Climate Change and the Australian Constitution: The Case for the Ecological Limitation

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Abstract

Climate change poses a serious threat to the long-term structural integrity, if not existence, of the Australian constitutional system. This means that Australian government action worsening climate change poses a threat to this constitutional system. When government action threatens this system, even in a partial or incremental manner, the High Court may derive implications from the *Commonwealth Constitution* ('Constitution') to restrain such action. This is the reasoning underpinning the Court's establishment of implied limitations such as the *Melbourne Corporation* and political communication limitations. Based on this reasoning, I explore in this thesis whether a doctrinal argument can be made for deriving a new implication from the Constitution that I refer to as the 'ecological limitation'. This limitation, if established, would restrain some forms of Commonwealth or State legislative and executive action worsening climate change in the interests of preserving the Australian constitutional system.

My methodology for assessing the doctrinal merits of this proposed implication is framed by the High Court's 'text and structure approach' articulated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. This interpretive approach requires implications to be derived from the text and structure of the Constitution. I supplement this approach by drawing comparisons between the ecological limitation and established implications to gain further insights on what aspects of a proposed implication may be deemed acceptable and unacceptable by the Court. Finally, I tease out the operation of the ecological limitation by considering its hypothetical application in relation to a real occurrence. Namely, I consider how the limitation might apply to restrain Queensland government approval of a proposed coal mine – the Carmichael mine currently being pursued by Adani Mining Pty Ltd.

By following this methodology, I arrive at the doctrinal argument for deriving the ecological limitation outlined above and assess the doctrinal arguments against its derivation that might be raised in response (such as concerns regarding the political decision-making judges would have to engage in if the limitation is established). I conclude that a compelling doctrinal case can be made in support of the ecological limitation that can withstand these counter-arguments.

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CHAPTER 1: INTRODUCTION

The Earth and jurisprudence are both systems. The Earth is a system of physical and interlinked relationships. Jurisprudence is a system of abstract laws. Jurisprudence is a human creation. As such, jurisprudence is a system that depends for its existence on the systems of Earth because the former is the creation of a species whose existence is of the latter. It is therefore important, indeed necessary, to situate the system of laws within the physical context of the Earth's systems, because although the law currently situates itself above or separate to the physical realm, in reality the converse is true. Humans are physical beings dependent on, and subject to, their only home and ultimate jurisdiction – Earth.

- Nicole Graham[1]

[W]hat is necessarily implied is as much part of the Constitution as that which is expressed; the only question is, whether the implication is necessary.

- Sir Robert Garran[2]

[1] 'Owning the Earth' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011) 259, 259.
[2] 'Development of the Australian Constitution' (1924) 40 *Law Quarterly Review* 202, 216.

I INTRODUCING THE ECOLOGICAL LIMITATION

A *Climate Change and the Constitution*

In this thesis, I consider the possibility of deriving a new implication from the *Commonwealth Constitution* ('Constitution'). I refer to this implication as the 'ecological limitation.' The rationale for its establishment stems from the following prosaic observation: the Australian constitutional system requires the continued existence of humans within a particular physical site. These humans are the voters, judges, parliamentarians and others that run, and are served by, this constitutional system. This physical site is essentially the landmass known as Australia, within which the Constitution has legal force.[3] The fact that the Australian constitutional system relies upon these humans within this site means that it relies upon the continuation of some standard of habitability within this site.[4] This is because humans can only sufficiently run, and be served by, this constitutional system within Australia if the basic ecological conditions for human life within Australia are maintained. The Australian constitutional system, therefore, not only rests upon ideational foundations that must be preserved, such as federalism, representative democracy and separation of powers. It rests upon ecological foundations that require preservation as well.[5]

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[3] See discussion in: Chapter 4(III)(A). The precise geographic dimensions of the physical site within which the Australian constitutional system operates depends on the drawing of borders in international law and is subject to change (if, for example, a new State joins the 'Commonwealth of Australia'): The Constitution, ss121-124. For discussion on the circumstances in which the Constitution has extraterritorial legal force see: Anne Twomey, 'Geographical Externality and Extraterritoriality: XYZ v Commonwealth' (2006) 17 *Public Law Review* 256.

[4] The concept of 'habitability' is discussed in more detail in Chapter 4(I) and (III). In essence, 'habitability' is defined for the purposes of this thesis as a physical site's ability to provide the basic ecological conditions for humans to survive and thrive such as those that bear food, water, air and shelter. Reference to a site's 'habitability' does not merely capture whether a site can or cannot support human life in binary terms. It captures the quality of support for human life that the relevant site's ecological features provide on a spectrum, from the bountiful to the scant. As will be explored in this thesis, the Constitution requires a certain quality or standard of habitability to be maintained in order for the Australian constitutional system to be maintained.

[5] As will be discussed in Chapter 4(III), these ideational and ecological foundations are intertwined. Principles such as federalism, representative democracy and separation of powers require certain ecological conditions to be in place for their practical operation.

The fact that the Australian constitutional system relies upon the continuation of some standard of habitability within Australia means that a serious threat to Australia's habitability may be a serious threat to this constitutional system. Runaway climate change poses such a threat. Runaway climate change is a phenomenon predicted to occur if greenhouse gas emissions into the atmosphere surpass a certain level.[6] Once this level is surpassed, global temperature is expected to effectively rise of its own volition as a myriad of changes in the Earth's climate system detrimental to humankind are generated.[7] In Australia, runaway climate change is predicted to compromise food and water security;[8] exacerbate health problems;[9] increase security threats as severe climate impacts fuel international conflicts;[10] submerge coastal areas as sea-levels rise;[11] and increase extreme weather events such as heatwaves and floods.[12] While the future effects of runaway climate change cannot be known with certainty, climate experts fear that these overlapping pressures may ultimately result in nothing short of societal collapse in Australia and beyond.[13] Runaway climate change, therefore, has the potential to significantly damage, if not completely destroy, the Australian constitutional system, along with a range of other areas of human (and non-human) life.[14]

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[6] Haydn Washington and John Cook, *Climate Change Denial: Heads in the Sand* (Earthscan, 2011) 30-31.

[7] Ibid 30-31. For discussion of possible objections to this framing of runaway climate change (and alternative framings) see: Chapter 6(III)(B)(2).

[8] Lesley Hughes et al, 'Feeding a Hungry Nation: Climate Change, Food and Farming' (Climate Council, 2015); Will Steffen et al, 'Deluge and Drought: Australia's Water Security in a Changing Climate' (Climate Council, 2018); Mark Howden et al, 'Agriculture in an Even More Sunburnt Country' in Peter Christoff (ed), *Four Degrees of Global Warming: Australia in a Hot World* (Routledge, 2014) 101; Ben Saul et al, *Climate Change and Australia: Warming to the Global Challenge* (Federation Press, 2012) 44-46.

[9] Australian Academy of Science, 'Climate Change Challenges to Health: Risks and Opportunities' (Australian Academy of Science, 2015); Anthony McMichael, 'Health Impacts in Australia in a Four Degree World' in Peter Christoff (ed), *Four Degrees of Global Warming: Australia in a Hot World* (Routledge, 2014) 155; Saul et al, above n 8, 48-49.

[10] Chris Barrie et al, 'Be Prepared: Climate Change, Security and Australia's Defence Force' (Climate Council, 2015); Peter Christoff and Robyn Eckersley, 'No Island is an Island: Security in a Four Degree World' in Peter Christoff (ed), *Four Degrees of Global Warming: Australia in a Hot World* (Routledge, 2014) 190; Saul et al, above n 8, 191-226.

[11] Department of Climate Change, 'Climate Change Risks to Australia's Coasts: A First Pass National Assessment' (Commonwealth of Australia, 2009); Will Steffen et al, 'Counting the Costs: Climate Change and Coastal Flooding' (Climate Council, 2014).

[12] Steffen et al, 'Deluge and Drought', above n 8; Karl Braganza et al, 'Changes in Extreme Weather' in Peter Christoff (ed), *Four Degrees of Global Warming: Australia in a Hot World* (Routledge, 2014); Saul et al, above n 8, 40-43.

[13] See discussion in: Chapter 6(III)(A).

[14] Ibid.

Despite the danger runaway climate change poses, Australian governments continue to take legislative and executive action that contributes to bringing about this existential threat. Indeed, Australia is ranked as one of the worst performing nations on climate change in the world.[15] This low ranking is due to a range of factors including Australian governments' insufficient laws and policies regarding emissions reduction, renewable energy and the phasing out of coal.[16] While climate change is the product of a complex web of fossil fuel projects and human activities and no one nation's (or corporation's or other grouping of humans') contributions are determinative, Australian governments' greenhouse gas contributions are not insignificant. Climate change is a 'death by a thousand cuts' problem and all substantial 'cuts' must be taken seriously.[17] This is especially the case considering the dangerous position in which humankind has been placed after decades of climate inaction. While the level of greenhouse gas emissions into the atmosphere that must be observed is not known with precision (and the Earth's complex climate system is not expected to react to greenhouse gas emission increases in a steady linear fashion), some climate experts fear that this level has already been breached.[18] This is why Will Steffen and Lesley Hughes from the Australian Climate Commission refer to 2011-2020 as the 'critical decade': the decisions made by governments and others in the decade now coming to a close on their greenhouse gas emitting activities may substantially determine if increasingly dangerous levels of climate change are avoided or rendered irreversible.[19] Australian government

[15] Australia ranks 55 out of 60 nations in the Climate Change Performance Index of 2018: Jan Burck et al, 'Climate Change Performance Index Results 2019' (Germanwatch, New Climate Institute and Climate Action Network, December 2018) 7.

[16] Ibid 20. This is not to suggest that the ecological limitation would be capable of restraining legislative and executive action in all of these areas. See discussion in: Chapter 4(III).

[17] Jacqueline Peel, 'Issues in Climate Change Litigation' (2011) 1 *Carbon and Climate Law Review* 15, 17-18.

[18] The Stockholm Resilience Centre, for example, asserts that the 'planetary boundary', which effectively demarcating when the risk of triggering runaway climate change substantially increases, has already been breached: Johan Rockström et al, 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity' (2009) 14(2) *Ecology and Society* <ecologyandsociety.org/vol14/iss2/art32>; Will Steffen et al, 'Planetary Boundaries: Guiding Human Development on a Changing Planet' (2015) 347 *Science* 1259855-1. Also see: Eileen Crist, 'Beyond the Climate Crisis: A Critique of Climate Change Discourse' (2007) 141 *Telos* 29, 31-33. See discussion in: Chapter 6(III).

[19] 'The Critical Decade 2013: Climate Change Science, Risks and Responses' (Climate Commission, 2013).

action worsening climate change at this fragile moment has a heightened significance.

Thus, by contributing to bringing about runaway climate change, this government action contributes to bringing about a serious threat to the Australian constitutional system. When government action poses a threat to this constitutional system, political means (such as parliamentary scrutiny or public debate) might be relied upon to confront this action. The existence of such a threat, however, may also provide the grounds for deriving an implied limitation from the Constitution to restrain such action.[20] The *Melbourne Corporation* doctrine or principle ('*Melbourne Corporation* limitation'), for example, is an implied limitation restraining the Commonwealth from passing laws that unduly hinder the States' autonomy.[21] The High Court derived it to help protect the federal foundations of this constitutional system. Another example is the implied freedom of political communication ('political communication limitation'), an implied limitation restraining the Commonwealth and States from taking legislative and executive action that unduly hinders the people's freedom of communication about government and political matters.[22] The High Court derived it to help protect the democratic foundations of this constitutional system.[23] In this thesis, I propose that a compelling argument can be made for establishing an implied limitation to help protect this system's ecological foundations. This is what I refer to as the ecological limitation.

[20] The existence of these political processes might be grounds against the derivation of an implied limitation if the courtroom is considered an inappropriate forum for determining the bona fides of the government action in question. See discussion in: Chapter 5(II).
[21] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.
[22] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*').
[23] See discussion in: Chapter 2(IV)-(V).

B *The Ecological Limitation*

The ecological limitation would restrain Commonwealth or State legislative and executive action burdening Australia's habitability if that action compromises the structural integrity of the Australian constitutional system.[24] The basic premise for the ecological limitation is drawn from the fact that, as discussed above, this constitutional system requires some standard of habitability to be maintained within Australia. This means that government action burdening Australia's habitability may threaten the structural integrity, if not existence, of this constitutional system – humans cannot sufficiently play their various constitutional roles if the site within which this constitutional system operates substantially loses its ability to support human life. It may be 'logically or practically necessary', therefore, to derive an implied limitation on government action burdening Australia's habitability if that action compromises the structural integrity of the Australian constitutional system.[25]

The reasoning that supports the ecological limitation is similar to that which supports other implied limitations. Like the *Melbourne Corporation* limitation, the political communication limitation and others, the ecological limitation's aim is to protect the Australian constitutional system from government action that may undermine it. These implied limitations may be, and have been, established despite the fact that the government action in question is not typically taken with the intention of damaging this constitutional system. Such action is typically taken to secure some social, economic or other benefit for (some portion of) the Australian population. The existence of these countervailing benefits is not necessarily disregarded but may be factored into the formulation of these limitations. The political communication limitation, for instance, is formulated in a manner that requires judges to carry out proportionality analysis.[26] This involves taking into account the 'legitimate objective' served by the relevant government action as well

[24] For a detailed formulation of the ecological limitation see: Chapter 4(V).
[25] Chief Justice Mason's 'necessity test' is the generally accepted framing for deriving implied limitations to protect the Constitution's structure: *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 135 ('*ACTV*'). See discussion in: Part II(A) and Chapter 2(V)(B).
[26] *Lange* (1997) 189 CLR 520, 567.

as the burden it places on the people's freedom of communication about government and political matters.[27] As will be seen in Chapter 4, the ecological limitation is similarly formulated via the concept of proportionality to take into account the countervailing benefits of government action burdening Australia's habitability.[28]

Another similarity between the ecological limitation and other implied limitations is that the offending government action might be in breach of the relevant limitation when it only partially damages, rather than singlehandedly destroys, the Australian constitutional system. The laws restricting political donations and electoral communication expenditure in *Unions NSW v New South Wales* and activists' ability to protest in certain forestry areas in *Brown v Tasmania*, for example, did not singlehandedly destroy the Australian constitutional system.[29] They partially, but substantially, damaged it and this was considered sufficient for these laws to be held in breach of the political communication limitation in both cases. The High Court's formulation of implied limitations recognises the incremental way in which the structural integrity of the Australian constitutional system may be undermined.[30] The ecological limitation, as proposed in this thesis, is also formulated to respond to such incremental attacks. This makes the ecological limitation capable of addressing Australian governments' piecemeal contributions to bringing about runaway climate change – their 'cuts' in this 'death by a thousand cuts' problem.

Finally, the ecological limitation mirrors established implied limitations, and other constitutional implications, in the fact that profound social or global changes often form the backdrop for their derivation. The era of big (centralised) government during and after World War II, for example, formed the backdrop of the *Melbourne*

[27] Ibid 561-562. See discussion in: Chapter 4(V)(A).
[28] See discussion in: Chapter 4(IV). An example of such countervailing benefits would be the revenue raised and jobs created from executive approval of a coal mining project (which may be causally linked to the burdening of Australia's habitability due to the greenhouse gas emissions resulting from the coal unearthed and burned). For a detailed illustration of the proportionality assessment undertaken in an ecological limitation matter with regard to the economic benefits and ecological burdens of a coal mining project see: Chapter 6(V).
[29] *Unions NSW v New South Wales* (2013) 252 CLR 530; *Brown v Tasmania* (2017) 261 CLR 328.
[30] See discussion in: Chapter 4(II).

Corporation limitation's establishment.[31] In *Melbourne Corporation v Commonwealth*, the High Court was compelled to consider what implied protection might exist to preserve the States' autonomy in the face of unprecedented expansions of Commonwealth power.[32] The unique threat posed by communism during the Cold War, for another example, formed the backdrop of the nationhood power's establishment (or at least the postulate to it).[33] Matters from this era raised the question of whether some implied constitutional power may allow the Commonwealth to tackle threats to the nation that may not fit neatly within other expressed constitutional mechanisms for protection such as the defence power.[34] Profound social and global changes similarly form the backdrop for the ecological limitation. The unprecedented emerging threat of runaway climate change serves as the catalyst for considering the establishment of this proposed implication.

