA).

[66] Ibid 364 [24] (Maxwell P, Redlich, Tate and Priest JJA).

[67] Ibid 364 [27] (Maxwell P, Redlich, Tate and Priest JJA).

[68] Ibid 366–7 [36], 367 [38], 368 [42] (Maxwell P, Redlich, Tate and Priest JJA).

[69] Ibid 367 [40], 372 [59] (Maxwell P, Redlich, Tate and Priest JJA).

[70] Ibid 368 [44] (Maxwell P, Redlich, Tate and Priest JJA).

[71] Ibid 372–3 [59]–[60] (Maxwell P, Redlich, Tate and Priest JJA).

[72] Ibid 373 [61]–[62] (Maxwell P, Redlich, Tate and Priest JJA).

[73] Ibid 373 [61] (emphasis added).

not used' — for example, to rectify a drafting error.[74] But the rectification required to make this sentencing statute work was beyond the outer limits of judicial power:

> [T]he defect in the legislation is incurable. Parliament did not provide any mechanism for the achievement of the intended future median, and the Court has no authority to create one, as the Director of Public Prosecutions … properly conceded. To do so would be to legislate, not to interpret. Acknowledging the absence of the necessary statutory language, the Director was constrained to rely on the aspirations of the Minister as stated in the second reading speech, but those statements could never have been a substitute for the missing statutory language.[75]

Justice of Appeal Whelan dissented, concluding: 'I am unable to accept that the legislation is meaningless or is incapable of practical application.'[76] His Honour noted that the legislation was expressed in difficult terms:

> It is true that the concept of the 'median' in the context of sentencing is beset with uncertainty and difficulty. By its very nature the median is dependent on other cases. The legislation sets no period for the determination of the median. The effect of any particular sentence on the future median is incapable of accurate prediction.[77]

Nonetheless, his Honour concluded that the provisions could be given effect if they were read as a looser guide to the exercise of judicial discretion: a 'guidepost or yardstick', rather than a rule that was 'to be applied in a rigid manner' or 'any mathematical way'.[78] Indeed, the fact that it would be impossible to apply the provision as a mathematical rule was said to 'indicate that Parliament [did] not intend' the legislation to operate in that way.[79]

But it is not clear how a court could comply with even this looser instruction. One might accept that the provision was intended to prescribe a guidepost rather than a rule. As a guidepost, maybe all it would require courts to do is take that guidance into account, and make sentencing decisions that they reasonably think will move the median sentence closer towards the intended median — even if they did not, and could not, achieve that goal. But this does not

[74] Ibid 359 [4], citing *DPP (Vic) v Leys* (2012) 44 VR 1, 38–9 [109]–[110] (Redlich, Tate JJA and Forrest AJA).

[75] *Walters* (n 58) 360 [8] (Maxwell P, Redlich, Tate and Priest JJA).

[76] Ibid 391 [141].

[77] Ibid 392 [146].

[78] Ibid 392 [145]–[146].

[79] Ibid 392 [146].

really solve the underlying problem of how the goal was described. If the legislation had given courts the general goal of *raising* sentences for specified crimes, courts could probably pursue it. For example, when exercising their discretion, they could lean in favour of the higher sentence, or perhaps impose a sentence higher than what had been given to comparable crimes in the past. But the legislatively stated goal was not to raise (or, for that matter, lower) sentences in general, but rather, for the *median sentence* to reach a *specified point*.[80] Justice of Appeal Whelan does not indicate how these provisions could be read as anything other than a statistical conclusion,[81] and a precise one at that. And given a court could never know how the sentence they hand out affects the median, they could never tell if they were acting compatibly with the prescribed goal, even in the looser sense envisaged above.

Walters is a difficult precedent. There appears to be no other case in which an Australian court has found a statute to be so devoid of content that it could not be given legal effect.[82] Writing extra-curially, former High Court Justice Kenneth Hayne suggested *Walters* was wrongly decided. He said that 'courts cannot decline to enforce the provisions of a statute (if those provisions are not held to be invalid) on the basis that their meaning is too difficult to discern',[83] and that *Walters* 'cites no authority and states no argument from accepted principles which justifies the result reached in that case'.[84] But that is not a fair description. While the application of it may be novel, the principle relied upon by the majority in *Walters* is the same as that articulated in *Momcilovic* and the other cases discussed above: that is, that courts have no power to contribute to the content of statute law. Hayne is right, however, that *Walters* seems to contradict the well-established position that there are no constitutional limits on the powers of Australian parliaments to enact uncertain laws. That is the issue to which the next Part turns.

B *The Constitutional Implications of Vagueness*

The High Court recognises no justiciable limit on the powers of Australian parliaments to enact indeterminate laws. Arguments along those lines have been explicitly rejected,[85] and the Court has often stated that a 'void-for-vagueness'

[80] Explanatory Memorandum, Sentencing Amendment (Baseline Sentences) Bill 2014 (Cth) 2.

[81] See *Walters* (n 58) 386 [115], 391–3 [141]–[148].

[82] See Meagher, 'Void-for-Vagueness Doctrine?' (n 14) 98–9.

[83] Kenneth Hayne, 'Rule of Law' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 167, 176.

[84] Ibid 176 n 48.

[85] See above n 10.

doctrine of the kind that operates in the US stems from constitutional rights to due process which have no counterpart in Australian law.[86]

The High Court appeared to confirm these principles in the 2017 case of *Brown*,[87] a constitutional challenge to Tasmanian anti-protest legislation. The question for the Court was whether the *Workplaces (Protection from Protesters) Act 2014* (Tas) ('*Protesters Act*') was invalid because it impermissibly burdened the implied freedom of political communication.[88] But the Court also commented on vagueness and its constitutional implications, because of the way that the restrictions on protest were drawn.

The Act gave police officers a complex set of 'move on powers' that could be used to exclude protesters from certain areas of Tasmanian forest. Police officers could arrest protesters in those areas or direct them to leave, and further direct that they not return to the area for up to three months. It was an offence to contravene such a direction, punishable by up to four years' imprisonment. The areas in question were called 'business premises' and 'business access area[s] in relation to business premises',[89] and though both phrases were defined at length in the statute,[90] the plurality still suggested that they were vague.[91] Their location and scope were likely to change from time to time. They were not necessarily fenced or otherwise identified.[92] And there may not be any obvious signs

[86] See above nn 14–16 and accompanying text. See also *Pollentine v Bleijie* (2014) 253 CLR 629, 645 [27] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[87] *Brown* (n 10) 373 [148]–[149] (Kiefel CJ, Bell and Keane JJ), 469–70 [447]–[449] (Gordon J), 487 [507] (Edelman J).

[88] Ibid 340–1 [5] (Kiefel CJ, Bell and Keane JJ, Nettle J agreeing at 398 [236]), 479 [482] (Edelman J).

[89] *Workplaces (Protection from Protesters) Act 2014* (Tas) ss 3, 5(1)(b) ('*Protesters Act*'). See also Patrick Emerton and Maria O'Sullivan, 'Private Rights, Protest and Place in *Brown v Tasmania*' (2018) 44(2) *Monash University Law Review* 458, 464.

[90] *Brown* (n 10) 349 [44]–[45] (Kiefel CJ, Bell and Keane JJ), quoting *Protesters Act* (n 89) ss 3, 5(1)(b):

> The term 'business premises' is defined relevantly to mean premises that are 'forestry land'. 'Forestry land' is defined relevantly to mean 'an area of land on which forest operations are being carried out'. 'Forest operations' are defined widely to mean work comprised of, or connected with, seeding and planting trees; managing trees prior to harvest; or harvesting, extracting or quarrying forest products, and includes any related land clearing, land preparation, burning-off or access construction. A 'business access area' is relevantly defined to mean 'so much of an area of land (including but not limited to any road, footpath or public place), that is outside the business premises, as is reasonably necessary to enable access to an entrance to, or to an exit from, the business premises'.