This is not to suggest that a clear or discernible link can always be drawn 'between the constitutional jurisprudence of the High Court and broader political currents.'[35] New circumstances, however, have the capacity to shed light on dimensions of Australian constitutional law that have never been considered (or, at least, never been considered in this new light).[36] While this aspect of Australian constitutional law is in keeping with common law tradition – the Court develops its understanding of the law incrementally as new and unforeseen matters are brought to it for

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[31] Fiona Wheeler, 'The Latham Court' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 159, 166-167, 169.

[32] (1947) 74 CLR 31.

[33] Nicholas Aroney et al, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 196-198.

[34] The Constitution, s 51(vi); *Burns v Ransley* (1949) 79 CLR 101, 109-110, 116; *R v Sharkey* (1949) 79 CLR 121, 135, 148; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187-188, 259-260.

[35] Rosalind Dixon and George Williams, 'Introduction' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 1, 7-8. For discussion on the influence of social or global changes on the High Court's interpretation of the Constitution (or lack thereof) see: Dixon and Williams (see in particular: 7-17); Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987); Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, 2000); Jason Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006); Geoffrey Lindell, 'In Defence of the High Court – Its Role as an Agent of Constitutional Change' (2012) 33 *Adelaide Law Review* 399.

[36] *Theophanous v Herald & Weekly Times* Ltd (1994) 182 CLR 104, 143-144, 197; *Victoria v Commonwealth* (1971) 122 CLR 353, 396-397 ('*Payroll Tax Case*'); Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323, 332-333.

adjudication – it is particularly pertinent with regard to constitutional implications.[37] These implications are often not explicitly evident from a reading of the Constitution's text. They are written, as Aharon Barak phrases it, in 'invisible ink'.[38] The possibility of detecting implications' existence in the Constitution may present itself only when the circumstances arise that demand it. This was the case for the *Melbourne Corporation* limitation, nationhood power and other constitutional implications. It is also the case for the ecological limitation.

C *The Research Question*

At the core of this thesis is the following research question: can a compelling doctrinal argument be made for establishing the ecological limitation in Australian constitutional law? My conclusion is that such an argument can indeed be made. This is not to discount the potential for counter-arguments to be raised against deriving this implication that might ultimately prove more convincing to a court. As discussed in Chapter 5, these include arguments that the establishment of the ecological limitation would conflict too greatly with the constitutional role of the judiciary (due to the political decision-making it would require of judges) and the intentions of the framers (they ostensibly did not envision such constitutional restraint on the States' and Commonwealth's domain over Australian nature).[39] While my conclusion is that the doctrinal argument for deriving the ecological limitation can withstand these counter-arguments, the ability to predict the High Court's position on this question is marred by the existence of areas of ambiguity in Australian constitutional law. As discussed below, the High Court's approach to

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[37] As Windeyer J states with regard to the relationship between common law and Australian constitutional law:

> In any country where the spirit of the common law holds sway the enunciation by courts of constitutional principles based on the interpretation of a written constitution may vary and develop in response to changing circumstances. This does not mean that courts have transgressed lawful boundaries: or that they may do so: *Payroll Tax Case* (1971) 122 CLR 353, 396-397.

[38] *Purposive Interpretation in Law* (Princeton University Press, 2011) 373; 'On Constitutional Implications and Constitutional Structure' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press, 2016) 53, 61.

[39] For discussion on the counter-argument pertaining to the constitutional role of the judiciary see: Chapter 5(II). For discussion on the counter-argument pertaining to the intentions of the framers see: Chapter 5(III).

deriving constitutional implications is vague and contentious.[40] Further, the Australian constitutional system's interconnection with, and dependence upon, the Australian ecosystem is a topic lacking substantial judicial or scholarly consideration.[41] Thus, the Australian constitutional jurisprudence that must be navigated to determine the potential for deriving the ecological limitation is complex and uncertain terrain. This thesis offers an exploration of that terrain.

In the remainder of this introduction, I contextualise this thesis in terms of its relationship to constitutional law and climate litigation. In Part II, I survey the relevant case law and literature on both constitutional implications and nature's role in the Australian constitutional system. This involves discussion of the contribution made by this thesis to scholarship on these two disparate topics in Australian constitutional jurisprudence. This Part also involves discussion of my methodology for assessing the doctrinal merits of the ecological limitation based on the High Court's articulation of its approach to deriving implications.[42] In Part III, I examine the climate litigation from across the world that has broadly inspired this thesis. I explain the ways in which climate litigation matters, and literature on these matters, inform the analysis undertaken in my work. I also discuss how this thesis can be understood as a contribution to climate litigation scholarship, in addition to scholarship on constitutional law. I conclude this chapter in Part IV with final remarks on the ecological limitation and an outline of the thesis structure.

[40] See discussion in: Part II(A).
[41] See discussion in: Part II(B).
[42] I discuss this methodology in more detail in: Chapter 3(VII).

II AUSTRALIAN CONSTITUTIONAL LAW AND THE ECOLOGICAL LIMITATION

A *Australian Constitutional Law and Constitutional Implications*

The focus of this thesis is assessing whether the ecological limitation may be established in Australian constitutional law. This means that the foundational material that shapes my inquiry, apart from the Constitution itself, is case law on the derivation of constitutional implications. While the High Court has wrestled with the question of how to derive implications throughout its history, the case law that emerged in the 1990s is of particular significance.[43] During this decade, members of the High Court voiced support for a range of what were perceived as 'revolutionary' constitutional implications.[44] The most prominent (and one of the few to gain majority support) was the political communication limitation.[45] This sparked intense debate within the High Court and beyond, leading to the Court clarifying its contemporary approach to establishing implications in *Lange v Australian Broadcasting Corporation* ('*Lange*').[46] This is the 'text and structure approach', which requires implications to be derived from the text and structure of the Constitution.[47] As noted in Part I, part of the text and structure approach

[43] At one point in the High Court's history, it even wrestled with the question of whether any implications should be derived: Chapter 2(III)(B). This was in the wake of the Court's abandonment of two of the earliest implications that it had established (the reserved State powers doctrine and the immunity of instrumentalities) in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers*'): *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 681; Zines 222-223. This view no longer has currency in Australian constitutional law: Chapter 2(III)(B). For discussion on the High Court's historical approach to deriving constitutional implications see: Geoffrey Sawer, 'Implication and the Constitution - Part 1' (1948) 4 *Res Judicatae* 15; Geoffrey Sawer, 'Implication and the Constitution - Part 2' (1948) 4 *Res Judicatae* 85; Leslie Zines, 'Sir Owen Dixon's Theory of Federalism' (1965) 1 *Federal Law Review* 221.

[44] Nicholas Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1994) 18 *University of Queensland Law Journal* 249, 252; Nicholas Aroney, 'The Structure of Constitutional Revolutions: Are the Lange, Levy and Kruger Cases a Return to Normal Science?' (1998) 21 *University of New South Wales Law Journal* 645, 645; Stephen Gageler, 'Implied Rights' in Michael Coper and George Williams (eds), *The Cauldron of Constitutional Change* (Centre for International and Public Law, 1997) 84; Pierce, above n 35; See discussion in: Chapter 2(IV).

[45] See discussion in: Chapter 2(IV).

[46] (1997) 189 CLR 520. See discussion in: Chapter 2(IV)-(V).

[47] See discussion in: Chapter 2(V).

stipulates that implications aimed at preserving the structural integrity of the Australian constitutional system can be derived only if 'logically or practically necessary'.[48] The text and structure approach and this 'necessity test', thus, provide the framework for determining the doctrinal merits of the ecological limitation.

A substantial amount of literature on implications in Australian constitutional law offers a critique of the text and structure approach.[49] The general consensus among scholars is that the High Court's claims that it is drawing solely on the Constitution's 'text and structure' does not adequately explain how the Court, in fact, derives implications.[50] Much of this literature draws attention to how judicial choice is evident in the derivation of these implications to a larger extent than judges have themselves articulated.[51] Discussing the 2004 political communication

[48] *ACTV* (1992) 177 CLR 106, 135. See discussion in: Chapter 2(V)(B).

[49] See in particular: Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668; Adrienne Stone, 'Limits of Constitutional Text and Structure Revisited' (2005) 28 *University of New South Wales Law Journal* 842; Jeremy Kirk, 'Constitutional Implications I: Nature, Legitimacy, Classification, Examples' (2000) 24 *Melbourne University Law Review* 645; Jeremy Kirk, 'Constitutional Implications II: Doctrines of Equality and Democracy' (2001) 25 *Melbourne University Law Review* 24; Nicholas Aroney, 'Towards the Best Explanation of the Constitution: Text, Structure, History and Principle in Roach v Electoral Commissioner' (2011) 30 *University of Queensland Law Journal* 145; Jeffrey Goldsworthy, 'Constitutional Implications Revisited - The Implied Rights Cases: Twenty Years On' (2011) 30 *University of Queensland Law Journal* 9. Critique of the text and structure approach is often provided indirectly in the process of assessing judges' reasons for supporting or rejecting particular constitutional implications. The focal point of this work is usually the political communication limitation because this implication was the main catalyst for the High Court articulating the text and structure approach in *Lange* (1997) 189 CLR 520. For example see: Stone, 'Limits'; Stone, 'Revisited'. For examples of the text and structure approach being discussed in the context of other constitutional implications see: Aroney, 'Towards the Best Explanation' ('voting access limitations'); Jeffrey Goldsworthy, 'Kable, Kirk and Judicial Statesmanship' (2014) 40 *Monash University Law Review* 75 ('*Kable*' and '*Kirk* limitations'); Catherine Penhallurick, 'Commonwealth Immunity as a Constitutional Implication' (2001) 29 *Federal Law Review* 151 ('Commonwealth immunity limitation'); Kirk, 'Implications II', 31-43 (Justices Deane and Toohey's proposed 'legal equality limitation').

[50] For example see: Stone, 'Revisited', above n 49, 844; Kirk, 'Constitutional Implications I', above n 49, 647; Aroney, 'Towards the Best Explanation', above n 49, 162-163; Goldsworthy, 'Kable', above n 49; Geoffrey Lindell, 'Expansion or Contraction – Some Reflections about the Recent Judicial Developments on Representative Democracy' (1998) 20 *Adelaide Law Review* 111, 145; George Williams and Andrew Lynch, 'The High Court on Constitutional Law: The 2010 Term' (2011) 34 *University of New South Wales Law Journal* 1006, 1026-1027; Tom Campbell and Stephen Crilly, 'The Implied Freedom of Political Communication, Twenty Years On' (2011) 30 *University of Queensland Law Journal* 59, 60; James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 563.

[51] For example see: Kirk, 'Implications I', above n 49, 649-651, 676; Kirk, 'Implications II', above n 49, 50; Penhallurick, above n 49, 163-165; Williams and Lynch, above n 50, 1026-1027; Campbell and Crilly, above n 50, 60; Aroney, 'Towards the Best Explanation', above n 49, 147. Several scholars draw particular attention to the substantial degree of judicial choice required with regard to determining what is 'practically necessary' to preserve the Australian constitutional system's structural integrity. For example see: Aroney, 'Seductive Plausibility', above n 44, 264-267;

limitation case of *Coleman v Power*, for instance, Adrienne Stone notes that the opposing views of Gleeson CJ and Heydon J in that case (who emphasise the importance of governments restraining insulting speech in order to protect healthy political discourse in society) and McHugh and Kirby JJ (who emphasise the risks in restraining such speech *because* it is valuable to healthy political discourse in society) are each substantially the product of subjective value judgments.[52] Nevertheless, both sides can, and do, claim that their view aligns with the Constitution's 'text and structure' and what is 'necessary' to preserve the structural integrity of the Australian constitutional system.[53] Such claims tend to leave unclear (and underestimated) the role that extrinsic materials, historical analysis of the Constitution, consideration of modern circumstances or other factors perform in various judges' approaches to deriving implications.[54] The end result is that 'text and structure' is almost being used as some form of 'mantra' or 'ritual incantation' by the Court.[55] Judges use the phrase to justify their decision to derive (or refuse to derive) a certain implication without explaining precisely how the Constitution's 'text and structure' has led them to their conclusion. This scholarship on the text and structure approach is discussed in more detail in Chapter 3.

While I share the view expressed in this scholarship that the text and structure approach provides insufficient guidance for determining the doctrinal merits of a proposed implication, I offer original analysis in this thesis to explain this position. The High Court makes clear in *Lange* that implications may only be drawn from the Constitution's 'text' and 'structure'. In Chapter 3, I analyse the meaning of the

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Goldsworthy, 'Constitutional Implications Revisited', above n 49, 26-31; Stone, 'Revisited', above n 49, 847; Kirk, 'Implications II', 50; Penhallurick 163-165.

[52] (2004) 220 CLR 1; 'Revisited', above n 49, 849-850.

[53] Stone, 'Revisited', above n 49, 850.

[54] For example see: Aroney, 'Towards the Best Explanation', above n 49, 149; Campbell and Crilly, above n 50, 60; Kirk, 'Implications I', above n 49, 666-667; Kirk, 'Implications II', above n 49, 50-52; Williams and Lynch, above n 50, 1027. The relevant factors that judges may draw upon to derive implications depends on their interpretive method (such as originalism, progressivism and so forth). See discussion in: Chapters 2(III) and 3(III). Some of this literature goes beyond critiquing the text and structure approach and proposes modifications to it or alternative approaches to deriving implications that the Court should adopt: Jeffrey Goldsworthy, 'Implications in Language, Law and the Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994); Aroney; Kirk, 'Implications I', 650; Kirk, 'Implications II', 40-43; Stone, 'Limits', above n 49, 705-707.

[55] Kirk, 'Implications I', above n 49, 647 ('mantra'); Williams and Lynch, above n 50, 1026 ('ritual incantation').

terms ‘text’ and ‘structure’ in a way that has not been previously undertaken. I view the Constitution’s ‘text’ and ‘structure’ as each representing sets of ideas.[56] The ‘text’ represents the set of ideas conveyed by the Constitution’s words. This is due to the fact that all written words, in essence, are ‘black marks on a white background’ conveying ideas.[57] The Constitution’s ‘structure’ represents two distinct sets of ideas.[58] First, it represents those ideas conveyed by the ordering of the Constitution’s words into chapters and provisions (‘organisational structure’). Second, it represents those ideas conveyed by the Constitution’s words that establish the existence of the foundational principles underpinning the Constitution, such as federalism and representative democracy (‘systemic structure’). The reason why it is important to deconstruct the terms ‘text’ and ‘structure’ to this level is that this is the level at which constitutional implications operate. That is, as will be discussed in Chapter 2, constitutional implications are ideas – specifically, ideas conveyed indirectly by the Constitution’s words.[59] The text and structure approach, therefore, requires these ideas (constitutional implications) to be drawn from these two sources of ideas (the ‘text’ and ‘structure’). As will be seen in Chapter 3, this framing allows me to provide a detailed analysis of the workings and shortcomings of the text and structure approach.

This framing also allows me to critique the views of some scholars in relation to this approach.[60] As I detail in Chapter 3, some scholars suggest that the central problem with the text and structure approach is that judges are claiming to be deriving implications from the Constitution’s text and structure but are, in fact, regularly looking beyond these two sources when undertaking this task.[61] I disagree

[56] See discussion in: Chapter 3(II).
[57] Stanley Fish, ‘Intention Is all There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law’ (2008) 29 *Cardozo Law Review* 1109, 1112.
[58] See discussion in: Chapters 2(V)(B) and 3(II). Jeremy Kirk and Justice Susan Kenny deconstruct the concept of the Constitution’s ‘structure’ to the level of including both organisational and systemic structure, to use my terminology: Kirk, ‘Implications I’, above n 49, 664; Justice Susan Kenny, ‘The High Court of Australia and Modes of Constitutional Interpretation’ in *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission of New South Wales, 2007) 45, 62. The further deconstruction of these two forms of ‘structure’ so as to be understood as representing distinct sets of ideas, however, is my own: Chapter 3(II).
[59] See discussion in: Chapter 2(II).
[60] See discussion in: Chapter 3(V).
[61] Ibid. These scholarly works include: Stellios, above n 50, 562-563; Campbell and Crilly, above n 50, 59-60; Williams and Lynch, above n 50, 1026-1027. For discussion on the potential for other

with this assertion. Judges are not necessarily looking beyond the Constitution's 'text' and 'structure' when they employ 'external' sources in their interpretive process when deriving implications. They generally can be understood as using such sources to shed light on the ideas conveyed by this 'text' and 'structure'.[62] Their use of 'external' sources is not necessarily a betrayal of the text and structure approach but an accompaniment to it. Thus, while I agree with these scholars and others that the text and structure approach provides insufficient guidance for deriving constitutional implications, I disagree with aspects of their scholarship as to why this is the case. Identifying these differences between my critique of the text and structure approach and others enables me to more precisely articulate my view of the shortcomings of this approach.

This, ultimately, allows me to outline my methodology for assessing the doctrinal merits of the ecological limitation in light of these shortcomings. As will be seen in Chapter 3, my starting point is to adhere to the tenets of the text and structure approach as closely as possible.[63] This involves attention being paid to the High Court's conceptualisation of the Constitution's 'structure' and focusing on the question of whether this proposed implication is 'logically or practically necessary'.[64] I gain further guidance by comparing the ecological limitation with established implications.[65] The latter ostensibly satisfy the text and structure approach, meaning that they offer insights on what aspects of a proposed implication may be deemed acceptable and unacceptable by the Court. In drawing these comparisons, I provide original analysis on the anatomy of constitutional implications, with particular attention paid to, what I refer to as, 'implied structural limitations'.[66] These are implications derived to restrain government action threatening the structural integrity of the Australian constitutional system.[67]

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scholars to be viewed as holding similar views on the text and structure approach see: Chapter 3, n 84.

[62] See discussion in: Chapter 3(IV).

[63] See discussion in: Chapter 3(VII).

[64] *ACTV* (1992) 177 CLR 106, 135; Ibid.

[65] See discussion in: Chapter 3(VII).

[66] With regard to the High Court's conceptualisation of 'constitutional implications', see: Chapter 2(II)-(III). With regard to the Court's conceptualisation of 'implied structural limitations' more specifically, see: Chapters 3(VII) and 4(II).

[67] This includes implications such as the *Melbourne Corporation* and political communication limitations discussed in: Part I.

Thus, in assessing whether the ecological limitation may be derived from the Constitution, I primarily draw on the case law articulating the High Court's approach to deriving implications as well as drawing on the literature contextualising and critiquing this approach. In carrying out this assessment, I contribute to scholarship on constitutional implications in three ways. First, and most obviously, I explore the possibility of establishing a new implication, the ecological limitation. Second, I offer original insights on the operation of the text and structure approach. Finally, I provide analysis on the anatomy of constitutional implications, and implied structural limitations in particular.

B *Australian Constitutional Law and Nature*

An assessment of the doctrinal merits of the ecological limitation, however, does not only require consideration of how the Court derives implications. It also requires consideration of nature's place in Australian constitutional law. Case law on the relationship between nature and the Australian constitutional system is scarce. That which exists generally focuses on how the Commonwealth and States divide legislative and executive jurisdiction over Australian nature.[68] This became a significant point of contention from the 1970s onwards when the Commonwealth began to encroach on what was traditionally assumed to be State areas of governance over nature in cases such as *Commonwealth v Tasmania* ('*Tasmanian Dam Case*').[69] This case law does not have direct application to this thesis. It is

[68] For example see: *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1; *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*'); *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314.

[69] (1983) 158 CLR 1. While the Constitution's framers envisioned the States playing the primary role governing Australian nature, the Commonwealth has been largely successful in expanding its role in this regard over the last few decades: Simon Evans, 'Property and the Drafting of the Australian Constitution' (2001) 29 *Federal Law Review* 121, 125-127. This is due, in part, to the Commonwealth's fiscal dominance over the States providing them with leverage to influence States' environmental policies and implement their own: Peter Johnston, 'The Constitution and the Environment' in Peter Gerangelos and HP Lee (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 79, 98-100; Douglas Fisher, *Australian Environmental Law: Norms, Principles and Rules* (Thomson Reuters, 3rd ed, 2014) 110-113. This is also due, in part, to the High Court's generous interpretation of certain Commonwealth legislative powers: Johnston 90-94; Fisher 106-110. In the *Tasmanian Dam Case*, for example, the High Court opened up the constitutional possibilities for the Commonwealth to legislate and govern on matters of environmental protection through its broad interpretation of the external affairs power (Commonwealth laws may be made on environmental protection if they

taken for granted in case law that the Commonwealth and States collectively have virtually limitless legal domain over Australian nature under the Constitution. The focus is placed solely on *which* level of government is entitled to control *what* aspects or parts of Australian nature. The question of whether there is some implied restraint on their collective control of Australian nature for the sake of maintaining its (and, thereby, the Australian constitutional system's) structural integrity is not considered.

Literature on nature's place in Australian constitutional law generally reflects this trend in the case law. That is, scholars discussing the relationship between nature and the Australian constitution system also largely focus on the division of nature's governance between the Commonwealth and States.[70] Adam Webster's work regarding these federalist tensions is noteworthy for present purposes.[71] Webster considers how questions of the federal division of nature's governance might give rise to the establishment of two similar but distinguishable constitutional implications. These implications centre on the issue of transboundary river disputes – disputes 'over the sharing of the waters of rivers that flow through or form the boundary between two or more States'.[72] One of these implications is framed as an

sufficiently correlate with a treaty the Commonwealth has signed on the subject; the Constitution, s51(xxix)), corporations power (Commonwealth laws may regulate corporations' activities regarding their environmental impacts on certain conditions; the Constitution, s51(xx)) and the race power (Commonwealth laws may be made protecting environmental areas of historical, cultural and religious significance to Aboriginal and Torres Strait Islander people on certain conditions; the Constitution, s51(xxvi)).

[70] For works discussing this federal division regarding nature's governance in general terms see: James Crawford, 'The Constitution and the Environment' (1991) 13 *Sydney Law Review* 11; George Williams, 'Commonwealth Power and the Environment' (1991) 16 *Legal Service Bulletin* 217; James Crawford, 'The Constitution' in Tim Bonyhady (ed), *Environmental Protection and Legal Change* (Federation Press, 1992); Johnston, above n 69; Fisher, above n 69, 101-121; Richard Marlin, 'The External Affairs Power and Environmental Protection in Australia' (1996) 24 *Federal Law Review* 71; Sangeetha Pillai and George Williams, 'Commonwealth Power and Environmental Management: Constitutional Questions Revisited' (2015) 32 *Environmental and Planning Law Journal* 395. Works on more particular features regarding this federal division typically revolve around specific significant cases (for example: Geoff Fisher, 'External Affairs and Federalism in the Tasmanian Dam Case' (1985) 1 *Queensland Institute of Technology Law Journal* 157) or features of Australian nature (for example: Paul Kildea and George Williams, 'The Constitution and the Management of Water in Australia's Rivers' (2010) 32 *Sydney Law Review* 595).

[71] 'Sharing Water from Transboundary Rivers: Limits on State Power' (2016) 44 *Federal Law Review* 25; 'Sharing Water from Transboundary Rivers in Australia – An Interstate Common Law?' (2015) 39 *Melbourne University Law Review* 263. The ideas in these works first appeared in: *Defining Rights, Powers and Limits in Transboundary River Disputes: A Legal Analysis of the River Murray* (PhD thesis, University of Adelaide, 2014) 246-275.

[72] Webster, 'Limits on State Power', above n 71, 25.

extension of the *Melbourne Corporation* limitation that would restrain one or more States depriving another of water in certain transboundary river disputes for the sake of preserving the Constitution's federal underpinnings.[73] The other implication is framed around a proposed principle of 'equality between the States' that can be derived from the Constitution based, in part, on various provisions emphasising States' equality (such as s 7 which provides States equal representation in the Senate).[74] If this principle can be established, Webster suggests that it might effectively enable one State to restrain another that interferes with its access to transboundary river water.[75]

Webster's work shares similarities with the analysis that I conduct in the present thesis. In essence, Webster is asking whether an implied limitation may be derived to restrain an Australian government from misusing a feature of Australian nature (namely, river water) in a manner that threatens the structural integrity of a feature of the Australian constitutional system (namely, the Constitution's federal structure). In this sense, Webster is essentially suggesting a form of ecological limitation. Further, his methodology for deriving these proposed constitutional implications is similar to mine. He frames (parts of) the Australian constitutional system as dependent upon the maintenance of certain physical elements of Australian nature and, by applying the text and structure approach, articulates constitutional implications that might emerge as a result.

Despite these similarities, his work also differs from mine in substantial ways. Webster's formulation of these two implications is concerned only with maintaining States in the context of transboundary river disputes. My formulation of the ecological limitation is concerned with maintaining a broader range of features of the Australian constitutional system (if not the system in its entirety) in the context of a wider range of disputes regarding the burdening of Australia's habitability. Further, unlike Webster's formulation, my formulation of the ecological limitation is not an extension of an existing implied limitation (the *Melbourne Corporation* limitation) or based on an implied principle of 'equality

[73] Ibid 36-47.
[74] Webster, 'Interstate Common Law', above n 71, 298.
[75] Ibid 303.

between the States'.[76] The ecological limitation's formulation is a limitation derived in its own right, based on the fundamental need to preserve some standard of Australia's habitability for the ongoing maintenance of the Australian constitutional system for future generations. While Webster's works share similarities with this thesis, substantial differences exist between these works which mean that ultimately it has been (as a kindred work of doctrinal analysis and reformism) a source of inspiration rather than direct application to the questions underpinning the present inquiry.

Some literature on nature's place in Australian constitutional law does not focus on these federalist tensions. A notable example comes from the legal school of thought, 'Wild Law' (also known as 'Earth Jurisprudence').[77] Wild Law critically analyses the anthropocentric (human-centred) underpinnings of Western law and advocates for ecocentric (Earth-centred) models of law.[78] A key interest in Wild Law is considering what legal systems might look like if they were to recognise all (human and non-human) beings in the 'Earth Community' as having rights to exist, thrive and participate in this community.[79] A similar position was perhaps most famously put forward in an earlier source of inspiration to Wild Law scholars – Christopher Stone's 1972 article, 'Should Trees Have Standing? – Toward Legal Rights for Natural Objects' – on the possibility of granting legal rights to 'objects' in nature.[80]

Three Wild Law works focus on Australian constitutional law.[81] The authors of these works – Nicole Rogers and Aidan Ricketts – draw inspiration from feminist

[76] Ibid 298.
[77] For collections of Wild Law works see: Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011); Cormac Cullinan, *Wild Law* (Siber Ink, 2nd ed, 2011); Michelle Maloney and Peter Burdon (eds), *Wild Law - In Practice* (Routledge, 2014); Nicole Rogers and Michelle Maloney (eds), *Law as If Earth Really Mattered: The Wild Law Judgment Project* (Routledge, 2017).
[78] Michelle Maloney, 'Ecological Limits, Planetary Boundaries and Earth Jurisprudence' in Michelle Maloney and Peter Burdon (eds), *Wild Law - In Practice* (Routledge, 2014) 193, 196.
[79] Ibid 196; Thomas Berry, *The Great Work: Our Way into the Future* (Bell Tower, 1999) 80.
[80] 45 *Southern California Law Review* 450; Alessandro Pelizzon, 'Keeping the Fire: Impressions of Earth Jurisprudence' (2011) 14 *Southern Cross University Law Review* vii, vii; Michelle Maloney and Patricia Siemen, 'Responding to the Great Work: The Role of Earth Jurisprudence and Wild Law in the 21st Century' (2011) 5 *Environmental and Earth Law Journal* 6, 8.
[81] Nicole Rogers, 'Who's Afraid of the Founding Fathers? Retelling Constitutional Law Wildly' in Michelle Maloney and Peter Burdon (eds), *Wild Law - In Practice* (Routledge, 2014) 113; Nicole Rogers, 'Duck Rescuers and the Freedom to Protest: Levy v Victoria' in Nicole Rogers and Michelle Maloney (eds), *Law as if Earth Really Mattered: The Wild Law Judgment Project* (Routledge, 2017)

judgment retelling literature, in which scholars examine and rewrite judgments from a feminist perspective.[82] These Wild Law scholars, thus, examine and rewrite Australian constitutional law judgments from an ecocentric perspective. Rogers' reimagining of the decision in *Levy v Victoria* in 'Duck Rescuers and the Freedom to Protest: Levy v Victoria' is exemplary of these works.[83] In this case, the High Court held that a law forbidding animal rights activists from entering duck hunting sites for their own protection did not breach the political communication limitation. This is because, while the law hindered their freedom of communication about government and political matters, it was ultimately reasonably appropriate and adapted for a legitimate end – the activists' safety. Rogers, however, notes that environmental direct action is sometimes an expression of ecocentric ideology – one's life is worth risking to save members of other species' lives because they too have intrinsic value.[84] By upholding this law, the High Court was

> expressing quite different values, anthropocentric values which assume that human beings dominate nature and that human lives are more important than the lives of other species. In a wild retelling of the *Levy* case, the wellbeing and protection of other species would be as important as considerations of public safety in evaluating the validity of legislation which restricts the activities of animal rights activists.[85]

In this manner, these Wild Law scholars reveal the anthropocentric assumptions guiding the Court's interpretation of the Constitution.

These Wild Law works demonstrate how never before considered dimensions of the Constitution, and constitutional law judgments, can be brought to the fore by examining them from an ecologically-minded perspective. My work is similar in

339; Aidan Ricketts, 'Exploring Fundamental Legal Change through Adjacent Possibilities: The Newcrest Mining Case' in Nicole Rogers and Michelle Maloney (eds), *Law as if Earth Really Mattered: The Wild Law Judgment Project* (Routledge, 2017) 178.

[82] Nicole Rogers and Michelle Maloney, 'The Wild Law Judgment Project' in Nicole Rogers and Michelle Maloney (eds), *Law as If Earth Really Mattered: The Wild Law Judgment Project* (Routledge, 2017) 3, 3. For examples of feminist judgment retelling literature see: Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Bloomsbury, 2010); Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014).

[83] Above n 81; (1997) 189 CLR 579.

[84] Rogers, above n 81, 124.

[85] Ibid 124.

this regard, and this scholarship has been instructive in illustrating how such analysis can be undertaken. This thesis differs from these works, however, in the particular perspective employed.[86] While these Wild Law scholars draw upon an ecocentric perspective, I adopt a perspective in this thesis that can be understood as 'ecological' in a more basic sense. The fundamental premise that grounds ecology as a field of study is that living organisms (in this case, humans) should be understood as interrelating with, and not distinct from, the environment within which they exist.[87] This premise underpins the argument for deriving the ecological limitation. Namely, the Australian constitutional system, a system of humans, should also be understood as interrelating with, and not distinct from, the environment within which it exists.[88] It follows from this that this environment requires protection in order for the constitutional system situated within it to be protected as well. This ecological perspective does not rest on a belief in the intrinsic value of human and non-human life being comparable, as defines the ecocentric perspective adopted in this Wild Law literature. Indeed, the argument for the ecological limitation is inherently anthropocentric. The need to preserve a habitable site for humans (regardless of its habitability for other beings) is at the heart of this argument.[89] While an ecological understanding of the Australian constitutional system is needed to appreciate how the ecological limitation might be derived from the Constitution, this understanding is not ecocentric in character.

Another notable example of literature on nature's place in Australian constitutional law (that does not focus on federalist disputes) is found in two recent works suggesting that environmental protection provisions be added to the Constitution – Mary Good's *Legal Recognition of the Human Right to a Healthy Environment as*

[86] My thesis also differs from these works in the fact that I am looking prospectively at the way in which the Constitution may be interpreted in future judgments (in a manner that is harmonious with existing doctrine) to incorporate an ecologically-minded perspective. These Wild Law works are looking retrospectively at existing judgments and considering how they might have been decided differently if such a perspective was employed.

[87] Eugene Odum, *Fundamentals of Ecology* (WB Saunders Company, 3rd ed, 1971) 3.