[91] *Brown* (n 10) 354 [67], 357 [78], 357–8 [81] (Kiefel CJ, Bell and Keane JJ).

[92] Ibid 354 [67]–[68] (Kiefel CJ, Bell and Keane JJ). This marks a point of difference between the plurality and Edelman J, who reasoned in dissent that the *Protesters Act* should be read in light of other legislation that required forestry areas to be fenced and signed. This is explained below: see below nn 121–2 and accompanying text.

that forestry operations were being carried out there, given they included areas where merely preparatory work was being undertaken, and areas which were not themselves forestry sites but reasonably necessary to access one.[93] As a result, the plurality concluded, these areas would be difficult for both protesters and police officers to correctly identify.[94] This was borne out by the fact that numerous charges laid under the Act had been discontinued when it was revealed that the protesters were not actually in an area to which the Act applied.[95]

What were the implications of this? The plurality restated the orthodox position that there is no void-for-vagueness doctrine in Australian law; the plaintiffs did not challenge the law on that basis, and their Honours stated that their reasons did not rest on any such thing.[96] The plurality also restated the orthodox explanation of *why* there is no void-for-vagueness doctrine in Australia:

> The US doctrine is addressed to First Amendment freedom of speech and is rooted in the due process requirements of the Fifth and Fourteenth Amendments, neither of which has a counterpart in the *Australian Constitution* and the implied freedom. It is well understood that our Constitution does not say that the uncertainty of laws violates a constitutional safeguard.[97]

For similar reasons, the plurality was reticent to import the US idea of a 'chilling effect' into the implied freedom jurisprudence.[98]

However, the plurality made clear that the indeterminacy of a law that burdens the implied freedom of political communication *is relevant* to assessing whether that burden is justified, and hence, whether the law stands or fails. Indeed, the fact that the geographical operation of the *Protesters Act* was so difficult to discern was pivotal to their Honours' reasoning. That meant that the Act went further than was necessary to achieve its purpose of 'prevent[ing] damage and disruption to forest operations from the conduct of protesters',[99] because it

[93] See *Brown* (n 10) 349 [45]–[46], 354 [67]–[68] (Kiefel CJ, Bell and Keane JJ).

[94] Ibid 355 [73].

[95] Ibid 356 [75].

[96] Ibid 373 [147]–[149].

[97] Ibid 373 [148].

[98] Ibid 374 [151]. See also at 409–10 [262] (Nettle J).

[99] Ibid 370 [132] (Kiefel CJ, Bell and Keane JJ). As this language suggests, the plurality was here applying structured proportionality analysis, which was endorsed as the appropriate method for assessing a burden on the implied freedom in *McCloy v New South Wales* (2015) 257 CLR 178, and involves consideration of suitability, necessity and adequacy in the balance: at 193–5 [2] (French CJ, Kiefel, Bell and Keane JJ).

> may operate to stifle political communication on the mistaken, albeit reasonable, belief of a police officer as to the effect of protest activity whether or not it involves the presence of protesters on land where they have no right to be and where that question may never be determined by a court. … [I]t is in consequence of this overreach of means over ends that the *Protesters Act* operates more widely than its purpose requires.[100]

It did not matter for their Honours 'that a court might resolve the bounds of the physical area to which the *Protesters Act* applies in a given case',[101] because 'at this point a burden has already been effected, the protest quelled and future protests deterred'.[102]

Justice Gordon and Justice Edelman dissented, and in doing so their Honours criticised the plurality for effectively letting void-for-vagueness in through the back door.[103] Both rejected the plaintiff's argument that the legislation was vague and that this somehow exacerbated its burden on the freedom.[104] That argument assumed that the legislation should be assessed on the assumption that the legislation would be misinterpreted and misapplied, which their Honours said was not the right inquiry.[105] Rather, the manner and extent to which a law burdens political communication depended upon its operation 'when applied according to [its] proper construction',[106] or as Edelman J put it, the 'meaning given to it by the judiciary.'[107] The fact that provisions were drafted in a way 'that may initially leave a person unsure of their effect' was deemed irrelevant.[108] If it so happened that a police officer misinterpreted the Act and acted without power, that was a matter for administrative law.[109]

It could not be otherwise, their Honours argued, given the absence of a void-for-vagueness doctrine in Australian law. Both judges quoted extensively from prior case law, which acknowledged that the meaning of legislation was often

[100] *Brown* (n 10) 365 [109] (Kiefel CJ, Bell and Keane JJ).

[101] Ibid 374 [150].

[102] Ibid. Justice Nettle substantially agreed with the plurality: at 412–13 [269], 423–4 [292], 425 [295].

[103] See ibid 468 [439], 471 [453] (Gordon J). See also at 482 [492], 488 [508] (Edelman J).

[104] Ibid 428 [306], 469–70 [446]–[448] (Gordon J), 481–2 [489]–[490] (Edelman J).

[105] Ibid 428–9 [307] (Gordon J), 488 [508]–[509] (Edelman J).

[106] Ibid 429 [307] (Gordon J).

[107] Ibid 488 [509].

[108] Ibid 428 [306] (Gordon J).

[109] Ibid 442–3 [356], 457–9 [405]–[409] (Gordon J). See also at 488 [509] (Edelman J).

unclear.[110] Justice Gordon spoke of 'wrestl[ing]' with 'difficult language',[111] while Edelman J said that 'legislation can be in urgent need of construction' — for example, when it 'prescribes only broad standards, leaving the judiciary to fill the open texture created by Parliament'.[112] Both presented the courts as having no choice but to persevere. As Gordon J put it, '[c]ourts cannot abandon the [interpretive] task'.[113] And '[o]nce it is accepted, as it must be, that Australia knows no doctrine of statutory uncertainty, there is no legal basis for importing a doctrine of vagueness by speaking of a law having "that quality"'.[114]

Justice Gordon and Justice Edelman write in defence of the orthodox approach to vagueness. But in doing so, they highlight tensions between that position and the standard claim that courts cannot contribute to statutory meaning. Justice Gordon states that courts are quite capable of resolving all questions of statutory meaning, using established principles of statutory interpretation.[115] Yet, her Honour says that there is a point at which they will run out. More specifically:

> There may be a point at which a law appears to be expressed with such indefinite width, or to delegate power to such an extent, that it invites judicial consideration of questions of the kind discussed by the plurality in *Plaintiff S157/2002 v The Commonwealth*, including whether the law truly provides for 'a rule of conduct or a declaration as to power, right or duty'. But such questions do not arise in the present case, and they are not the concern of the implied freedom.[116]

[110] Ibid 470–71 [449]–[452] (Gordon J), 486–7 [506], 488 [508] (Edelman J) (citations omitted).

[111] Ibid 470 [449], quoting *R v Holmes; Ex parte Altona Petrochemical Co Ltd* (1972) 126 CLR 529, 562 (Windeyer J).

[112] *Brown* (n 10) 487 [506].

[113] Ibid 471 [452]. See also at 479–80 [485]–[486] (Edelman J), quoting Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law* (John S Voorhies, 1857) 293–4; *Coleman v Power* (2004) 220 CLR 1, 84–5 [220] (Kirby J), quoting *R v Hughes* (2002) 202 CLR 535, 565–6 [66] (Kirby J).

[114] *Brown* (n 10) 471 [451]–[453]. There are intriguing parallels between this passage and the statements made by the US Supreme Court in *Loper Bright v Raimondo*, 603 US 369 (2024) — the momentous case in which the Court overturned the doctrine of *Chevron* deference. The majority emphasised that statutory interpretation was an exercise of judicial power, that courts were expected to and routinely did grapple with indeterminacy, that their job was to resolve that indeterminacy using all of their interpretive resources, and they should not presumptively defer to the executive's interpretation of a statute whenever that proved difficult to do so: at 400–3, 413 (Roberts CJ, Thomas, Alito, Gorsuch, Kavanaugh and Barrett JJ). This is not to say that Gordon J would necessarily agree with that judgment.