[88] This may be contrasted with a more binary perspective deeply rooted in Western thought and practice that frames humans as distinct from, and superior to, nature: Bob Tostevin, *The Promethean Illusion: The Western Belief in Human Mastery of Nature* (McFarland, 2010); Clive Hamilton, *Requiem for a Species* (Allen and Unwin, 2010) 161-190. For discussion on the influence of this perspective in Western law see: Nicole Graham, *Lawscape* (Routledge, 2011); Peter Burdon, *Earth Jurisprudence: Private Property and the Environment* (Routledge, 2014).

[89] See discussion in: Chapter 4(I).

a Tool for Environmental Protection in Australia: Useful, Redundant, or Dangerous? and Daniel Goldsworthy's 'Re-Stumping Australia's Constitution: A Case for Environmental Recognition'.[90] Good considers whether a 'right to a healthy environment' should be entrenched in the Constitution via referendum. This is a right that exists in the constitutions of most nations, as will be discussed further in Part III.[91] Australia is one of only fifteen nations without such a right recognised in its constitution.[92] Good considers the various forms that this right might take. It could, for instance, be framed 'positively' to demand Australian governments implement certain legislative and executive environmental protections or 'negatively' as a restraint on Australian governments if they take legislative or executive action that goes 'too far' in damaging the environment.[93] She also considers the various ways in which it could be entrenched as part of a broader bill of rights, for instance, or within an existing chapter in the Constitution.[94]

Goldsworthy writes more abstractly about the kind of environmental protection provisions he proposes be implemented in the Constitution. He considers a range of anthropocentric and ecocentric visions of an amended Australian constitution gleaned from literature and other nations' approaches to constitutional forms of environmental protection.[95] While Good and Goldsworthy proclaim the benefits of entrenching environmental protection provisions into the Constitution, both acknowledge that altering the Constitution via referendum to entrench such protection would be extremely difficult in practice.[96] This is due to the particulars of the referendum process, historical reluctance to include explicit rights in the Constitution and, perhaps, a bias against implementation of an environmental right specifically.[97]

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[90] Mary Emily Good, *Legal Recognition of the Human Right to a Healthy Environment as a Tool for Environmental Protection in Australia: Useful, Redundant, or Dangerous?* (PhD, University of Tasmania, 2016); Daniel Goldsworthy, 'Re-Stumping Australia's Constitution: A Case for Environmental Recognition' (2017) *Australian Journal of Environmental Law* 53.
[91] Good, above n 90, 88.
[92] Ibid 88; David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press, 2012) 48.
[93] Good, above n 90, 181-198.
[94] Ibid 183-198.
[95] Goldsworthy, above n 90.
[96] Good, above n 90, 219-220; Ibid 65-66.
[97] Goldsworthy focuses on the difficulties with the referendum process: above n 90, 219-20. Good considers the latter two concerns: above 90, 66.

Good's and Goldsworthy's work share common ground with my own in some respects. Both of these scholars address the ways in which judicially enforced environmental protection provisions might be viewed as an 'odd fit' for the Constitution. Namely, the Constitution is generally silent on environmental matters and, as Good examines in particular, such provisions might invite a fear of 'judicial activism'.[98] Further, the emerging challenge of climate change (and other ecological challenges) is what compels both Good and Goldsworthy to evaluate Australia's constitutional arrangements for nature's governance. In this thesis, arguing as I do that there is a basis for deriving the ecological limitation, I also must consider how the concept of environmental protection 'fits' with the Constitution and address concerns regarding 'judicial activism' that the establishment of this limitation might invite.[99] I do so in the interests of reckoning with how Australian constitutional law might develop in response to the emerging challenge of climate change.

Despite this shared ground, this thesis and these works are substantially different. Good and Goldsworthy are considering whether the text of the Constitution should be directly altered. I am considering whether the High Court might be able to derive an implication from the Constitution as it currently exists. Good and Goldsworthy consider a range of visions of environmental protection that may be transplanted into the Constitution. I only consider a vision of environmental protection that might have the potential of being drawn from the Constitution in its present form. While there is little mention of implied constitutional protection of the environment in Good's or Goldsworthy's work (Good briefly mentions the possibility of implying a 'right to a healthy environment' in the Constitution but dismisses the idea without significant analysis), this thesis explores this possibility in depth.[100]

[98] Good, above n 90, 178-223 (for discussion on 'judicial activism', in particular, see: 187-193, 218-219); Goldsworthy, above n 90, 63-68.
[99] See discussion in: Chapter 5(II).
[100] Good notes that the political communication limitation 'can be justified as a necessary implication from the text of the Constitution (primarily ss 7 and 24)' but that '[i]t is difficult to see how a human right to a healthy environment could be similarly implied from the text of the document. The High Court has not recognised any implied economic, social and cultural rights, and it is unlikely that it could or would do so in the future': above n 90, 181-223.

Overall, the literature on nature's place in Australian constitutional law is modest. This thesis has not only been informed by this literature but can be understood as a contribution to it. In this thesis, I examine the fundamental role played by Australia's habitability in the ongoing maintenance of the Australian constitutional system. This serves as the foundation for the possible establishment of the ecological limitation. No other scholarly works exist considering the importance of the life-supporting properties of the Australian ecosystem to the continuation of the Australian constitutional system, let alone the establishment of a constitutional implication to help protect these interrelated systems. The closest work of literature to this thesis is that of Webster. As discussed above, however, the implications he proposes are distinguishable from mine in their focus (transboundary river disputes) and underlying rationale (an extension of the *Melbourne Corporation* limitation or, alternatively, an implied principle of 'equality between the States'). This thesis, therefore, is a unique work in Australian constitutional jurisprudence with regard to scholarship on constitutional implications as well as scholarship on the role of nature in the Australian constitutional system. In the next Part, I explore the contribution to knowledge made by this thesis with regard to climate litigation as well as the insights gained from case law and literature in this field for the purposes of my work.

III CLIMATE LITIGATION AND THE ECOLOGICAL LIMITATION

Across the globe, courts are adjudicating matters involving climate change's causes and impacts in growing numbers.[101] This category of cases is known as climate litigation.[102] Climate litigation is an area of litigation that includes relatively straightforward matters regarding the enforcing of legislation explicitly designed for the mitigation of, or adaptation to, climate change.[103] It also includes matters involving litigants thinking creatively with regard to how pre-existing laws and legal principles may be applied to the new circumstances climate change creates.[104] In *Urgenda Foundation v The State of the Netherlands* ('*Urgenda*'), a prominent example, the Hague District Court held that the Dutch Government has a duty of care to its citizens to strengthen their greenhouse gas emission reduction commitments.[105] This is the first case in which the tort of negligence has been successfully applied to a national government for inadequately mitigating climate change.[106] This thesis, while a work of scholarship, relates to this latter form of climate litigation. It examines how an existing area of law – Australian constitutional law – may develop so as to apply to the new circumstances climate change creates.

Other nations' constitutions have figured in climate litigation matters internationally. According to David Boyd, a majority of the world's national

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[101] United Nations Environment Programme, 'The Status of Climate Change Litigation - A Global Review' (United Nations Environment Programme, May 2017) 4.
[102] David Markell and JB Ruhl, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual' (2012) 64 *Florida Law Review* 15. Also see: Meredith Wilensky, 'Climate Change in the Courts: An Assessment of Non-US Climate Litigation' (2015) 26 *Duke Environmental Law & Policy Forum* 131, 134; Ibid 8, 40; Jacqueline Peel and Hari Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015) 1, 339-340; Justice Brian Preston, 'The Influence of Climate Change Litigation on Governments and the Private Sector' (2011) 2 *Climate Law* 485, 485.
[103] United Nations Environment Programme, above n 101, 5.
[104] Ibid 5.
[105] Hague District Court, ECLI:NL:RBDHA:2015:7196, C/09/456689/HA ZA 13-1396, 24 June 2015 ('*Urgenda*').
[106] Jolene Lin, 'The First Successful Climate Negligence Case: A Comment on Urgenda Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment)' (2015) 5 *Climate Law* 65, 66.

constitutions (147 out of 193) include explicit provisions referencing environmental rights or responsibilities.[107] Boyd places these provisions in five categories: those that place a duty on governments to protect the environment;[108] place a duty on individuals to protect the environment;[109] provide individuals with the right to a healthy environment;[110] provide individuals with procedural rights (such as the right to information or the ability to contribute to government decision-making on questions of environmental protection);[111] and a 'catch-all' category of provisions that do not neatly fall into the others (such as provisions on environmental issues of particular concern to the relevant nation, for instance, several Oceanic nations' constitutional prohibitions on nuclear testing).[112]

Climate litigation has been pursued, and some has succeeded, based on such explicit constitutional provisions across these various categories.[113] In Colombia, for example, the Constitutional Court struck down two laws that threatened the nations'

[107] *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (UBC Press, 2012) 68. Climate change is explicitly referenced in three nations' constitutions – Ecuador (*Constitution of the Republic of Ecuador* art 414), Tunisia (*Tunisian Constitution of 2014* art 45) and the Dominican Republic (*Constitution of the Dominican Republic* art 194).
[108] Boyd, *Right to a Healthy Environment*, above n 107, 73-74.
[109] Ibid 80.
[110] Ibid 74-78.
[111] Ibid 78-79.
[112] Ibid 80-83.
[113] For an example of climate litigation regarding a duty on government to protect the environment see: *Mbabazi and Others v Attorney General and National Environmental Management Authority*, High Court at Kampala, Civil Suit No 283 of 2012, 2012. The court considered whether the Ugandan government had breached its duty to protect environmental areas held 'in trust' under art 237 of the *Constitution of Uganda* by not sufficiently addressing climate change. The matter was ultimately referred to mediation. For an example of climate litigation regarding a duty on individuals to protect the environment see: *Vimal Bhai v Ministry of Environment and Forests*, National Green Tribunal, Appeal No 5 of 2011, 14 December 2011. The tribunal held that the appellants had standing in this climate litigation matter, in part, because of every citizen's fundamental duty to protect the environment in art 51A(g) of the *Constitution of India*. For an example of climate litigation regarding individuals' procedural rights see: *Environment-People-Law v Cabinet of Ministers of Ukraine and National Agency of Environmental Investments*, Lviv Circuit Administrative Court, 2009. The court ordered the Ukrainian government to release information on a carbon trading deal with Japan, in part, due to art 50 of the *Constitution of Ukraine* which gives individuals a right to government information relating to environmental matters. For an example of climate litigation regarding individuals' right to a health environment see: *Greenpeace Norway v Government of Norway*, Oslo District Court, 16-166674TVI-OTIR/06, 4 January 2018. The court held that the Norwegian government's issuing of certain oil and gas extraction licenses did not breach the right to a healthy environment enshrined in art 112 of the *Constitution of the Kingdom of Norway*. For an example of climate litigation regarding provisions Boyd places in the 'catch-all' category (in this instance, the right to clean water) see *Sentencia C-035 de 2016*, Constitutional Court of Colombia, 8 February 2016 ('*Sentencia*') discussed in text.

páramos.[114] The court held that these alpine tundra ecosystems are fragile, provide Colombia with as much as 70 percent of its drinking water and particularly highlighted their role as a carbon sink, storing more carbon than a similarly sized tropical rainforest.[115] The court's decision was, in part, based on breaching the public's constitutional right to clean water and the government's constitutional obligations to justify decisions that degrade environmentally sensitive and valuable areas. As the United Nations Environment Programme notes, '[t]he court framed its protection of rights in this decision as responsive to climatic changes that would make resources like the water flowing from *páramos* even more valuable in the future.'[116] Its decision resulted in the revocation of hundreds of mining licenses for projects in the *páramos*.[117]

The courts in at least 20 nations, including nations as diverse as Greece, India, Malaysia, Kenya and Argentina, have found environmental protections *implied* in their constitutions.[118] The typical rationale for deriving these constitutional implications is that a right to a healthy environment may be considered a fundamental component of a right or rights made explicit in these constitutions, such as the right to life or right to health.[119] Some of these constitutional implications have been utilised in climate-specific matters. In Pakistan, for example, the High Court of Lahore held that the Pakistani government's failure to implement its climate policies violated citizens' constitutional rights.[120] The court concluded:

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[114] *Sentencia*, Constitutional Court of Colombia, 8 February 2016. *Law No. 1450 of 2011* authorised the Commission on Intersectoral Infrastructure and Strategic Projects to class specific projects as exempt from particular local regulation. *Law No. 1753 of 2015* prohibited particular activities in the *páramos*, such as mining, unless authorised prior to certain dates: Grantham Research Institute on Climate Change and the Environment, *Decision C-035/16 of February 8, 2016* <lse.ac.uk/GranthamInstitute/litigation/decision-c-03516-of-february-8-2016>.

[115] United Nations Environment Programme, above n 101, 19. Carbon sinks are reservoirs, such as oceans and forests, which absorb and release carbon where 'the amount absorbed is greater than the amount released': Steffen and Hughes, above n 19, 88.

[116] Above n 101, 19.

[117] Iván Dario Vargas Roncancio, 'Plants and the Law: Vegetal Ontologies and the Rights of Nature, a Perspective from Latin America' (2017) 43 *Australian Feminist Law Journal* 67, 76.

[118] Boyd, *Right to a Healthy Environment*, above n 107, 86-88.

[119] Ibid 86-88.

[120] *Ashgar Leghari v The Federation of Pakistan*, High Court of Lahore, WP No 25501/2015, 4 September 2015 ('*Ashgar Leghari*'); United Nations Environment Programme, above n 101, 16.

> Right to life, right to human dignity, right to property and right to information under articles 9, 14, 23 and 19A of the Constitution read with the constitutional values of political, economic and social justice provide the necessary judicial toolkit to address and monitor the Government's response to climate change.[121]

The court used this 'judicial toolkit' to establish a Climate Change Commission to oversee the implementation of the government's climate policies.[122]

Constitutional law has also figured in climate litigation in a 'hybrid' manner.[123] In *Urgenda,* most notably, the court drew on the Dutch government's environmental protection obligations in constitutional law to help establish the government's 'duty of care' to take climate action in tort law.[124] Similar reasoning has been, and is currently being, pursued in climate litigation matters in other jurisdictions.[125] Constitutional law also arises in some climate litigation matters regarding governments' need to take care of natural resources they hold 'in trust' with regard to the public trust doctrine.[126] This is a traditional common law doctrine that frames the Crown or State as holding various natural resources 'in trust' for the benefit and use of the public now and into the future.[127] At the time of writing, the plaintiffs in *Kelsey Cascade Rose Juliana v The United States of America* are in the process of arguing that the public trust doctrine has an implied place in the United States constitution that effectively puts limits on the Federal government's ability to worsen climate change.[128] Constitutional law, therefore, can sometimes be found operating in tandem with other areas of law in climate litigation matters.

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[121] *Ashgar Leghari*, High Court of Lahore, WP No 25501/2015, 4 September 2015, [7]; Justice Rachel Pepper, 'Climate Change Litigation: A Comparison between Current Australian and International Jurisprudence' (2017) 13 *Judicial Review* 329, 338-339.
[122] United Nations Environment Programme, above n 101, 16.
[123] Ibid 38-39.
[124] Specifically, the court references art 21 of the *Constitution of the Kingdom of the Netherlands 2008* which states: 'It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment'.
[125] United Nations Environment Programme, above n 101, 39; Josephine van Zeben, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?' (2015) 4 *Transnational Environmental Law* 339. For examples of such litigation see: *PUSH Sweden, Nature and Youth Sweden et al v Government of Sweden*, Stockholm District Court, 2017; *VZW Klimatzaak v Kingdom of Belgium*, Court of First Instance, 2015.
[126] United Nations Environment Programme, above n 101, 39.
[127] Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 9th ed, 2016) 52-53.
[128] 6:15-cv-1517-TC (Oregon, 2016).

Thus, a trend can be detected across the globe in the field of constitutional law. In the Netherlands, Colombia, Pakistan, the United States and a myriad of other nations, people have been seeking answers from their courts on what is implied or expressed within their respective constitutions that may be of assistance in addressing climate change's causes and impacts. Most often, they have been seeking answers on what these documents that define and restrain government power stipulate with regard to governments using their power to worsen climate change.[129] Such an inquiry is yet to be made in an Australian court regarding Australia's constitution. This thesis considers the potential for making such an inquiry domestically, at least with regard to the question of what may be implied in the Constitution regarding restraints on Australian government action contributing to climate change.