[115] *Brown* (n 10) 471 [452], quoting *Kennedy v Lowe; Ex parte Lowe* [1985] 1 Qd R 48, 49 (Thomas J).

[116] *Brown* (n 10) [468] (citations omitted).

Justice Edelman describes gap-filling as a routine part of what courts do, concluding that '[t]he need to understand statutory text *together with its judicial exegesis* is the reason why Australia has no doctrine that legislation can be unconstitutional based on uncertainty'.[117] That is consistent with the theoretical literature on vagueness discussed below, much of which agrees that courts routinely embroider indeterminate legislation and thereby contribute to their legal content[118] — but not the constitutional case law discussed above, which insists Australian courts have no power to contribute to statutory meaning.[119] And though his Honour rejects a US-style void-for-vagueness doctrine, he also states that a 'hopelessly vague' law that fails to 'frame a rule' might fail on separation of powers grounds — for in purporting to apply the law the court would really have to fashion law entirely of their own making, and thus exercise 'truly legislative power'.[120]

But Edelman J concluded that these issues did not arise in this case, because the *Protesters Act* could be read in a way that rendered its application quite clear. Specifically, the *Protesters Act* could be read in light of the *Forest Management Act 2013* (Tas) ('*Forest Management Act*'), such that the 'business premises' and 'business access areas' to which it applied were those in respect to which the Forest Manager had exercised their powers under the *Forest Management Act* — which, crucially, meant they would be 'marked by signs, barriers, or other notices prohibiting entry'.[121] That reading was said to be preferred for several reasons, including that it made the *Protesters Act* clear, and that there was textual and extrinsic evidence to suggest that the two Acts were intended to interact.[122]

C *The Problems with the Orthodoxy*

The preceding Part explained two important rules of Australian constitutional law: first, that 'Australia [has] no doctrine that renders legislation constitutionally invalid … for uncertainty',[123] and second, that Australian courts have no power to choose the content of statute law. In this Part, I argue that these positions are at least unclear, and at worst, inconsistent.

[117] Ibid 486–7 [506]–[507] (citations omitted) (emphasis added).

[118] See below nn 182–7 and accompanying text.

[119] See above nn 5, 58 and accompanying text.

[120] Ibid 481 [489], quoting Sedgwick (n 113) 294.

[121] *Brown* (n 10) 482–2 [490].

[122] Ibid 494–500 [535]–[549].

[123] Ibid 488 [508] (Edelman J).

Take first the proposition that laws cannot fail because they are uncertain. *Brown* indicates that even if uncertainty is not a reason to invalidate a law, it may cause a law to fail for other reasons. If a law burdens a constitutional freedom in terms of the meaning or operation of which is difficult to discern, it is likely to fail proportionality testing. Justice Nettle (who formed part of the majority) made that quite plain:

> [W]here the means adopted is a power which turns upon the exercise of a discretion which is, in its terms, broad-ranging, it is the more likely that it will disproportionately burden the implied freedom even though it might be said, or hoped, that the 'actual application may be limited by the sensible exercise' of the discretion by the person or official to whom the discretion is granted.[124]

I have described this as a statement about the operation of constitutional freedoms (and not just the implied freedom of political communication) because it would seem to apply whenever the Court applies means/ends analysis, which would tend to favour precise laws.[125] But this was, of course, a point of contention on the bench. As Edelman J put it, '[n]ot only does Australia have no doctrine that renders legislation constitutionally invalid directly for uncertainty, but it also does not have a doctrine that renders legislation constitutionally invalid indirectly for uncertainty' — and thus the Court should resist any argument that uncertain laws unjustifiably burden the implied freedom of political communication for that reason.[126]

Take second, the claim that courts cannot contribute to statutory meaning. It is not clear how this fits with the claim that courts can make constructional choices, because the courts have not clearly articulated what that choice entails. This is related to the uncertainty highlighted by Dale Smith, about the precise role of the established principles of statutory interpretation.[127] Do these play a role in constituting meaning, or merely help the court to unearth it? The weight of case law seems to suggest the latter,[128] though this has not been clearly articulated. And only the latter would be consistent with the overarching claim that courts cannot contribute to statutory meaning.

[124] Ibid 424 [293]. See also at 425 [294] (Nettle J).

[125] This is but a general statement. *Palmer v Western Australia* (2021) 272 CLR 505, for example, indicates that the Court will tolerate legislation that confers broad powers the exercise of which might burden a constitutional freedom in some circumstances: at 101–2 [282]–[288] (Edelman J).

[126] *Brown* (n 10) 488 [508] (emphasis omitted).

[127] Dale Smith, 'Is the High Court Mistaken about the Aim of Statutory Interpretation?' (2016) 44(2) *Federal Law Review* 227–8.

[128] Ibid 228, 230–2.

A more immediate problem is that the two constitutional positions articulated above contradict each other, if one accepts the standard account of vagueness. In the case law discussed above, and my exegesis of it, indeterminacy is described in loose and general terms. The High Court sometimes talks about statutes that are unclear or uncertain;[129] sometimes statutes that are ambiguous;[130] sometimes statutes that are indeterminate, or vague.[131] In the background is the spectre of a statute that simply fails to 'make law', creating no rule, power or duty at all. But there is a distinction to be drawn between statutes that are open to more than one meaning, and statutes that fail to provide an answer to all the questions that might arise in attempting to apply them.

Texts that are open to more than one meaning may be described as ambiguous. There are many well-known examples of this phenomenon. For instance, the word 'right' can mean 'belonging or relating to the side of a person or thing which is turned towards the east when the face is towards the north';[132] it can also mean 'morally correct',[133] while *a* right can mean a 'just claim or title, whether legal, prescriptive, or moral'.[134] Possibilities of meaning may multiply when words are combined in phrases: take James Spigelman's hypothetical, 'the chicken is ready to eat'.[135] But ambiguity of this kind is relatively rare in legislative texts,[136] because legislative drafting is a far more controlled form of communication than many others, with every word and phrase carefully chosen in accordance with elaborate protocols that ensure consistency of usage across statutes.[137] Ambiguity is also relatively easy for courts to resolve, particularly if the established principles of statutory interpretation permit them recourse to context[138] — a point I return to below.[139] To give a trite example, the word 'bank' can refer to the edge of a river or a financial institution,[140] but it would be

129 See, eg, *Brown* (n 10) 471 [452] (Gordon J), 486 [505] (Edelman J).

130 See, eg, ibid 366 [112] (Kiefel CJ, Bell and Keane JJ), 486 [505] (Edelman J).

131 See, eg, ibid 373 [149], 469 [443] (Gordon J); *Work Choices* (n 57) 197 [460] (Kirby J).

132 *Macquarie Dictionary* (online at 27 April 2025) 'right' (def 12).

133 Ibid (def 58).

134 Ibid (def 18).

135 JJ Spigelman, 'The Intolerable Wrestle: Developments in Statutory Interpretation' (2010) 84(12) *Australian Law Journal* 822, 824.

136 See Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) 214.

137 Lisa Burton Crawford, 'Rules as Code and the Rule of Law' [2023] (July) *Public Law* 402, 411 ('Rules as Code'). See also Barnes (n 21) 1091.

138 Ralf Poscher, 'Ambiguity and Vagueness in Legal Interpretation' in Lawrence M Solan and Peter M Tiersma (eds), *The Oxford Handbook of Language and Law* (Oxford University Press, 2012) 128, 129 (citations omitted).

139 See below nn 152–62 and accompanying text.

140 *Macquarie Dictionary* (online at 27 April 2025) 'bank' (n^1, def 3), (n^2, def 1).

difficult for a court to conclude that it means the latter when appearing in a statute about riparian rights. Vagueness, on the other hand, is indeterminacy in the true sense. A text is vague when its meaning is not only difficult to ascertain but also incomplete. This is often but not necessarily the case because the term refers to a spectrum of matters or conduct[141] — and so while there are some instances in which we can confidently say that something does or does not fall within its meaning, there are inevitably borderline cases where we cannot. To paraphrase Ralf Poscher, we can know all there is to know about 'solids' and still be unsure whether pudding counts as one.[142]

While references to pudding in legislation might be rare, the law frequently employs words and phrases that theorists have described as vague — for example, standards like 'reasonable'.[143] The semantic meaning of reasonable is fairly clear (sensible, appropriate, etc[144]). But a standard like reasonableness 'allow[s] different, incompatible views as to the nature of the standard and the principles of its application (even among sincere and competent interpreters)'.[145] If this is right, then the person confronted with the task of applying the standard of reasonableness — for example, the judge who has to determine whether a minister's decision to cancel a licence in a given case was 'reasonable' — simply will not find the answer in the statute. Many theorists contend that vagueness is inevitable.[146] It can be a useful tool for the legislature to have at its disposal, and it could not eradicate it even if it tried: for one, legislatures are made of fallible human beings who simply cannot predict all of the circumstances in which their statutes will fall to be applied. HLA Hart famously argued that in circumstances like this, courts must exercise a discretion to fill in the gaps left by the law if they are to apply it to resolve the dispute before them.[147]

This poses a real problem for Australian constitutional law. The High Court seems to say that it has *no* power to fill gaps in legislation, even though they are ubiquitous and unavoidable. But the judicial duty to interpret and apply statutes is said to remain 'constant, regardless of whether the words of a statutory

141 See Poscher (n 138) 128, 129.

142 Ibid.

143 See, eg, Timothy Endicott, 'Law Is Necessarily Vague' (2001) 7(4) *Legal Theory* 379, 382.

144 See, eg, *Oxford English Dictionary* (online at 26 April 2025) 'reasonable' (adj, defs 1, 7a).

145 Timothy Endicott, 'The Value of Vagueness' in Vijay K Bhatia et al (eds), *Vagueness in Normative Texts* (Peter Lang, 2005) 27, 32.

146 The canonical statement is Timothy AO Endicott, *Vagueness in Law* (Oxford University Press, 2000) 190. For other theorists: see below nn 184–5 and accompanying text.

147 HLA Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 135–6.

provision are uncertain',[148] and it is said courts 'cannot abandon th[is] task'.[149] If we accept that vague statutes are inevitable, then we can only make sense of that description of the 'judicial duty' if we also accept that courts can occasionally step in and fill the gaps they find in the legislative texts before them. Otherwise, they would seem to have no choice but to throw up their hands whenever they encounter a vague statute, for they would be constitutionally incapable of supplying the content that the statute requires to work. There is at least one case in which an Australian court has done that: *Walters*. But I know of no other case like it, and at least one esteemed jurist has suggested that it was wrongly decided.[150]

Must we accept that vague statutes are inevitable? Perhaps the theorists have it wrong. In other words, legislation in Australia might be so meticulously drafted that no gaps in their meaning ever arise, or the principles of statutory interpretation applied by Australian courts are so comprehensive that they will always lead a diligent court to one right answer. If either is the case, then the constitutional principles articulated above can sit harmoniously together: there is no need for a void-for-vagueness doctrine in Australian law, even though courts have no power to contribute to statutory meaning. But I do not think that either is the case.

The possibility that our laws are perfectly drafted can be fairly easily dismissed. Legislation in Australia tends to be very detailed and prescriptive — more so than legislation in other jurisdictions,[151] and more so than legal scholars typically presume.[152] But this does not mean that statutes are always determinate. There is extensive literature showing why that would be impossible.[153] And numerous examples could be found of staggeringly detailed legislation, the meaning and application of which is nonetheless unclear. *Brown* provides an example. The *Protesters Act* was a long and technical statute containing a great amount of detail, and no doubt very carefully drafted. But did 'business premises' and 'business access areas' mean those areas designated by the Forest Manager in the exercise of powers under the *Forest Management Act* or something broader? Either reading was plausible, given the established canons of construction.[154]

148 *Brown* (n 10) 471 [452] (Gordon J) (citations omitted).

149 Ibid.

150 See above nn 82–4 and accompanying text.

151 Crawford, 'Rules as Code' (n 137) 410–11, 418.

152 See ibid 414.

153 See, eg, above n 146.

154 See above nn 90–5, 121–2 and accompanying text.

What of the second possibility, that Australian courts have developed an interpretive toolkit that is capable of guiding them to the one, best interpretation of a statute? This would amount to a kind of autochthonous version of Ronald Dworkin's 'one right answer' thesis[155] — and there is at least some support for it in the judgment of Gordon J in *Brown*.[156] Other case law is ambivalent. Some judges have made tolerably clear that statutory interpretation requires them to make an evaluative choice.[157] While that choice is to be *guided* by accepted interpretive principles — including the principle that a purposive approach is to be preferred to all others, where possible — true discretion remains. Others have suggested there is only one legitimate choice to be made. For example, in *Commissioner of Taxation v Sharpcan Pty Ltd*, Greenwood ACJ said:

> Although the statutory text may, read in context, present a constructional choice, the resolution of that choice having regard to an evaluation of the relative coherence of the alternatives with the identified statutory objects or policies can, in the end, result in *only one unique answer*, in the exercise of judicial power: *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 (2018) 92 ALJR 713 (*SZVFW*), Gageler J at [54]. As to construction and the derivation of meaning attributable to text, there is *always* 'one and only one true meaning' to be given to fully expressed words: *SZVFW*, Edelman J at [127] …[158]

But the passages of *Minister for Immigration and Border Protection v SZFVW* relied upon do not clearly support the proposition that each statute is only open to one correct interpretation. [159] Rather, on my interpretation those passages instead make clear that Australian courts do not defer to the executive's view of what a statute means — and so, the courts' interpretation is *the only one that is legally binding*.[160] Secondly, the modern approach to statutory interpretation only seems capable of narrowing the range of interpretive choices that a court can legitimately make, and not directing them to one right answer.

Take the well accepted principle that statutory texts can be read in context 'in [their] widest sense'.[161] A judiciary that adopted a strictly textualist approach would lack this resource. And given the specificity of many Australian statutes,

155 See generally Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986).

156 See *Brown* (n 10) 471 [452].

157 See especially the judgments of French CJ and Gageler J, quoted above in Part II(A) nn 22–5 and accompanying text.

158 (2018) 262 FCR 151, 201 [216]. Justice McKerracher agreed: at 208 [256].

159 (2018) 264 CLR 541.

160 See ibid 565 [50] (Gageler J), 582 [127] (Edelman J).

161 See, eg, *SZTAL* (n 25) 368 [14] (Kiefel CJ, Nettle and Gordon JJ), quoting *CIC Insurance* (n 18) 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

context provides a rich source of guidance. The word 'reasonable' continues to provide an example. This is a term found throughout the Australian statute book, and it poses little trouble for the courts.[162] So let us imagine (which is easy to do) a statute that gives a decision-maker power to adjourn certain proceedings, but only when 'reasonable' to do so. What amounts to a reasonable decision to grant, or refuse, an adjournment? The possibilities might seem infinite if we considered this statutory phrase in abstract, but reference to the surrounding statutory context will significantly narrow the field. There will likely be a legislated statement of the purpose of the statute in which the power appears. There will likely be several paragraphs explaining the nature of the decision-maker and their role, and perhaps stipulating principles to guide them in that role or more specific considerations that they must or must not take into account in exercising certain powers. The statute may also stipulate the precise conditions which must exist before the power to adjourn arises. There will likely be prior case law interpreting the scope of this power, or one that was similarly worded. And reference to legal context (whether common law or statutory) will also reveal the consequences of adjourning, or failing to adjourn. All of this casts considerable light on what a 'reasonable' decision in this context would be.[163]

To some extent, a commitment to the modern approach to statutory interpretation — and denial of the possibility of statutory indeterminacy — may prove self-fulfilling. A court that adopts this stance may be less likely to find indeterminacy than a court that openly acknowledges the creative and discretionary components of its role, or indeed, that has void-for-vagueness up its sleeve as an alternative solution. As Edelman J demonstrated in *Brown*, even the problematic *Protesters Act* could be rendered determinate by reading it in light of another cognate statute.[164] Reading one statutory text in light of

[162] See, eg, *Thomas* (n 29) 332–3 [24]–[27] (Gleeson CJ), 352 [100] (Gummow and Crennan JJ). There, it was held that a power that hinged on a reasonableness standard did not violate the separation of powers principles derived from ch III of the *Australian Constitution*: at 333 [27] (Gleeson CJ), 366 [155] (Gummow and Crennan JJ), 511 [609] (Callinan J), 526 [651] (Heydon J).