While these developments in constitutional law across the globe have served as broad inspiration for this thesis, the reasoning underpinning the ecological limitation's potential establishment differs from the reasoning employed to establish constitutional implications on environmental protection in other nations.[130] The latter implications were drawn primarily from provisions on individual rights. The Australian constitution is largely bereft of provisions on such rights.[131] As can be seen in Part I and will be discussed in more depth in Chapter 4, the argument for establishing the ecological limitation is drawn from the Constitution's 'structure' and centres on preserving the integrity of the institutions that compose the Australian constitutional system.[132] Any personal benefits gained by individuals from the ecological limitation would be incidental.[133] Ultimately, the reasoning underpinning the derivation of implied environmental protections in a nation's constitution depends on the particular content of that constitution (if deriving such an implication is possible at all). In this thesis, my focus is on the

[129] While government bodies 'are almost always the defendants in climate change cases' and this is particularly the case in constitutional law matters, this is not to discount instances where other entities or individuals are the subject of climate litigation: United Nations Environment Programme, above n 101, 14. According to the United Nations Environment Programme, corporations in the fossil fuel industry are the most likely defendants in climate litigation matters after governments: 14.
[130] See discussion in: Chapter 4(II).
[131] See discussion in: Chapter 4(II) and (IV)(B)(1).
[132] See discussion in: Chapter 4(II).
[133] See discussion in: Chapter 4(IV)(B)(1).

particulars of Australian constitutional jurisprudence in order to determine the viability of establishing the ecological limitation.

Beyond its contribution to scholarship on Australian constitutional law discussed in Part II, this thesis also contributes to climate litigation literature. It is an examination of a potential area of development for case law regarding climate change's causes and impacts. Such works are not unusual in climate litigation scholarship. As an emerging area of litigation and one covering a subject which touches on so many areas of life (and potentially, therefore, so many areas of law), various scholars are engaged in the question of examining what might be 'new ground' for development in climate litigation case law. Tim Baxter, for example, examines the potential for pursuing litigation in Australia centred on an *Urgenda*-style tort law argument.[134] Bruce Thom, for another example, examines the potential for pursuing litigation centred on the public trust doctrine.[135] Thom considers whether coastal areas could be deemed natural resources held 'in trust' in Australia thereby obligating Australian governments to take bolder action protecting them from rising sea levels and extreme weather events brought about by climate change.[136] This thesis is akin to these works in climate litigation scholarship, assessing what areas of law may or may not be fertile ground for climate litigation matters in the future.

In adding to the literature on climate litigation, this thesis also draws upon it. Specifically, it is informed by scholarship tracing how judges in various jurisdictions have approached issues that commonly arise in climate litigation matters. One such issue involves the question of causality. A common obstacle in climate litigation matters is drawing a causal link between government approval of a particular fossil fuel project, such as a coal mine or coal-powered plant, and particular climate change impacts, such as rising sea-levels or rising

[134] 'Urgenda-Style Climate Litigation Has Promise in Australia' (2017) 32 *Australian Environment Review* 70.
[135] 'Climate Change, Coastal Hazards and the Public Trust Doctrine' (2012) 8 *Macquarie Journal of International and Comparative Environmental Law* 21.
[136] For further discussion on how climate litigation might develop in the future in Australia see: Justice Brian Preston, 'Mapping Climate Change Litigation' (2018) 92 *Australian Law Journal* 774; Jacqueline Peel, Hari Osofsky and Anita Foerster, 'Shaping the 'Next Generation' of Climate Change Litigation in Australia' (2018) 41 *Melbourne University Law Review* 793.

temperatures.[137] Various scholars examine how courts have approached this issue and what arguments on causality have been successful and unsuccessful.[138] Another issue that commonly arises in climate litigation matters relates to the question of justiciability.[139] Scholars have tracked judges' responses to concerns that it might be inappropriate for them to engage in the political decision-making that matters involving climate mitigation and adaptation invite.[140] This literature on how judges have dealt with these issues, in Australia and elsewhere, provides guidance on how judges might deal with such issues in the context of the ecological limitation. It is of particular utility in Chapter 6, where I consider a hypothetical ecological limitation matter. In that chapter, I examine whether Queensland government approval of a coal mine, the Carmichael mine, might be considered in breach of this proposed limitation. My analysis in this chapter, as will be seen, is aided by reference to this climate litigation scholarship and the case law it discusses.

The utility of this scholarship and case law, however, must be qualified. None of the climate litigation matters discussed in this thesis are based in Australian constitutional law. They are either not Australian, unrelated to constitutional law, or both. This means that judges' approaches to climate-related issues in these matters cannot be assumed to align with how judges would approach the question of whether the ecological limitation may be established in Australian constitutional

[137] For example see: *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* (2006) 232 ALR 510; *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48 ('*Adani*'); *WildEarth Guardians and Sierra Club v United States Bureau of Land Management*, 870 F 3d 1222 (10th Cir, 2017). See discussion in: Chapter 6(III)(B)(3)-(5).

[138] For example see: Kane Bennett, 'Australian Climate Change Litigation: Assessing the Impact of Carbon Emissions' (2016) 33 *Environmental and Planning Law Journal* 538; Lesley McAllister, 'Litigating Climate Change at the Coal Mine' in William Burns and Hari Osofsky (eds), *Adjudicating Climate Change: State, National, and International Approaches* (Cambridge University Press, 2009) 48; Justine Bell-James and Sean Ryan, 'Climate Change Litigation in Queensland: A Case Study in Incrementalism' (2016) 33 *Environmental and Planning Law Journal* 515; Anna Rose, '*Gray v Minister for Planning*: Rising Tide of Climate Change Litigation in Australia' (2007) 29 *Sydney Law Review* 725.

[139] For example see: *Connecticut v American Electric Power Co*, 406 F Supp 2d 265 (SD NY, 2005); *Urgenda,* Hague District Court, ECLI:NL:RBDHA:2015:7196, C/09/456689/HA ZA 13-1396, 24 June 2015; *Kelsey Cascade Rose Juliana v The United States of America*, 217 F Supp 3d 1224 (D Or, 2016).

[140] For example see: Peel, above n 17, 23-24; Michael Gerrard and Gregory Wannier, 'United States of America' in Richard Lord et al (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2012) 556; United Nations Environment Programme, above n 101, 27-30; Robert Weaver and Douglas Kysar, 'Courting Disaster: Climate Change and the Adjudication of Catastrophe' (2017) 93 *Notre Dame Law Review* 295.

law. Caution must be taken, therefore, to appreciate the specific legal contexts within which judges are approaching these issues.[141] One may have more licence to draw comparisons where the issue in question is primarily fact-based (and thus, relatively detached from the specific legal paradigm within which the issue is being assessed).[142] Determining whether a causal link exists between the greenhouse gas emissions attributable to a coal mine and particular climate change impacts is one such fact-based issue.[143] One may have to exercise more caution, however, where the issue in question is more directly rooted in the specific legal paradigm at play. Determining whether the judiciary is the appropriate institution for dealing with the 'political' questions that climate change raises, for instance, depends on the particular relationship between the judiciary and other branches of power in the jurisdiction at hand. While climate litigation scholarship illuminates the issues that often arise in climate litigation matters and the arguments that have proven persuasive to judges in resolving these issues, care must be taken in transplanting these insights into the distinct realm of Australian constitutional jurisprudence.

The developments in climate litigation discussed above help to contextualise this thesis. Around the world, established doctrine in constitutional law (and other areas of law) is evolving in response to the emerging challenges posed by climate change. In this thesis, I explore how domestic constitutional law might evolve in this regard by considering the potential for deriving the ecological limitation. This means that the present thesis is not only a contribution to scholarship on implications and the role of nature in the Australian constitutional system, as discussed in Part II. It is also a contribution to climate litigation scholarship examining what may or may not be a potential area of development in future climate litigation matters. Further, just

[141] Mark Van Hoecke, 'Methodology of Comparative Legal Research' [2015] (December) *Law and Method* 1, 16-18.
[142] This is at least justifiable in the context of a functionalist comparative law method. From this perspective, the common ground that makes comparisons between differing legal systems possible and appropriate is that both share the same 'factual world' and are addressing materially similar factual problems: CJW Baaij, *Legal Integration and Language Diversity: The Case for Source-Oriented EU Translation* (Oxford University Press, 2018) 184; Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Oxford University Press, 1998) 32-45. For critique of the functionalist comparative law method and discussion of alternative methods see: Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 340; Ibid.
[143] For discussion on the difficulties drawing such causal links in Australian constitutional law see: Chapter 4(III)(B) and Chapter 6(III)(B)(3)-(5).

as this thesis draws upon the relevant case law and literature in Australian constitutional jurisprudence, so too is it enriched by the case law and literature that has emerged from the climate litigation movement. In these ways, this thesis operates as both a product of, and contribution to, climate litigation and constitutional law discourse.

IV CONCLUDING REMARKS AND THESIS OUTLINE

In this thesis, I consider whether an implication restraining Commonwealth and State government action burdening Australia's habitability may be derived from the Constitution. This proposed implication is the ecological limitation. Establishing this implication might, on its face, seem a radical proposition. This is not necessarily determinative of how it will ultimately be received. While newly proposed implications have often been met with strong opposition from various judges and scholars, many of these implications have nevertheless become fixtures of Australian constitutional law.[144] While climate litigation is still a new area of litigation, practitioners in this field have already garnered substantial successes as seen in Part III.[145] As one anonymous Australian lawyer interviewed by Jacqueline Peel and Hari Osofsky in *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* states:

> I take a long-term view [of] climate litigation. I really think we are like lawyers in Alabama in 1950 fighting for black civil rights or … lawyers at the early stages of cigarette and asbestos litigation, trying to establish a causal link between cigarettes and lung cancer. And, you know, you get looked at like you've got two heads and you're green by the courts to start with and you get lots of bad decisions. But the

[144] The questions of legitimacy that often greet the establishment of constitutional implications in Australian constitutional law generally stem from the fact that these implications, by definition, are not explicitly mentioned in the Constitution. This invites concerns regarding how much they are the product of judicial creativity rather than 'truly' derived from the Constitution as written. See discussion in: Part II(A) and Chapter 2(IV); Kirk, 'Implications I', above n 49, 649-654.

[145] This, of course, is not to underestimate the difficulties and lack of success climate litigants have had in various climate litigation matters in and outside of Australia. For discussion on common barriers to success in climate litigation see: Peel and Osofsky, *Climate Change Litigation*, above n 102, 266-309.

> issues are so enormous and the science is so strong; it's not like the problem is going away.[146]

Even Wild Law scholars have seen some of their most radical ideas gain traction. Their successes can be seen scattered across the globe, such as the legal personhood given to 'natural objects' such as rivers in New Zealand, Colombia and India and the rights of nature enshrined in the constitutions of Bolivia and Ecuador and 150 local ordinances in the United States.[147] The concept of 'natural objects' having legal rights seemed an oddity when Stone proposed it in 1972.[148] Such an oddity is now a reality.

Ultimately, the perception of the ecological limitation on first appearance matters less than the substantive merits of the doctrinal arguments for and against its establishment. An exploration of these arguments is the focus of this thesis. This exploration is timely, if not overdue. Climate change raises questions that profoundly challenge the foundational values, beliefs and assumptions underpinning almost all disciplines and areas of life. Economists in growing numbers are questioning their discipline's foundational dedication to infinite economic growth now that the finite nature of this warming planet's resources is firmly in view.[149] Theologians in growing numbers are questioning Western religions' foundational belief that God gifted nature to humans to dominate now

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[146] Ibid 1.

[147] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 14; *Center for Social Justice Studies v Presidency of the Republic Judgment*, T-622/2016, Constitutional Court of Colombia, 10 November 2016; *Salim v State of Uttarakhand* (2017) PIL No 126/2014 (High Court of Uttarakhand); *Miglani* v *State of Uttarakhand* (2017) PIL No 140/2015 (High Court of Uttarakhand); *Constitution of the Republic of Ecuador* art 414; *Constitution of the Plurinational State of Bolivia 2009* art 108.16 (also see the *Framework Law of Mother Earth and Integral Development for Living Well 2012* (Bolivia)). For examples of local ordinances on the rights of nature in the United States see: *Home Rule Charter of the City of Pittsburgh, Pennsylvania*, § 618.03(b); *Santa Monica Municipal Code*, § 12.02.030(b). See discussion in: Michelle Maloney, 'What Does the Global Earth Laws Movement Mean for Australian Law?' (2015) 30 *Australian Environment Review* 115, 115-116; Alexandre Lillo, 'Is Water Simply a Flow: Exploring an Alternative Mindset for Recognizing Water as a Legal Person' (2018) 19 *Vermont Journal of Environmental Law* 164; Paola Villiavicencio Calzadilla, 'A Paradigm Shift in Courts' View on Nature: The Atrato River and Amazon Basin Cases in Colombia' (2019) 15 *Law, Environment and Development Journal* 1.

[148] Above n 80. See discussion in: Part II(B).

[149] For example see: Tim Jackson, *Prosperity without Growth? The Transition to a Sustainable Economy* (Earthscan, 2009); Giorgos Kallis, Christian Kerschner and Joan Martinez-Alier, 'The Economics of Degrowth' (2012) 84 *Ecological Economics* 172; Samuel Alexander, 'Degrowth and the Carbon Budget: Powerdown Strategies for Climate Stability' (Simplicity Institute, 2014).

that this domination seems to be wreaking such decay.[150] It seems appropriate that the Australian legal community consider what questions climate change poses for Australia's foundational legal document – not least of all because it threatens the document itself.

The structure of the remainder of this thesis is as follows. In Chapter 2, I define a 'constitutional implication', based on the High Court's usage of the term (and its derivatives) in case law and aided by literature on constitutional implications. In the process, I discuss the difficulties in defining the term and the ways in which a judge's chosen interpretive method, such as intentionalism and progressivism, frames how constitutional implications are understood. I then outline the High Court's approach to deriving implications: the text and structure approach. This requires an exploration of the debates surrounding the establishment of the political communication limitation during the 1990s, which led to the articulation of this approach in *Lange*.[151]

In Chapter 3, I provide a detailed critique of the text and structure approach and my methodology for assessing the doctrinal arguments for and against deriving the ecological limitation. The fundamental problem with the text and structure approach, as noted in Part II, is that it provides insufficient guidance for determining the doctrinal merits of a proposed implication. This is due, in part, to the fact that it does little to restrain judges' choice of interpretive method, which fundamentally shapes both their vision of constitutional implications and the 'text' and 'structure' from which these implications are to be derived. The lack of guidance provided by the text and structure approach is also due, in part, to the fact that it does little to restrain judges' choice of 'external' sources when considering a proposed implication's viability. While good reasons exist for not restraining judges' choices

[150] For example see: Michael Himes and Kenneth Himes, 'The Sacrament of Creation: Toward an Environmental Theology' (1990) 117 *Commonweal* 42; Michael Northcott and Peter Scott, *Systematic Theology and Climate Change: Ecumenical Perspectives* (Routledge, 2014); Christopher Hrynkow, 'Greening God? Christian Ecotheology, Environmental Justice, and Socio-Ecological Flourishing' (2017) 10 *Environmental Justice* 81.
[151] *Lange* (1997) 189 CLR 520, 566-567.

of interpretive method or 'external' sources when deriving implications, the end result is that different judges can come to vastly different conclusions on a proposed implication's legitimacy while claiming adherence to the text and structure approach. This chapter concludes with a discussion of my methodology for determining the doctrinal merits of the ecological limitation in light of the insufficient guidance provided by this interpretive approach.

In Chapter 4, I follow the methodology laid out in the previous chapter and provide the overarching argument for the derivation of the ecological limitation. As summarised in Part I, the argument for deriving this limitation stems from the need to preserve the structural integrity of the Australian constitutional system. Commonwealth and State government action burdening Australia's habitability that can be causally linked with threatening this structural integrity may be considered impliedly prohibited by the Constitution. The ecological limitation would be the manifestation of this implied prohibition. In order to refine the ecological limitation to a form in which it can be applied, I propose that the ecological limitation be framed similarly to the political communication limitation via the concept of proportionality.