[163] This example is based on the decision in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, in which the High Court held that it was legally unreasonable for the Merits Review Tribunal to refuse the applicant an adjournment. The Court drew upon evidence in the statute, including the statutory direction that they perform their functions in a manner that was 'fair'. However, here the legal requirement of 'reasonableness' was a judicial implication: at 350–1 [29]–[30] (French CJ), 362–3 [64], [66] (Hayne, Kiefel and Bell JJ), 370 [90] (Gageler J).

[164] *Brown* (n 10) 481–2 [490] (Edelman J).

another, in circumstances where there is some connection between the two, is a reasonably well-established principle of statutory interpretation.[165]

But I doubt that we can say the principles of statutory interpretation are so omnipotent that no prospect of indeterminacy remains. The example of how an Australian court could interpret the word 'reasonable' was given to demonstrate the way that reference to context can narrow the range of meanings that could be attributed to a theoretically vague term. But it could only narrow the range, and would seem to inevitably leave room for some reasonable interpretive disagreement. Moreover, while the broad parameters of the 'modern approach' are now 'interpretive orthodoxy',[166] there is still disagreement about discrete principles.[167] Those principles can conflict with one another, and their diligent application does not necessarily produce one clear solution.

Consider, for example, the case of *R v A2*.[168] This concerned the meaning of the word 'mutilates' in s 45 of the *Crimes Act 1900* (NSW) — did this mean 'injure to any extent', or only to inflict serious and lasting harm?[169] That was crucial, because the defendants had been charged for engaging in the ceremonial practice of female 'khatna' which involves the nicking or cutting of a young girl's clitoris,[170] a 'ritualised practice[]' which could be said to cause only minor and transient physical harm.[171] In deciding this question, all judges agreed that they had to start with the text of that provision and consider its context, including the purpose it was enacted to serve.[172] But the judges disagreed about the contextual evidence and what the purpose of the law *was*.[173] Did the legislation refer holistically to the constellation of practices known as 'female genital mutilation', which caused varying degrees of physical harm, and which the Crown argued had acquired a settled meaning in public discourse?[174] Was it enacted to

[165] See, eg, *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 520 [42] (French CJ, Hayne, Crennan, Bell and Gageler JJ); *Harvey v Minister for Primary Industry and Resources* (2024) 278 CLR 116, 140–2 [56]–[63] (Gageler CJ, Gordon, Steward and Gleeson JJ).

[166] Crawford and Meagher (n 21) 210.

[167] Ibid 218.

[168] (2019) 269 CLR 507.

[169] Ibid 513–14 [7]–[12] (Kiefel CJ and Keane J).

[170] Ibid 512 [4] (Kiefel CJ and Keane J).

[171] See ibid 513 [6], 540 [107], 541 [109] (Kiefel CJ and Keane J), 545 [123] (Bell and Gageler J), 557 [156] (Nettle and Gordon JJ).

[172] Ibid 520 [32]–[34] (Kiefel CJ and Keane J), 545 [124] (Bell and Gageler JJ), 556–7 [152]–[155] (Nettle and Gordon JJ), 559–60 [163] (Edelman J).

[173] Ibid 530 [67] (Kiefel CJ and Keane J), 554 [145] (Bell and Gageler JJ), 556 [154] (Nettle and Gordon JJ), 564 [173] (Edelman J).

[174] Ibid 510. See also at 547 [129] (Bell and Gageler JJ).

implement a recommendation of the Family Law Council to outlaw female genital mutilation 'in all its forms'?[175] Ultimately, the Court split by a majority of 5:2 on the interpretive question.[176]

The nature and breadth of the established principles of statutory interpretation can also *multiply* interpretive choices. The decision in *Plaintiff S157* provides an example, again using the well-established interpretive principle of context. There, the High Court held that a privative clause that purported to oust the courts' jurisdiction to review 'decisions' only referred to decisions that were not vitiated by jurisdictional error.[177] That interpretation was made available and compelling by two features of Australian public law. First, there is a distinction between jurisdictional and non-jurisdictional errors of law,[178] and decisions vitiated by the former are said to be 'in law, no decision[s] at all'.[179] Secondly, judicial review for jurisdictional error is constitutionally guaranteed.[180] In other words, considerations of (legal) context created the choice to read 'decision' down.

These are both 'hard cases' that reached Australia's highest courts. But they demonstrate that the triumvirate of text, context and purpose still leaves room for interpretive disagreement. The fact that judges disagree about the meaning of a statute does not prove that there is no one right answer; the judges could have got it wrong. But it does tend to indicate that there is not one right answer, and moreover, that judges are incapable of finding it — in which case it should not seriously inform the development of doctrine or method.[181] Therefore, the problem identified above remains. Orthodox principles of Australian constitutional law seem unable to account for the inevitability of indeterminate legislation. The next Part considers how this problem might be solved.

[175] Ibid 519–20 [24] (Kiefel CJ and Keane J), 546 [125] (Bell and Gageler JJ).

[176] Ibid 530 [67] (Kiefel CJ and Keane J), 553–4 [145] (Bell and Gageler JJ), 555 [151] (Nettle and Gordon JJ), 564 [174] (Edelman J).

[177] *Plaintiff S157* (n 27) 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[178] As established in *Craig v South Australia* (1995) 184 CLR 163, 178–9 (Brennan, Deane, Toohey, Gaudron and McHugh JJ) ('*Craig*').

[179] *Plaintiff S157* (n 27) 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), quoting *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 614–15 [51] (Gaudron and Gummow JJ), 618 [63] (McHugh J), 646–7 [152] (Hayne J).

[180] *Plaintiff S157* (n 27) 512 [98], 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[181] This is an abbreviated version of arguments that are well-worn in the discussion of Dworkin's work: see, eg, Brian Leiter, 'Explaining Theoretical Disagreement' (2009) 76(3) *University of Chicago Law Review* 1215, 1216–37.

III Rethinking the Orthodoxy

A *Rethinking the Constitutional Parameters of Statutory Interpretation*

One way to reconcile the points of law discussed above is to reconsider the constitutional parameters of statutory interpretation. The High Court has said that Australian courts cannot contribute to the content of legislation. This could simply be wrong — or it could be overbroad, for there are distinctions to be drawn between the different choices that courts could be empowered to make.

Momcilovic considered whether a court could *change* a statute, ignoring the meaning communicated by its text as read in accordance with the established principles of statutory interpretation, and instead giving it a different meaning that the court decided would be compatible with human rights.[182] But this is not the same scenario that arises when a statute is vague. In the *Momcilovic* scenario, the court overrules the choice made by Parliament. In the vagueness scenario, the court supplements the choices made by Parliament. In both instances, the court then takes the further step of constructing some meaning of its own making. But there may be good reasons to conclude that courts can perform that construction work when confronted by a vague statute, though not necessarily elsewhere.