While Chapter 4 provides the essential argument for deriving the ecological limitation, Chapter 5 examines the arguments against its derivation that might be raised in response. The first of these arguments centres on the grounds that ecological limitation matters would invite judges to engage in a substantial amount of political decision-making. Such decision-making may be deemed to be beyond the judiciary's skills, resources and democratic mandate and so should be avoided. The second argument comes from an intentionalist perspective. One may argue that the ecological limitation should not be established because it conflicts with the framers' intentions. Following critical assessment of these arguments, I ultimately conclude that the case for deriving the ecological limitation can withstand them.

In Chapter 6, I apply the ecological limitation (as formulated in Chapter 4) to a hypothetical matter based on a real occurrence. This 'test case' centres on whether government approval of a specific coal mine in Queensland breaches the ecological

limitation. This is the Carmichael mine being pursued by Adani Mining Pty Ltd ('Adani'). The Queensland and Commonwealth government approvals granted to Adani allow for a coal mine to be built that would be the biggest in Australia and one of the biggest in the world, expected to produce 2.3 billion tonnes of coal over its 60 year lifetime.[152] The climate impacts of these emissions are the focus of this test case. The primary aim of this exercise is to give the reader a detailed understanding of what the application of the ecological limitation might look like in practice. This helps shed light on issues pertaining to the derivation of this implication. It provides a nuanced examination of how government action can be viewed as burdening Australia's habitability and how it may be causally linked to the compromising of the structural integrity of the Australian constitutional system. It also provides insights on the political decision-making required by judges in an ecological limitation matter. This informs discussion on the first argument against deriving the limitation, raised in Chapter 5.

I conclude this thesis in Chapter 7 by, first, summarising the contributions made by this work in the fields of Australian constitutional law and climate litigation scholarship. While these contributions are doctrinal in nature, I venture into discussion beyond doctrine in the remainder of this chapter to explore the possible place of the ecological limitation in future scholarship and litigation. I outline areas of inquiry, both doctrinal and non-doctrinal, that would offer further insights on the potential for deriving and applying this limitation. I also consider the confluence of (social, political, ecological and other) factors that might compel a litigant to take the doctrinal argument for establishing the ecological limitation crafted in this thesis to the courtroom.

[152] Cameron Amos and Tom Swann, 'Carmichael in Context: Quantifying Australia's Threat to Climate Action' (Australia Institute, 2015) i; *Adani* [2015] QLC 48, [2]. For details on the various Queensland and Commonwealth government approvals granted to Adani see: Chapter 6(II). While these approvals are for a mine the size of that described above, at the time of writing, the precise size of the mine Adani plans to construct is a matter of contention: Chapter 6(I).

CHAPTER 2: THE TEXT AND STRUCTURE APPROACH

I INTRODUCTION

In this chapter and the next, I examine how the High Court defines and establishes constitutional implications. This lays the foundation for the discussion in the remainder of this thesis on the potential establishment of the ecological limitation. With regard to defining constitutional implications, I begin this chapter by developing the following definition: a 'constitutional implication' is an idea conveyed indirectly by the Constitution's words that identifies a feature (or collection of features) of the Australian constitutional system. This definition is unavoidably broad due, in part, to the High Court's diverse usage of the term 'constitutional implication' (and derivatives of this term, such as reference to what is 'implied from the Constitution').[1] Any definition capturing its doctrinal meaning, therefore, must accommodate this diverse usage. While this definition is broad, it provides clarity on the use of the term 'constitutional implication' (and its derivatives) employed throughout this thesis. As will be seen in Chapter 3, this deconstruction of the concept of a 'constitutional implication' also helps me articulate the operation of the High Court's approach to deriving implications, the text and structure approach.[2]

Before the text and structure approach is examined in Chapter 3, this chapter explains its development in Australian constitutional law. The approach demands that implications only be drawn from the Constitution's text (its words) and structure (the arrangement of its provisions and chapters as well as the foundational principles underpinning the Constitution, such as federalism and separation of

[1] For example see: *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 146 ('*Theophanous*'); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 260; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 274. For discussion on the other reasons why this definition is broad see: Part II.

[2] See discussion in: Chapter 3(II).

powers). Following intense curial and extra-curial debate on the proper means of deriving implications in the 1990s, the High Court unanimously endorsed this approach in *Lange v Australian Broadcasting Corporation* ('*Lange*').[3] This debate was sparked by the High Court's establishment of the political communication limitation and consideration of other 'representative democracy' implications during this period. While the Court embraced the text and structure approach to explain its approach to deriving implications, significant questions remain regarding its shortcomings that I will explore in Chapter 3.

This chapter is structured as follows. In Part II, I define the term 'constitutional implication.' I do so by drawing on the literature on such implications discussed below with attention paid to the diverse ways in which the term is employed in case law. In Part III, I discuss the relationship between interpretive methods and constitutional implications. An interpretive method is a theory or framework, and its accompanying practices and techniques, used to interpret the Constitution's words.[4] In this Part, I define three interpretive methods that figure prominently in this thesis – legalism, progressivism and intentionalism. While these interpretive methods evade precise definition, they help illustrate the ways in which a judge's interpretive method frames their conceptualisation of implications and approach to their derivation. In Part IV, I explore the debates that took place in the 1990s discussed above that led to the development of the text and structure approach. I conclude the chapter in Part V with an examination of the High Court's establishment of this approach in *Lange* and an outline of its basic operation.

[3] (1997) 189 CLR 520.

[4] For taxonomies of different interpretive methods see: Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323; Sotirios Barber and James Fleming, *Constitutional Interpretation: The Basic Questions* (Oxford University Press, 2007); Sir Dyson Heydon, 'Sir Maurice Byers Lecture: Theories of Constitutional Interpretation: A Taxonomy' (New South Wales Bar Association, 3 May 2007); Larry Alexander, 'Constitutional Theories: A Taxonomy and (Implicit) Critique' (2014) 51 *San Diego Law Review* 623.

II DEFINING 'CONSTITUTIONAL IMPLICATIONS'

As a doctrinal work in Australian constitutional law, the definition of 'constitutional implication' employed in this thesis needs to align with the usage of the term in case law. The High Court, however, has never provided a conclusive definition. The literature on implications in Australian constitutional law also does not offer a straightforward definition of this term's doctrinal meaning. The works closest to doing so are those of Jeremy Kirk and Jeffrey Goldsworthy.[5] Kirk's work is the most useful for the purposes of this thesis. While he only defines 'implication' rather than 'constitutional implication', Kirk uses his definition of the former to ground subsequent discussion on the 'nature' of constitutional implications and the act of their derivation in doctrine.[6] For his part, Goldsworthy avoids the task of defining an 'implication', let alone 'constitutional implication'. Rather, he notes the inherent difficulty in providing such a definition and instead offers a non-exhaustive categorisation of four discernible kinds of implications (or what he refers to as 'implied meanings') based on the philosopher of language, Paul Grice's, work on linguistic communication.[7] Similar to Kirk, Goldsworthy uses his discussion of

[5] Jeremy Kirk, 'Constitutional Implications I: Nature, Legitimacy, Classification, Examples' (2000) 24 *Melbourne University Law Review* 645; Jeremy Kirk, 'Constitutional Implications II: Doctrines of Equality and Democracy' (2001) 25 *Melbourne University Law Review* 24; Jeffrey Goldsworthy, 'Implications in Language, Law and the Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 150; Jeffrey Goldsworthy, 'Constitutional Implications Revisited – The Implied Rights Cases: Twenty Years On' (2011) 30 *University of Queensland Law Journal* 9. Kirk and Goldsworthy draw on a broad range of literature to deconstruct the concept of constitutional implications. They draw on literature from non-legal fields such as linguistics that define 'implications' and 'implied meaning.' For example see: Paul Grice, *Studies in the Way of Words* (Harvard University Press, 1989) cited in Goldsworthy, 'Language', 155. They also draw on literature in other areas of law, most notably literature on implications in contracts (for example see: Guenter Treitel, *The Law of Contract* (Sweet & Maxwell, 9th ed, 1995) cited in Kirk 651) and statutory implications (for example see: Donald Gifford, *Statutory Interpretation* (Law Book Co, 1990) cited in Goldsworthy, 'Language, Law and the Constitution', 163).

[6] Kirk, 'Implications I', above n 5, 647-648.

[7] Goldsworthy, 'Language', above n 5, 152-162; Grice, above n 5. These four kinds of implied meaning are: logical implications (the speakers' implied meaning is clear through logical reasoning); deficient expression (the speaker failed to communicate meaning expressly but it is clear what they 'really meant to say'); deliberate implications (the speaker deliberately chose to communicate meaning through implication); and implicit assumptions (the speaker may not have actually considered a particular meaning but simply taken it for granted). For further discussion of these four categories of implications see: Chapter 3(III)(A). For discussion on the difficulty of defining 'implication' and 'constitutional implication' see the discussion at: nn 27-35 and accompanying text.

these categories to ground subsequent discussion on the 'nature' of constitutional implications and the act of their derivation in doctrine.[8] For the purposes of this thesis, therefore, I draw primarily on Kirk's definition of 'implication' and further discussion on constitutional implications to arrive at my definition of a 'constitutional implication', supported by the works of Goldsworthy and other scholars in this field.

Defining a 'constitutional implication' begins with an understanding of the relationship between words and ideas. Written words, at their most basic level, are 'black marks on a white background'.[9] These 'marks' convey ideas.[10] That is, reading them places certain concepts or thoughts in the reader's mind. Ideas conveyed directly can be understood as the words' express meaning.[11] Those conveyed indirectly are the words' implied meaning.[12] The words 'Socrates is mortal', for a simple example, directly convey the idea that this Greek philosopher is susceptible to death.[13] The words 'All men are mortal and Socrates is a man' conveys the same idea indirectly. The idea that this Greek philosopher is susceptible to death, therefore, can be viewed as implied by these words. Thus, 'implications', as Kirk defines it, are ideas conveyed indirectly by words.[14] '*Constitutional* implications', following from this, can be defined as ideas conveyed indirectly by the *Constitution's* words.

This definition aligns with the High Court's understanding of constitutional implications. In its formulation of the text and structure approach discussed in Part V, the Court emphasises that such implications are not derived from outside of the

[8] Goldsworthy, 'Language', above n 5, 150.
[9] Stanley Fish, 'Intention Is all There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law' (2008) 29 *Cardozo Law Review* 1109, 1112.
[10] Ibid 1112; Kirk, 'Implications I', above n 5, 647. For discussion on how words convey ideas see: Part III(B) and Chapter 3(III).
[11] Kirk, 'Implications I', above n 5, 647; Aharon Barak, 'On Constitutional Implications and Constitutional Structure' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press, 2016) 53, 57-58; Goldsworthy, 'Language', above n 5, 154.
[12] Kirk, 'Implications I', above n 5, 647; Barak, 'On Constitutional Implications', above n 11, 53, 57-58; Goldsworthy, 'Language', above n 5, 154.
[13] Goldsworthy, 'Language', above n 5, 152.
[14] Kirk, 'Implications I', above n 5, 647. Kirk ostensibly considers implications to also include ideas conveyed indirectly by sources *other* than words (for instance, pictures). His discussion on implications and the examples he provides, however, centre on words.

Constitution's words nor should they be understood as judges effectively 'adding words' to the Constitution.[15] These implications emanate from the words themselves. Constitutional implications, therefore, are as much a part of the Constitution, and carry as much legal force, as the ideas conveyed directly by its words. The fundamental difference is that the existence of these implications is often more difficult to detect due to the indirectness in which they are conveyed.[16]

In order to build on this definition, attention must be paid to the basic function served by the Constitution. Namely, this document outlines the essential infrastructure of the Australian constitutional system. It identifies participants and institutions that make up this system; their powers and limitations within this system; and the guiding principles that underpin this system, such as federalism and representative democracy.[17] Some of these features of the Australian constitutional system are explicitly named or directly referred to by the Constitution's words. Others are implicitly identified or indirectly referred to by the Constitution's words. The existence of these latter features can be understood, therefore, as being identified by constitutional implications. For example, the idea that States cannot raise armies without Commonwealth Parliament consent is an idea directly conveyed by the words in section 114.[18] In contrast, the idea that States and the Commonwealth cannot take legislative or executive action unduly burdening freedom of communication about political and government matters is an idea indirectly conveyed by a collective reading of the words in sections 7, 24 and other provisions related to democratic processes.[19] The indirectness with which the idea

[15] Barak, 'On Constitutional Implications', above n 11, 61. The High Court frames the Constitution's words as forming the 'text' and 'structure' of the Constitution and stipulates that constitutional implications can only be derived from these two sources: Part V(B)(2). Constitutional implications, therefore, are purported to be drawn solely from the Constitution's words and not from outside of them. For discussion on how the Constitution's 'structure' specifically is, itself, a manifestation of the Constitution's words (that is, 'text') see: Part V(B)(2); Chapter 3(II), (VI).

[16] See discussion in: Chapter 1(I)(B).

[17] These guiding principles are referred to as 'structural elements' in this thesis based on the High Court's conceptualisation of them as facets of the Constitution's 'structure': Part V(B). Note, however, that the High Court has not made clear which principles are included as part of the Constitution's (systemic) 'structure': Chapter 3(VI)(A).

[18] Section 114 states: 'A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force'.

[19] For discussion on the connection between the political communication limitation and these provisions as asserted in *Lange* (1997) 189 CLR 520 see: Part V(A). For discussion of the political communication limitation's establishment in earlier cases, *Nationwide News Pty Ltd v Wills* (1992)

of the political communication limitation is conveyed by the Constitution's words renders it a constitutional implication. Thus, my definition can be extended as follows: constitutional implications are ideas conveyed indirectly by the Constitution's words that identify features of the Australian constitutional system.

A wide range of ideas fit this definition. This is to be expected considering the breadth of ideas that attract the label of 'constitutional implication' (and its derivatives) in doctrine. Some implications are narrow in scope and might be drawn from a single word.[20] For instance, guilty verdicts in Commonwealth indictable offence jury trials must be unanimous according to the High Court's interpretation of section 80 in *Cheatle v The Queen*.[21] While the idea that such trials require juries is conveyed directly by the Constitution's words in section 80, the idea that their verdicts must be unanimous is not made textually explicit. The High Court's identification of this latter feature of the Australian constitutional system, thus, may be classed as a 'constitutional implication' derived from the word 'jury' in section 80.[22] In contrast, some implications are grand in scope and derived from large tracts of the Constitution's words. The idea of separation of powers that operates as an overarching conceptual feature of the Australian constitutional system, for example, may be classed as a 'constitutional implication' conveyed indirectly by words spanning multiple chapters of the Constitution.[23] The label of 'constitutional implication' is perhaps most often employed in doctrine, however, to refer to

177 CLR 1 ('*Nationwide News*') and *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('*ACTV*') see: Part IV.

[20] This is not to suggest that a correlation always exists between the scope of a constitutional implication and the number of words it is derived from. The *Kable* limitation, for example, is a constitutional implication that essentially restrains States from passing laws that compromise the 'institutional integrity' of their Supreme Courts: *Kable v Director of Public Prosecutions* (1996) 189 CLR 51. While this implication is relatively broad in scope, it appears to be derived primarily from a single word, 'court', in 73(ii) and 77(iii) (the reasoning effectively being that the fact that these bodies must fit the definition of a 'court' implies that they maintain some degree of 'institutional integrity'): *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ). For discussion on the derivation of this implication from the word 'court' see: Jeffrey Goldsworthy, 'Kable, Kirk and Judicial Statesmanship' (2014) 40 *Monash University Law Review* 75, 86.

[21] *Cheatle v The Queen* (1993) 177 CLR 541 ('*Cheatle*').

[22] The joint judgment in *Cheatle* (1993) 177 CLR 541 refers to 'the requirement of unanimity' as 'implicit' in s 80: 560.

[23] See discussion in: Part V(B) and Chapter 3(VI)(A). McHugh J, for example, refers to separation of powers as an 'implication' and 'implied principle' in *McGinty v Western Australia* (1996) 186 CLR 140 ('*McGinty*'): 233. Dixon CJ, McTiernan, Fullagar and Kitto JJ suggest that the idea of 'separation of powers' is derived primarily from the words of ss 1, 61 and 71: *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275 ('*Boilermakers*').

powers or limitations of the executive, legislative or judicial branches.[24] These include implied limitations (such as the political communication limitation), implied executive powers (such as the nationhood power) and implied legislative powers (such as the implied incidental power).[25] This category of constitutional implications, incidentally, is the focus of this thesis. The ecological limitation is proposed as an implied limitation to restrain Commonwealth and State legislative and executive power.[26]

As can be seen from the foregoing discussion, my definition of a 'constitutional implication' is broad. This is not only because a breadth of ideas attract the label of 'constitutional implication' in doctrine and so my definition must capture this diversity, as noted in Part I. It is also because any posited definition of 'constitutional implication' is bound to be imprecise.[27] The distinction between express and implied meaning has long vexed linguists and philosophers of language.[28] The fundamental difficulty lies in the fact that the difference between the two is essentially one of degree – how directly or indirectly an idea is conveyed.[29] In Australian constitutional law, therefore, constitutional implications cannot be neatly distinguished from ideas conveyed directly by the Constitution's words.[30] Again, consider the word 'jury.' It is arguable that the requirement of unanimity drawn from this word should not be considered a constitutional

[24] The constitutional implication on unanimous jury verdicts discussed above can be viewed as belonging to this category of implications. This is because it appears to be an implied limitation, albeit one with a very narrow scope. Namely, this constitutional implication restrains the Commonwealth judiciary from holding indictable offence jury trials that do not require unanimous findings of guilt.

[25] For example see: *Lange* (1997) 189 CLR 520 (political communication limitation); *Davis v Commonwealth* (1988) 166 CLR 79 ('*Davis*') (nationhood power); *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 (implied incidental power).

[26] See discussion in: Chapter 4(V)(C).

[27] Kirk, 'Implications I', above n 5, 647-648; Nicholas Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1994) 18 *University of Queensland Law Journal* 249, 264; Goldsworthy, 'Language', above n 5, 153-154.

[28] Goldsworthy, 'Language', above n 5, 154. For example see: François Recanati, 'The Pragmatics of What is Said' (1989) 4 *Mind and Language* 295; Wayne Davis, *Implicature: Intention, Convention, and Principle in the Failure of Gricean Theory* (Cambridge University Press, 1998); Robyn Carston, 'The Explicit/Implicit Distinction in Pragmatics and the Limits of Explicit Communication' (2009) 1 *International Review of Pragmatics* 35.

[29] Kirk, 'Implications I', above n 5, 647; Barak, 'On Constitutional Implications', above n 11, 53, 57-58; Stephen Donaghue, 'The Clamour of Silent Constitutional Principles' (1996) 24 *Federal Law Review* 133, 137.

[30] Kirk, 'Implications I', above n 5, 647; Goldsworthy, 'Language', above n 5, 153-154; Barak, 'On Constitutional Implications', above n 11, 53, 57-58; Donaghue, 'Clamour', above n 29, 137; *Levy v Victoria* (1997) 189 CLR 579, 607 ('*Levy*').

implications but merely an explanation of this word's *express* meaning.[31] One cannot conclusively determine the correctness of this argument because of the gradational difference between express and implied meaning. Goldsworthy likens such complex conceptual distinctions to day and night.[32] There is 'an undeniable difference between' the two 'even though at dusk and dawn it is impossible to draw a clear dividing line between them.'[33]

The unclear distinction between express and implied meaning leads Kirk to question the need to treat constitutional implications as a 'special category' for the purposes of constitutional interpretation.[34] Kirk suggests that such categorisation is artificial and distracts from the important question at hand, 'what the Constitution means; whether the ideas are communicated directly or indirectly is incidental.'[35] Despite this, the High Court treats constitutional implications as a special category and enlists a distinct approach – the text and structure approach – for their derivation. As the present thesis is a doctrinal work in which I try to operate within the parameters of extant constitutional law doctrine, I will adhere to this position and treat the act of deriving constitutional implications in such a 'special' manner.

III INTERPRETIVE METHODS

While constitutional implications can only be defined in a broad fashion, a better grasp of their conceptualisation is gained through consideration of their relationship to interpretive methods. This is because, as will be seen below, a judge's choice of interpretive method shapes how the Constitution's words are understood to convey ideas and do so indirectly. Their choice of interpretive method also shapes their approach to deriving constitutional implications. These observations carry particular significance when critiquing the text and structure approach in Chapter

[31] Kirk, 'Implications I', above n 5, 648.
[32] 'Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue' (1997) 23 *Monash University Law Review* 362, 374.
[33] Ibid 374.
[34] 'Implications I', above n 5, 649. Also see: Geoffrey Sawer, 'Implication and the Constitution - Part 1' (1948) 4 *Res Judicatae* 15, 17; Barak, 'On Constitutional Implications', above n 11, 53.
[35] 'Implications I', above n 5, 648-649.

3.[36] At this preliminary juncture, however, it is helpful to provide definitions for three interpretive methods to facilitate discussion – those associated with the terms 'legalism', 'progressivism' and 'intentionalism'.

The reason I define these three interpretive methods is that they figure particularly prominently in this thesis. As will be seen in Parts IV and V, the text and structure approach was formulated amid debates framed as ones pitting legalism against progressivism.[37] As will be discussed in Chapter 5, intentionalism poses particular questions regarding the appropriateness of deriving the ecological limitation that must be addressed.[38] These three interpretive methods, therefore, ground the discussion in this thesis on the text and structure approach and the potential establishment of the ecological limitation more so than others.

The reason that definitions are required is because one cannot assume that the terms 'legalism', 'progressivism', 'intentionalism' or any other label for an interpretive method are understood by everyone in an identical manner. As Justice Stephen Gageler states extra-judicially with regard to legalism, for example, he has 'never been sure exactly what legalism means. … It seems to mean different things to different people.'[39] This confusion stems from the fact that interpretive methods are constructs – an artificial categorisation of the theories and practices that seem to define one style of constitutional interpretation and distinguish it from others. Observers are free to draw different connections as to what defines and distinguishes the countless styles of constitutional interpretation utilised by judges, lawyers and scholars.

[36] See discussion in: Chapter 3(III).
[37] Also see discussion in: Chapter 3(III)(A). Sir Anthony Mason was Chief Justice of the High Court from 1987 to 1995. For the sake of convenience in this thesis, I follow common practice of referring to different eras in the Court's history with reference to the Chief Justice at the time. Such references, however, are imprecise. While a Chief Justice's influence may be significant, there are other factors influencing the decisions during any given era: Rosalind Dixon and George Williams, 'Introduction' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 1, 7.
[38] See discussion in: Chapter 5(III).
[39] Justice Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32 *Australian Bar Review* 138, 144.

The fact that interpretive methods overlap in a myriad of ways (regardless of how one attempts to categorise them to avoid this problem) complicates this task of categorisation.[40] A legalist might champion the importance of the Constitution being interpreted to serve Australians' modern needs (a position typically associated with progressivism);[41] a progressivist might find it helpful to draw on the framers' intentions to justify their interpretation of the Constitution in some instances (a position typically associated with intentionalism);[42] an intentionalist might justify their employment of the framers' intentions because it provides judges with a form of objective guidance that restrains judges from drawing on their own value judgments (a position typically associated with legalism);[43] and so forth. This has led to scholars creating a proliferation of categories of interpretive methods to accommodate this complexity.[44] It has also led to disputes among scholars on the correctness of their competing categories and, consequentially, calls for categories of interpretive methods to be avoided in discourse on constitutional interpretation where possible.[45] For these reasons, the definitions of legalism, progressivism and

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[40] Cheryl Saunders, 'Interpreting the Constitution' (2004) 15 *Public Law Review* 289, 291; Aroney, 'Seductive Plausibility', above n 27, 254-255.

[41] *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 81 (Dixon J) ('*ANA*'); Greg Craven, 'After Literalism, What?' (1992) 18 *Melbourne University Law Review* 874, 875. Also see discussion in: nn 67-68 and accompanying text.

[42] Greg Craven, 'Heresy as Orthodoxy: Were the Founders Progressivists' (2003) 31 *Federal Law Review* 87, 92. Indeed, some judges and scholars defend progressivism via an intentionalist framework. That is, they assert that the framers intended for the Constitution to be interpreted in evolving ways based on Australian society's contemporary needs and has substantial license to do so based on how 'deliberately' broad the framers opted to write the Constitution. For example see: *Re Wakim; ex parte McNally* (1999) 198 CLR 511, 552-553 (McHugh J); James Thomson, 'Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes' (1982) 13 *Melbourne University Law Review* 597, 606. While progressivism would seem in binary opposition to intentionalism at first glance (the former emphasises interpreting the Constitution in its modern context while the latter emphasises interpreting the Constitution in its historical context), this reasoning sees progressivism as not distinct from, but justified by, intentionalism. For a critique of this view of the framers' intentions as sanctioning progressivism see: Craven 94-95.

[43] Richard Kay, 'Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses' (1988) 82 *Northwestern University Law Review* 226, 286-288; Kirk, 'Evolutionary Originalism', above n 4, 347-350.

[44] Kay, above n 43, 229; Saunders, above n 40, 291. Helen Irving, for example, lists the various categories of 'originalism' that have been proposed in scholarship – 'new', 'old', 'moderate', 'evolutionary' and 'living' originalism and so forth: 'Constitutional Interpretation, the High Court, and the Discipline of History' (2013) 41 *Federal Law Review* 95, 96.

[45] Saunders, above n 40, 291; Justice Susan Kenny, 'The High Court of Australia and Modes of Constitutional Interpretation' in *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission of New South Wales, 2007) 45, 48. For an example of such disputes among scholars, see Jeremy Kirk's and Greg Craven's disagreement on the distinction between 'legalism' and 'literalism': Kirk, 'Evolutionary Originalism', above n 4, 326; Greg Craven, 'Cracks in the Façade of Literalism: Is There an Engineer in the House?' (1992) 18 *Melbourne University Law Review* 540, 542. For an example of alternative means of interrogating different styles of

intentionalism provided below cannot be considered definitive and can only be formulated at a level of abstraction.[46]

I draw on various definitions of these interpretive methods to provide the ones that follow. These definitions come from Australian and non-Australian literature and span recent decades.[47] I pay particular attention to the definitions of these interpretive methods that emerged in Australian constitutional law scholarship during the debates in the 1990s on the proper means of deriving constitutional implications.[48] This literature is of particular utility because it explicitly links the discussion of interpretive methods with the discussion of constitutional implications in the contemporary Australian context.

constitutional interpretation, see United States legal theorist Philip Bobbitt's conception of 'modalities' of constitutional interpretation: *Constitutional Fate: Theory of the Constitution* (Oxford University Press, 1982); *Constitutional Interpretation* (Basil Blackwell, 1991). For works adopting Bobbitt's modalities of constitutional interpretation in the context of Australian constitutional law see: Kenny; Nicholas Aroney, 'Towards the Best Explanation of the Constitution: Text, Structure, History and Principle in Roach v Electoral Commissioner' (2011) 30 *University of Queensland Law Journal* 145.

[46] The fact that so many categories and sub-categories of interpretive methods exist (and are so disputed) also explains why I have limited my discussion defining interpretive methods to three such methods.

[47] For examples of Australian literature defining these interpretive methods see in particular: Craven, 'After Literalism, What?', above n 41; Craven, 'Cracks', above n 45; Kirk, 'Evolutionary Originalism', above n 4; Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2006), 133; Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1; Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, 2000); James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 638-699; Natalie Stoljar, 'Counterfactuals in Interpretation: The Case against Intentionalism' (1998) 20 *Adelaide Law Review* 29. For examples of non-Australian literature defining these interpretive methods see: Aharon Barak, *Purposive Interpretation in the Law* (Princeton University Press, 2011); Paul Brest, 'The Misconceived Quest for the Original Understanding' (1980) 60 *Boston University Law Review* 204; Fish, above n 9; Kay, above n 43; Jefferson Powell, 'Rules for Originalists' (1987) 73 *Virginia Law Review* 659.

[48] See discussion in: Part IV. See in particular: Kirk, 'Evolutionary Originalism', above n 4; Craven, 'Cracks', above n 45; Craven, 'After Literalism, What?', above n 41; Goldsworthy 'Originalism in Constitutional Interpretation', above n 47.

A *Defining 'Legalism', 'Progressivism' and 'Intentionalism'*

1 *Legalism*

Legalism, in its most extreme version, asserts that judges normatively should not, and practically need not, draw on their own value judgments or policy considerations when interpreting the Constitution.[49] They *should* not do this out of respect for the fact that the judiciary must treat like cases alike in keeping with the doctrine of precedent. This consistency can only be achieved if judges refrain from drawing on their own personal or political proclivities.[50] Further, political decision-making must generally be left to the legislature and executive.[51] This means that judges should avoid interpreting the Constitution in a manner that requires them to make value judgments or engage in policy considerations on legislative or executive actions when determining their constitutionality.[52]

As a practical matter, judges *need* not draw on their own value judgments or policy considerations when interpreting the Constitution, this extreme version of legalism espouses, because they can rely on (value and policy-free) legal interpretive practices and techniques, such as centuries-old principles of statutory construction, gleaned from the common law tradition.[53] Legalism in this extreme version, thus, aligns with the legal formalist position known as the 'declaratory theory of law'.[54]

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[49] Kirk, 'Evolutionary Originalism', above n 4, 326; Elisa Arcioni and Adrienne Stone, 'The Small Brown Bird: Values and Aspirations in the Australian Constitution' (2016) 14 *International Journal of Constitutional Law* 60, 76.

[50] Kirk, 'Evolutionary Originalism', above n 4, 326; Sir Daryl Dawson and Mark Nicholls, 'Sir Owen Dixon and Judicial Method' (1986) 15 *Melbourne University Law Review* 543, 545; John Finnis, 'Natural Law and Legal Reasoning' in Robert George, *Natural Law Theory: Contemporary Essays* (Clarendon Press, 1994) 134, 150; Stellios, above n 47, 639.

[51] For discussion on the acceptability (or lack thereof) of the judiciary engaging in political decision-making in Australian constitutional law see: Chapter 5(II).

[52] Goldsworthy, 'Devotion', above n 47, 133, 137; Arcioni and Stone, above n 49, 76; Stellios, above n 47, 639.

[53] Stellios, above n 47, 638-40; Kirk, 'Evolutionary Originalism', above n 4, 324; Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162, 177, 181; Rachael Gray, *The Constitutional Jurisprudence and Judicial Method of the High Court of Australia: The Dixon, Mason and Gleeson Eras* (Presidian Legal Publications, 2008) 19-20, 22. In *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, this is phrased as judges engaging in the 'ordinary principles of construction': 155.

[54] Kirk, 'Evolutionary Originalism', above n 4, 326. Also see: Goldsworthy, 'Language', above n 5, 162; Laurence Claus, 'Implication and the Concept of a Constitution' (1995) 69 *Australian Law*

This views ideas as buried within the Constitution in some pre-existing form, waiting to be unearthed by judges through an objective process of legal reasoning. Simply put, legalism, in its most extreme version, conceptualises judges as finding the ideas conveyed by the Constitution's words, not making them.[55]

Legalism, in a more moderate version, accepts that absolute neutrality in constitutional interpretation is not always attainable.[56] Supposedly objective processes of legal reasoning might be able to provide clear answers to some constitutional questions but others will undoubtedly demand judges draw on their own value judgments and policy considerations and require some degree of judicial creativity.[57] The typical goal for moderate legalists, therefore, is for judges to remain as objective as possible in determining the ideas conveyed by the Constitution's words.[58] This can be achieved by judges drawing on the legal interpretive techniques gleaned from the common law tradition, as noted above, and resisting interpretations that require them to draw upon their own value judgments and policy considerations where suitable.[59] Thus, while legalism can mean 'different things to different people', as Gageler asserts, legalism can be summarised as an interpretive method championing judicial objectivity and endorsing the practices and techniques that bring judges closest to this goal.[60]

Journal 887, 888; Brian Leiter, 'Legal Formalism and Legal Realism: What Is the Issue?' (2010) 16 *Legal Theory* 111, 111-112.

[55] Justice Michael Kirby, 'Judicial Activism' (1997) 27 *Western Australian Law Review* 1, 1.