First, it does not offend the constitutional supremacy of Parliament. When a court concludes that a statute means *x* but that for some reason, its legal meaning should be *y*, it overrules what Parliament has chosen, and abdicates its constitutional duty to give effect to the legislation that Parliament has (assumedly validly) made. But a court does not necessarily overrule Parliament or disregard this duty if it supplements the meaning of an indeterminate statute. Rather, it fills in the gaps that Parliament has left behind. I say this does not offend the constitutional supremacy of Parliament, though perhaps I should add, *so much*. One could still object to courts giving statutes content that Parliament did not create, as this usurps Parliament's power to decide what the law shall be. But that concern can be ameliorated if the courts fill the gaps they find in a way that coheres with the detail that Parliament has included, to the extent that it is possible to do so.

This seems to explain why theorists like Jeffrey Goldsworthy, whose constitutional thinking is animated by a concern to respect the supremacy of Parliament,[183] accept that courts sometimes contribute to statutory meaning.[184] Like

[182] *Momcilovic* (n 1) 92–3 [168], [171] (Gummow J).

[183] See, eg, Jeffrey Goldsworthy, 'The Meaning and Interpretation of Statutes in Anglo-American Legal Systems' in Tomasz Gizbert-Studnicki, Francesca Poggi and Izabela Skoczen (eds), *Interpretivism and the Limits of Law* (Edward Elgar Publishing, 2022) 43, 47.

[184] Ibid 54–5.

Hart,[185] Goldsworthy assumes that statutes will sometimes be vague, and that courts supplement the content that Parliament has provided 'when it is insufficiently determinate to resolve the legal dispute' before them.[186] Though 'they must sometimes embroider an under-determinate statute, they attribute their handiwork to "legislative intentions"' because 'they are reluctant to acknowledge the creative components of' their interpretive practices.[187] Thus, 'statutory interpretation' actually comprises interpretation and *construction*, or as Goldsworthy prefers to call it, 'clarifying' and 'creative' interpretation — both of which are accepted as part and parcel of *interpretation* in Anglo-American legal systems, even though the latter does not consist of deriving from a text in any way.[188] Goldsworthy and Ekins have defended the judicial power to correct drafting errors — referred to in *Walters* — in a broadly similar way, though they insist that this must be done in a way that gives effect to the legislature's evident intentions in order to amount to a legitimate exercise of judicial power.[189]

But there is another constitutional principle at play here, besides respect for parliamentary supremacy: that is, the basic assumption that courts should provide an effective forum for resolving disputes about the law. As John Quick and Robert Randolph Garran wrote, '[t]he judicial power' vested by s 71 of the *Australian Constitution* 'is that of hearing and determining questions which arise as to the interpretation of the law, and its application to particular cases'.[190] While much water has passed under the bridge since, this is the classic definition of judicial power offered in *Huddart, Parker & Co Pty Ltd v Moorehead* ('*Huddart Parker*'):

> [T]he words 'judicial power' as used in sec 71 of the *Constitution* mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property [which] … begin[s when] … some tribunal which has power to give a binding and authoritative decision … is called upon to take action.[191]

Thus, the leading scholarly text summarises, '[a]t the core [of judicial power] is the adjudication and conclusive settlement of a dispute between parties as to

185 Hart (n 147) 135.

186 Goldsworthy (n 183) 44–5.

187 Ibid 45.

188 Ibid.

189 Ekins (n 136) 214–15; Goldsworthy (n 183) 51–4.

190 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, rev ed, 2015) 864–5 (citations omitted).

191 *Huddart Parker* (n 1) 357 (Griffith CJ).

their rights and duties under the law'.[192] There is a school of legal theorists that define the constitutional function of courts in similar ways. Joseph Raz, for example, defined courts as those institutions in which 'the authority to make binding applicative determinations' is concentrated.[193] This power to 'settle disputes between individuals by applying existing norms or laws' is, Denise Meyerson agreed, 'an essential characteristic of a court'.[194] Of course, courts do other things too. There is also much more to be said about how courts should perform this dispute resolution function. But no one could deny that this is the basic constitutional function we expect courts to perform. The power of courts to make a binding resolution about what a statute means is particularly important in legal systems where statutes are complex and their meaning difficult to ascertain — to provide, as Mireille Hildebrandt put it, 'closure'.[195]

This reminds us that 'statutory interpretation is not an end in itself'; rather it is 'an element in the identification of the content of the substantive and procedural law that is applied by courts to determine the rights of parties who are in dispute.'[196] Indeed, Australian courts have little if any power to make a determination about what a statute means divorced from some dispute about its application.[197] And the courts' dispute resolution function would be hindered if they had to throw up their hands as soon as they encountered an indeterminate statute, leaving the parties without a resolution. Viewed in this light, contributing to the content of legislation — in limited circumstances — could be described as an element of judicial power, or necessarily incidental to its effective exercise.

The power being suggested here is a limited one, to supplement indeterminate legislation, not a general power to contribute to the content of legislation for other reasons. The extent of any judicial power to do so would depend upon

[192] James Stellios, *Zines and Stellios's the High Court and the Constitution* (The Federation Press, 7th ed, 2022) 234.

[193] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2nd ed, 2009) 110.

[194] Denise Meyerson, 'What is a Court of Law?' (2019) 42(1) *University of New South Wales Law Journal* 60, 65, citing Joseph Raz, *Practical Reason and Norms* (Hutchinson, 1975) 132–7.

[195] Mireille Hildebrandt, 'The Adaptive Nature of Text-Driven Law' (2020) 1(1) *Journal of Cross-Disciplinary Research in Computational Law* 1, 10. I have elsewhere argued that Hildebrandt overestimates the extent to which courts are involved in deciding these questions — for most of the time, statutes are applied without any judicial intervention: Crawford, 'Rules as Code' (n 137) 419–20. But I agree with this more fundamental claim.

[196] Stephen Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37(2) *Monash University Law Review* 1, 10.

[197] *Re Judiciary Act 1903-1920; Re Navigation Act 1912-1920* (1921) 29 CLR 257, 265–7 (Knox CJ, Gavan, Duffy, Powers, Rich and Starke JJ); *Saffron v The Queen* (1953) 88 CLR 523, 527–8 (Dixon J, Kitto and Taylor JJ agreeing at 528).

the reasons for which it is claimed. It is only because supplementing indeterminate legislation is a reasonable incident of the courts' dispute resolution function that it could be accommodated into our constitutional conception of 'judicial power'.

One possible response to this line of argument appeals to the separation of powers. Specifically, it might be argued that the integrity of the courts would be diminished if they began creating statutory meaning, even in the limited circumstances envisaged. That would be a straightforward breach of the separation of powers principles that apply at the state level,[198] and a compelling reason to conclude that creating statutory meaning cannot be classified as judicial power for the purposes of the federal *Boilermaker's* doctrine (indeed, this is fairly close to what Gummow J concluded in *Momcilovic*[199]).[200] There is a kernel of truth here, but it needs to be substantially refined. For it is not convincing to say that judicial lawmaking diminishes the integrity of the courts, because our courts already make law. They make substantive law (the norms and principles of the common law),[201] and they make law of a more procedural kind (for example, the norms and principles of statutory interpretation).[202] Therefore, judicial lawmaking cannot be problematic in and of itself.

Rather, the potential problem is judicial usurpation of the legislative power constitutionally vested in Parliament — and, I might add, judicial disregard for the superior democratic credentials of the legislative branch. And these problems would not arise, or at least not to a troubling degree, if courts supplemented legislative content in a way that was consistent with those higher norms. While the judicial power envisaged here to supplement indeterminate statutes is different and potentially more far-reaching than the judicial power to make common law, it is also tightly confined; it would operate only within the interstices of the statute that Parliament has chosen to make, and it may need to be exercised in a way that coheres with what Parliament *has* provided. A power, the raison d'être of which is to supply only that additional legislative content which is needed to resolve a dispute, would not allow a court to fashion

198 See above n 44 and accompanying text.

199 See *Momcilovic* (n 1) 92 [169].

200 See generally *Huddart Parker* (n 1) 357 (Griffith CJ); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270–2 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

201 See, eg, *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 15 (Mason CJ and McHugh J).

202 See, eg, *Project Blue Sky* (n 17) 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

a legislative scheme entirely of its own creation.[203] And so, while it amounts to *lawmaking*, it is not identical to *legislating* in the way that legislatures do.[204]

The upshot of this would be that *Momcilovic* is both right and wrong. It was right for the Court to say that it would be beyond judicial power to rewrite legislation *in order to protect the rights recognised by* the *Charter*, but wrong for them to state that as a matter of constitutional principle, *courts cannot contribute to the content of legislation*. The constitutional principle, correctly stated, would be that courts have some power to contribute to the content of legislation, where it is necessary to do so in order to resolve the legal dispute before them.

What about the other case that I used to illustrate the seemingly inconsistent constitutional positions articulated in Part II — *Walters*? Recognition of a limited judicial power to supplement indeterminate laws would not necessarily mean that *Walters* was wrongly decided. The supplementation required to make the Victorian sentencing legislation workable was significant — and crucially, might have required the court to effectively rewrite the legislation rather than merely add to it.[205] For, while some of the difficulty presented by that legislation would have been solved by further specifying how a court could perform the stipulated duty, that additional detail may not have solved the underlying problem: that it was simply impossible for a court to assess how its actions in sentencing one crime would affect the median.[206] As this suggests, a High Court willing to restate the constitutional parameters of judicial power would soon confront at least one further difficult question about the dividing line between supplementation and change. This prompts us to consider whether there are any better ways of making this area of law coherent.

[203] One can see that the limitations I have in mind here are not dissimilar to the ones the UK House of Lords found constrained the interpretive power conferred by s 3 of the *Human Rights Act 1998* (UK) (though I do not suggest that courts could be empowered to change legislation in order to protect human rights): *Ghaidan* (n 33) 572 [33] (Lord Nicholls), 584 [63] (Lord Millett), 601 [121] (Lord Rodger).

[204] John Gardner made a similar argument from a theoretical rather than constitutional perspective, criticising the assumption (made by Dworkin and others) that judges would intolerably act as 'part-time legislators' if they had to draw on extra-legal sources to apply indeterminate laws: John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press, 2012) 38–9. As he put it at 39:

> [J]udges admittedly have a professional obligation to reach their decisions by legal reasoning. And even in a case which cannot be decided by applying only existing legal norms, it is possible to use legal reasoning to arrive at a new norm that enables (or constitutes) a decision in the case, and this norm is validated as a new legal norm in the process.

[205] Ibid 360 [8], 373 [61] (Maxwell P, Redlich, Tate and Priest JJA).

[206] Ibid 368 [43].

B *Reconsidering an Australian Void-for-Vagueness Doctrine*

Rather than reconsider the constitutional parameters of statutory interpretation, we might instead rethink the possibility of a constitutional void-for-vagueness doctrine of some kind. Indeed, the cases discussed in Part II already provide us with some reason to doubt the orthodoxy that vagueness will never cause a law to fail. The judgments comprising the majority in *Brown* indicate that vagueness can cause a law to fail proportionality testing.[207] And while in dissent, Gordon J and Edelman J suggested that there are some constitutional constraints on Parliament's ability to enact vague laws, too.[208]

Recall Gordon J's suggestion that a vague statute may not be a 'law' at all.[209] This links to a long line of dicta, including the influential passage from *Plaintiff S157*, in which the Court signalled that a statute conferring unfettered discretion on an executive officer to decide which aliens could enter Australia would not stand.[210] There, their Honours quoted a passage from *Commonwealth v Grunseit* ('*Grunseit*'), in which Latham CJ identified the determination of 'the content of a law as a rule of conduct or a declaration as to power, right or duty' as 'the hallmark of legislative power'.[211] This passage from *Plaintiff S157* has been repeated since,[212] but its meaning has not been clarified, and to my knowledge it has never been applied to invalidate a statute. The idea appears to be that legislative power only extends to the making of 'laws', and that the constitutional concept of 'law' inheres some minimum content. If that minimum content is lacking, the purported 'law' is no law at all. This evokes an important body of scholarship, led now by scholars like TRS Allan, which seeks to show

[207] *Brown* (n 10) 373–4 [149]–[150] (Kiefel CJ, Bell and Keane JJ, Nettle J agreeing at 398 [236]).

[208] Ibid 475 [468] (Gordon J), 481 [489] (Edelman J).

[209] Ibid 475 [468]. At the federal level, this suggestion would be traced to the conferral of legislative power in s 1 and its further delineation in ss 51 and 52 of the *Australian Constitution*; at the state level, its anchor could be those constitutional provisions which similarly vest 'legislative power' to 'make laws' in the parliaments of the states: see, eg, *Constitution Act 1902* (NSW) s 5.

[210] *Plaintiff S157* (n 27) 512–13 [101]–[102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[211] Ibid 513 [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), quoting *Grunseit* (n 51) 82 (Latham CJ).

[212] See, eg, *A-G (NT) v Emmerson* (2014) 253 CLR 393, 429 [52] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ); *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336, 367 [88] (Hayne J); *Thomas* (n 29) 345 [71] (Gummow and Crennan JJ).

that 'law' has inherent requirements that must be present before a true and proper court will enforce it as such.[213]

But it is implausible to suppose that the word 'law' in the *Australian Constitution* operates this way. I explained the reasons why that is so shortly after the decision in *Brown* was handed down.[214] I argued that it is more plausible to conclude that the 'power to make laws' referred to in the *Australian Constitution* is

> *the kind of power exercised by the Parliament in Westminster*. Many quite basic things are captured by this alone: for example, the fact that Parliament will produce a thing called a 'statute', that will be in written form. More importantly, it captures the British tradition of parliamentary sovereignty, and hence the understanding that legislative power is inherently free from justiciable constraints. This reading is confirmed by ss 51 and 52 of *the Constitution* which, read fully, state that '[t]he Parliament shall, subject to this Constitution, *have power to make laws for the peace, order, and good government of the Commonwealth* (emphasis added)'. The words 'peace order and good government' are understood to be exhortatory words that impose no legal limitations. This is a 'stock phrase … routinely used in colonial constitutions to confer plenary power' — power as plenary as that of the Imperial Parliament itself.
>
> Of course, other phrases and provisions then constrain the power so conferred. Sections 51 and 52 state that the power to make laws (more fully described above) is 'subject to this *Constitution*'. For example, it can only be used to make laws with respect to the matters listed in those sections. Thus, unlike the power exercised by the Parliament in Westminster, the law-making power of the Commonwealth Parliament is subject to justiciable constraints. But this should not lead us to conclude that the kind of power conferred on the federal Parliament is fundamentally different in kind; that there are legal limitations on which statutes count as valid 'laws'. Rather, it suggests the opposite: that any legal limitations on the federal Parliament's 'power to make laws' are to be found *outside that phrase*. This demonstrates one of the ways in which the framers of the *Australian Constitution* melded US and UK constitutional precedent. It is an important

[213] See generally TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford University Press, 2013); TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2003); TRS Allan, 'Interpretation, Injustice, and Integrity' (2016) 36(1) *Oxford Journal of Legal Studies* 58.

[214] Lisa Burton Crawford, 'The Entrenched Minimum Provision of Judicial Review and the Limits of "Law"' (2017) 45(4) *Federal Law Review* 569, 586–96 ('The Entrenched Minimum Provision').

> manifestation of the synthesis of legal and political constitutionalism embodied by the *Australian Constitution*.[215]

While my argument was confined to the meaning of the *Australian Constitution*, there is good reason to suppose that the words 'law' and 'legislative power' in state constitutions should be interpreted in the same way.[216]

Granted, several phrases in the *Australian Constitution* are understood to convey rich and justiciable content — take, for example, the idea that a body has to take a certain form to meet the constitutional definition of a 'court'.[217] But the notion that the word 'law' itself places justiciable limits on the kinds of statutes that Parliament can make would seem to render much of the detail of the *Australian Constitution* redundant. The authority of *Grunseit* lends slender support, if any, to the radical constitutional claim being made here — for that was a case concerned with distinguishing executive and legislative power, for the more prosaic purposes of determining whether a direction made by the Minister for the Army had to be tabled before Parliament.[218]

Justice Edelman's suggestion in *Brown* that a vague law might infringe the separation of powers is more promising.[219] Indeed, it leads us to an underappreciated link between the constitutional jurisprudence of Australia and the contemporary void-for-vagueness jurisprudence from the US, highlighted by Meagher's contribution to this issue.[220] There is no doubt that vague laws may have deleterious consequences for the individual. But some US scholars and jurists say that void-for-vagueness is as much an outworking of the separation

215 Ibid 594–5 (citations omitted).

216 This (and adjacent issues) are explored in Martin Roland Hill, 'The *Momcilovic* Question: Does the Rule of Law Limit the Capacity of the New South Wales Legislature?' (Masters Thesis, University of Sydney, 2018) < https://ses.library.usyd.edu.au/handle/2123/18078>, archived at < https://perma.cc/XY93-9LLQ>: see especially at 59–61.

217 See, eg, *Kable* (n 44) 118–19, 121 (McHugh J), 127–8 (Gummow J). See also *South Australia v Totani* (2010) 242 CLR 1, 45 [66], 47–8 [69] (French CJ). While it is not essential to the present argument, the High Court appears to have moved away from this approach, now tending to emphasise the structural relationship between the court and other branches of government and the values protected by a strictly independent judiciary, rather than the essential meaning of the word 'court': see, eg, *Garlett v Western Australia* (2022) 277 CLR 1, 35 [80] (Kiefel CJ, Keane and Steward JJ), 42–3 [111]–[112] (Gageler J). That may be in part because of academic critiques of the claim that the entire separation of powers jurisprudence could be derived from this word: see, eg, Anne Twomey, 'The Defining Characteristics of Constitutional Expressions and the Nationalisation of the State Court System' (2013) 11(2) *Judicial Review* 233, 236–9.

218 *Grunseit* (n 51) 81–2 (Latham CJ). See also Crawford, 'The Entrenched Minimum Provision' (n 214) 578–80.

219 *Brown* (n 10) 481 [489].

220 Meagher, 'Void-for-Vagueness Doctrine?' (n 14) 121–9.

of powers as the constitutional right to due process. In short, it ensures that the courts do not sully their independence by exercising legislative power.[221]

These are only recent developments, and it is not yet clear where they will lead. But one can see some advantages to a void-for-vagueness doctrine that is grounded in the separation of powers and calibrated to that end, as opposed to concerns of due process. For one, it would not necessarily require the courts to assess the level of notice that is fair to the individual member of the public — a notoriously fraught task.[222] Rather, it would require the courts to assess for themselves when the limits of their interpretive capacities have been reached. That is not easy either, but judges may be somewhat better placed to assess their own competencies — based on their extensive experience of routine statutory interpretation — than how a statute would be perceived by an average person with skills and experiences incomparable to their own. Courts themselves appear confident to draw a distinction between legislating and interpreting — both in the US[223] and in Australia.[224]

And while one can readily describe doctrines grounded in individual constitutional rights as foreign to Australian law, it is very difficult to dismiss a doctrine said to give effect to the constitutional separation of judicial power. For the separation of judicial power is a bedrock of Australian constitutionalism, and now operates as one of the more robust constraints on legislative power at the state and federal level (albeit in different ways). The idea that courts cannot legislate is, after all, what underpins the Court's reasoning in cases like *Momcilovic*.[225] Why, then, can we not recognise some version of a void-for-vagueness doctrine too?

I say 'some version', for a constitutional constraint on legislative power to enact vague laws that is grounded in the limits of *judicial power* would work very differently from one grounded in *due process rights*. Its rationale would be the protection of the institutional integrity of the courts, not the fair treatment of the individual, and its operation would need to be calibrated accordingly. A statute could easily withstand such a doctrine, even if it would be beyond the reasonable comprehension of an ordinary member of the public, or indeed, an executive officer. A statute would only fail on this basis if a court concluded,

[221] See, eg, *Sessions v Dimaya*, 584 US 148, 176, 181 (Gorsuch J) (2018) ('*Dimaya*').

[222] Emily M Snoddon, 'Clarifying Vagueness: Rethinking the Supreme Court's Vagueness Doctrine' (2019) 86(8) *University of Chicago Law Review* 2301, 2308–9, 2339–40.

[223] See, eg, *Dimaya* (n 221) 155–6 (Kagan J for Ginsburg, Breyer and Sotomayer JJ).

[224] See, eg, *Pidoto v Victoria* (1943) 68 CLR 87, 110 (Latham CJ); *Native Title Act Case* (n 10) 485–8 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Momcilovic* (n 1) 158–9 [398]–[400] (Heydon J).

[225] See, eg, *Momcilovic* (n 1) 45 [39]–[40] (French CJ), 158–9 [398]–[400] (Heydon J).

having exhausted the established principles of statutory interpretation, that it would need to change or supplement the content of the statute in order to make it *work*. Indeed, it may be overbroad to suppose that the doctrine would always cause a law to *fail*: rather, a court may simply conclude that it could not be applied in the case before it. This may mean the distinction drawn in *Walters*, between laws that are 'invalid' and laws that are 'ineffective', would have some work to do after all.[226]

IV Conclusion

This article has examined two key principles of Australian constitutional law that I argue are in tension. If statutes are valid even if they are vague, and courts are always required to apply them, then statutory interpretation must sometimes involve contributing to the content of a statute. If courts cannot contribute to the content of a statute, then they cannot supply any of the content that a vague statute requires to work, and hence a vague law must have no legal effect to the extent that it is vague. As I have explained, Australian statutes are not necessarily as vague as legal theorists would have us believe, and the task of interpreting those statutes is meaningfully constrained by the modern approach. But this does not mean that there is no prospect of indeterminacy, nor that the modern approach removes the need for true interpretive choice. That leaves two possible ways of resolving the inconsistency I have identified here. The first is to rethink the scope of judicial power, and recognise that courts have some authority to contribute to the content of legislation. The second is to rethink the scope of legislative power, and recognise that there are some limits on the legislatures' power to enact vague laws.

I have argued that both are plausible, but rethinking the scope of judicial power seems to be the more compelling way to refine this area of the law. That is supported by a long line of Australian case law, which says that the quintessential function of the courts is to effectively resolve disputes about the law.[227] It is also supported by recent scholarship, which shows that many of the interpretive principles applied by Australian courts seem to play a role in constituting statutory meaning, and not merely unearthing it.[228] And the power it envisages can be limited, in the way suggested by the decision in *Walters*, the

[226] This distinction between invalid and ineffective or inoperative laws is drawn in other constitutional contexts, eg, s 109 inconsistency: *Native Title Act Case* (n 10) 465 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). This in turn allows for 'operational inconsistency' of the kind recognised in *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J).

[227] See above nn 190–92 and accompanying text.

[228] See, eg, Smith (n 127) 254; Goldsworthy (n 183) 54.

judgment of Edelman J in *Brown* and the work of leading theorists like Goldsworthy and Gardner. That is, gaps can be filled in a way that broadly coheres with what Parliament *has* provided, and if there arrives a point at which those gaps are so large or numerous that the courts would have to fashion an entirely new legislative scheme, then the law must fail. So understood, the appropriate resolution really requires us to reconsider both the limits of judicial power to interpret legislation *and* recognise a constitutional constraint on legislative power to enact vague laws. This would represent an important evolution in constitutional thinking, but it is consistent with the commitments to the separation of powers and parliamentary supremacy that rightfully animate this field of law.