[56] Kirk, 'Evolutionary Originalism', above n 4, 327.

[57] Ibid 327; George Williams, 'Engineers Is Dead, Long Live the Engineers' (1995) 17 *Sydney Law Review* 62, 84.

[58] Arcioni and Stone, above n 49, 76; Kirk, 'Evolutionary Originalism', above n 4, 327.

[59] Kirk, 'Evolutionary Originalism', above n 4, 327; Arcioni and Stone, above n 49, 76; Goldsworthy, 'Devotion', above n 47, 133.

[60] See above n 39 and accompanying text.

2 *Progressivism*

Progressivism can broadly be defined as an interpretive method emphasising two premises.[61] First, progressivists typically assert that much of the Constitution's language is ambiguous.[62] A judge can employ all of the practices and techniques that a legalist might propose to interpret, for instance, a particular provision in the Constitution. This will often result, however, in a range of plausible interpretations of that provision. A judge will ultimately need to draw upon their own value judgments and policy considerations to determine which of these alternative interpretations to enlist in their adjudication of a matter.[63] Thus, while a legalist is more inclined to frame judges as finding the ideas conveyed by the Constitution's words rather than making them, a progressivist would traditionally align with the legal realist position and recognise that judges are, to some extent, making these ideas rather than finding them.[64] A progressivist might share the same goal of a legalist that judges should attempt to remain as objective as possible when interpreting the Constitution and even employ similar techniques and practices as a legalist to achieve this goal.[65] They generally would not have as much faith as a legalist in the frequency with which such a goal is achievable.

Second, progressivism typically asserts that the Constitution should be read in a manner that serves the modern needs of the Australian community.[66] As Greg Craven notes, this second premise is, in part, a question of degree.[67] All interpretive methods are invested in ensuring that the Constitution serves contemporary Australian society.[68] Progressivism, however, places more emphasis on the

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[61] Kirk, 'Evolutionary Originalism', above n 4, 331.
[62] Craven, 'After Literalism, What?', above n 41, 874; Ibid 331; Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1, 23.
[63] Craven, 'After Literalism, What?', above n 41, 874-875; Brian Galligan, 'Realistic Realism and the High Court's Political Role' (1989) 18 *Federal Law Review* 40, 45-46; Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (2008) 30 *Sydney Law Review* 5, 7.
[64] Goldsworthy, 'Language', above n 5, 162; Patapan, above n 47, 24; Williams, above n 57, 84.
[65] See discussion in: Craven, 'After Literalism, What?', above n 41, 881-882; Kirby, above n 55, 18-20.
[66] Kirk, 'Evolutionary Originalism', above n 4, 331; Craven, 'After Literalism, What?', above n 41, 875; Michael Detmold, 'Australian Law: Federal Movement', (1991) 13 *Sydney Law Review* 31, 31; Patapan, above n 47, 27; Mason, above n 62, 23; Aroney, 'Seductive Plausibility', above n 27, 254.
[67] Craven, 'After Literalism, What?', above n 41, 875.
[68] Proponents of these interpretive methods would endorse their respective means of ensuring the Constitution continues to serve modern society. A legalist, for example, might endorse the connotation-denotation distinction. Namely, the Constitution's words have a connotation (what

importance of this pursuit, and typically does so the most explicitly compared to other interpretive methods.[69] Further, progressivism emphasises the opportunity for judges to read the Constitution in a manner that serves the modern needs of the Australian community. This opportunity exists as a result of the frequent ambiguity of the Constitution's language, as the first premise stipulates.[70] Thus, reading these two premises together, the operation of progressivism emerges. Due to the fact that judges can often arrive at an array of plausible interpretations of the Constitution due to its often ambiguous language, judges should prioritise interpretations responsive to the modern needs of the Australian community where this situation arises.

3 *Intentionalism*

Intentionalism can broadly be defined as an interpretive method emphasising the importance of interpreting the Constitution in accordance with the intentions of the Constitution's framers.[71] The rationale for adopting this method rests on the premise that the ideas conveyed by a particular arrangement of words primarily, if not solely, emanates from the person(s) who wrote them.[72] The task of

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those words mean at their core) and denotation (what those words might be extended to include in contemporary Australia): Ibid 875-876.

[69] Ibid 875.

[70] Ibid 874-875; McHugh, above n 63, 7.

[71] Aharon Barak, *Purposive Interpretation in the Law* (Princeton University Press, 2011) 260; Stoljar, above n 47, 29; Craven, 'After Literalism, What?', above n 41, 882. The term 'intentionalism' is often associated with the word 'originalism', though different scholars defined these terms (and their relationship to each other) differently. Barak, for example, frames intentionalism in opposition to originalism: 260. For Barak, intentionalism is an interpretive method focusing on what the framers (subjectively) intended in their selection of a constitution's wording while originalism is an interpretive method focusing on what a constitution's wording (objectively) meant to a reader at the time of its drafting. Jeremy Kirk and Stanley Fish frame intentionalism as a sub-category of originalism: Kirk, 'Evolutionary Originalism', above n 4, 328; Fish, above n 9, 1110. Originalism, according to Kirk and Fish, can generally be defined as an interpretive method emphasising the importance of interpreting the Constitution in its historical context: Kirk 324; Fish 1109-1110. Intentional originalism (or intentionalism) focuses on the framers' intentions while a textual originalism focuses on what the Constitution's wording meant at the time of its drafting (akin to Barak's understanding of the word 'originalist'). Jeffrey Goldsworthy, in contrast, uses the term 'originalist' essentially as a stand-in for the way I use the term 'intentionalist': 'The Case for Originalism' in Grant Huscroft and Bradley Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge University Press, 2011). Thus, some use the term 'intentionalism' in contrast to 'originalism' (like Barak); some use the term 'intentionalism' to describe a sub-category of 'originalism' (like Kirk and Fish); and some use the term 'originalism' in lieu of 'intentionalism' (like Goldsworthy). My usage of the term 'intentionalism' is akin to that of Kirk and Fish in how it may be viewed in relation to 'originalism'.

[72] Fish, above n 9, 1112; Greg Craven, 'Original Intent and the Australian Constitution — Coming Soon to a Court Near You?' (1990) 1 *Public Law Review* 166, 177; Goldsworthy, 'Language', above n 5, 167.

constitutional interpretation, therefore, is essentially one of attempting to determine the intentions of the framers when they wrote the relevant constitutional passage.[73] This is viewed by intentionalists (at least in their extreme version) as a process of discovery – one is finding the ideas conveyed by the Constitution's words by finding the framers' intentions.[74] These intentions may purportedly be gleaned from a reading of the Constitution's words alone.[75] Alternatively, an intentionalist might be willing to look beyond the Constitution's words at extrinsic materials, such as speeches given by the framers or the Constitutional Convention Debates of the 1890s, in order to determine the framers' intentions.[76]

A moderate intentionalist generally recognises the shortcomings associated with drawing on the framers' intentions to interpret the Constitution.[77] The framers' collective intentions might be difficult to discern for a range of reasons, such as a lack of sufficient documentation of their intentions at the relevant time or the fact that different framers might harbour differing views with regard to their drafting of the portion of the Constitution one is attempting to interpret.[78] Even when easy to discern, the authority of some of the framers' intentions might be questionable if, for instance, they are based on antiquated knowledge and circumstances.[79] These shortcomings generally lead a moderate intentionalist to conclude that the framers' intentions cannot and should not always be relied upon when interpreting the

[73] Fish, above n 9, 1112; Craven, 'Original Intent', above n 72, 168; Goldsworthy, 'Language', above n 5, 167. For criticism of this stance conflating the meaning contained in the Constitution (or other legal texts) with the intentions of its authors see: Donaghue, 'Clamour', above n 29, 142-143; Kirk, 'Implications I', above n 5, 660-661; Heidi Hurd, 'Sovereignty in Silence' (1990) 99 *Yale Law Journal* 945.

[74] Jeffrey Goldsworthy, 'Moderate versus Strong Intentionalism: Knapp and Michaels Revisited' (2005) 42 *San Diego Law Review* 669, 671.

[75] Kirk, 'Evolutionary Originalism', above n 4, 328-330 (note, however, the different usage of the term 'intentionalism' than the usage adopted in this thesis). For discussion on the problems with suggesting that 'reading the Constitution's words alone' siloes one off from external influences see: Chapter 3(IV)-(V).

[76] Kirk, 'Evolutionary Originalism', above n 4, 328-330.

[77] For discussion on various visions of a 'moderate' intentionalist see: Stoljar, above n 47; Goldsworthy, 'Moderate versus Strong Intentionalism: Knapp and Michaels Revisited', above n 74; Goldsworthy, 'Originalism in Constitutional Interpretation', above n 47, 19-21; Brest, above n 48; Craven, 'After Literalism, What?', above n 41, 883-886; Gregory Bassham, 'Freedom's Politics: A Review Essay of Ronald Dworkin's Freedom's Law: The Moral Reading of the American Constitution', (1997) 72 *Notre Dame Law Review* 1235, 1251-1257; Powell, above n 47, 659.

[78] Goldsworthy, 'Originalism and Constitutional Interpretation', above n 47, 20-21, 25-27; Kay, above n 43, 245-153; Stoljar, above n 47, 30; Kirk, 'Evolutionary Originalism', above n 4, 354.

[79] Irving, above n 44, 107; Powell, above n 47, 668; Goldsworthy, 'Originalism and Constitutional Interpretation', above n 47, 20-21; See discussion in: Chapter 5(III).

Constitution.[80] While a moderate intentionalist would tailor their usage of the framers' views to navigate around these shortcomings, they would still emphasise the benefits of drawing on intention, and the fundamental connection between words and intention, in the task of constitutional interpretation. For these reasons, a moderate intentionalist might see the task of constitutional implication as partially involving finding the ideas conveyed by the Constitution's words (by finding the framers' intentions) and partially involving making these ideas (by going beyond these intentions and employing at least some degree of judicial creativity when their utility is lacking).

B *Interpretive Methods and Constitutional Implications*

A judge's choice of interpretive method shapes their conceptualisation of constitutional implications and the act of their derivation. To start with, it shapes their view of where ideas conveyed by the Constitution's words emanate. For an intentionalist, the ideas that make up constitutional implications are generally viewed as reflections of the framers' intentions. The act of deriving constitutional implications, therefore, is one of determining those intentions – albeit ones that the framers only conveyed indirectly with their choice of words. For a progressivist, the ideas that make up constitutional implications are not necessarily anchored by the framers' intentions and are viewed as rarely anchored to any singular fixed source. This lack of anchorage is due to the posited ambiguity of language as well as the view that the ideas conveyed indirectly by the Constitution's words are ever-changing depending on the contemporary needs of Australian society. For a legalist, the ideas that make up constitutional implications might be drawn from a range of sources. They could be drawn from the framers' intentions, their articulation in common law, a definition in a dictionary, or other sources entirely – as long as those sources allow a judge to remain as objective as possible in their interpretive process. Thus, while constitutional implications can be defined broadly and imprecisely as ideas conveyed indirectly by the Constitution's words, a judge's interpretive

[80] 'Originalism and Constitutional Interpretation', above n 49, 20; Craven, 'After Literalism, What?', above n 41, 883; Powell, above n 47, 666-667.

method provides details on their view of how these words convey ideas in the first place.

A judge's interpretive method also teases out their view of how words convey ideas *indirectly*. An intentionalist might see the indirectness between words and the ideas conveyed as resulting, in some instances, from the fact that the framers took certain ideas for granted.[81] They might not have opted to use words to convey certain ideas directly but nevertheless assumed their position as part of the Constitution. The 'rule of law', for example, is not referred to in the Constitution's words. Despite this, an intentionalist might justify its establishment as a constitutional implication based on a belief that the framers assumed its inherent position as a guiding principle in the Australian constitutional system.[82] A progressivist, at least an extreme version, might view the act of interpreting the Constitution as inherently an act of determining indirect meaning. Again, this is rooted in the progressivist position that language is ambiguous. From this positon, one can rarely be confident of the ideas that words are conveying directly.

While proponents of other interpretive methods would hardly disagree, legalists would particularly champion logical inferences as a way (and perhaps the 'safest' way due to its inherent objectivity) in which ideas may be conveyed indirectly by the Constitution's words. The Constitution, for example, does not contain a provision simply and explicitly stating that the Commonwealth may pass laws to protect itself from subversion. Such a legislative power, however, has been held to extend logically from a combined reading of sections 61 ('The executive power of the Commonwealth … extends to the … maintenance of this Constitution') and 51(xxxix) (The Commonwealth may pass laws on 'matters incidental to the execution of any power vested by this Constitution … in the Government of the

[81] Goldsworthy, 'Language', above n 5, 154, 172-173; Kirk, 'Implications I', above n 5, 657-659. For other examples of ways in which an intentionalist might view the Constitution's words as conveying ideas indirectly see: Chapter 3(III).

[82] While Dixon J might not be considered an 'intentionalist' as I have defined them in this thesis, Dixon J seems to draw on this reasoning with his conclusion 'that the rule of law forms an assumption' in Australian constitutional law: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 ('*Communist Party Case*'). For discussion on how assumptions may be categorised as forms of constitutional implications see: Goldsworthy, 'Language', above n 5, 154, 172-173; Kirk, 'Implications I', above n 5, 657-659 (for discussion on the rule of law as a constitutional implication specifically see: 658, 663).

Commonwealth').[83] While this idea is conveyed indirectly, it is conveyed indirectly in a seemingly objective manner – the Commonwealth's executive power to maintain the Constitution (in section 61) coupled with its legislative power to make laws incidental to its executive powers (in section 51(xxxix) leads to a legislative power to maintain the Constitution and the Commonwealth itself from subversive activity. In these various ways, a judge's interpretive method frames the element of indirectness that is a defining attribute of constitutional implications.

The act of deriving these implications is also framed by a judge's interpretive method. Namely, are constitutional implications found or made (or some combination of the two)? A legalist, drawing on the declaratory theory of law noted above, may be inclined to assert the former position. Justice Windeyer's remarks in *Victoria v Commonwealth* ('*Payroll Tax Case*') reflect this viewpoint: 'I would prefer not to say "making implications", because our avowed task is simply the revealing or uncovering of implications that are already there'.[84] An intentionalist, at least an extreme version, may similarly view constitutional implications as found because determining the Constitution's meaning, whether implied or express, is ultimately a project of finding the framers' intentions on this subject. A progressivist, however, would be less inclined to conceptualise constitutional implications as needing to be revealed or uncovered from some pre-existing space but would emphasise that these implications are, at least in part, the product of judicial creativity. They are, to a substantial degree, made rather than found.

Thus, a judge's interpretive method frames their view on how words convey ideas, how they do so indirectly, and the act of determining the existence of these ideas. On an even more fundamental level, the question once emerged in the High Court's history as to whether a particular interpretive method – legalism – permitted the act of deriving constitutional implications altogether. In the 1920 case of *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ('*Engineers*'), the High Court signalled its embrace of legalism as its orthodox interpretive method.[85] It also, more

[83] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 ('*Pape*').
[84] (1971) 122 CLR 353 ,402.
[85] (1920) 28 CLR 129. Stellios, above n 47, 639; Kirk, 'Evolutionary Originalism', above n 4, 324, 326; Goldsworthy, 'Devotion', above n 47, 121. An adherence to legalism was present in Australian

specifically, signalled its abolition of two of the earliest constitutional implications that the Court had established: the reserved State powers doctrine and the immunity of instrumentalities.[86] These two events were connected with the legalist framework of the majority judgment leading to the abolition of these two constitutional implications. Knox CJ and Isaacs, Rich and Starke JJ emphasised that the interpretation of the Constitution that led to the establishment of these constitutional implications were too little a product of the specific wording of the Constitution and too much a product of 'opinions of Judges [sic] as to hopes and expectations respecting vague external conditions'.[87] While their judgment might be viewed as a fair assessment of the two specific constitutional implications in question, it took on a greater significance in its aftermath. Some members of the legal profession posited that *Engineers* instated a general prohibition on the derivation of constitutional implications.[88] The reasoning seemed to be based on a perceived link between deriving these implications and judges drawing on their own personal or political proclivities.[89] Since drawing on such proclivities is anathema to legalism (and this had ostensibly been confirmed as the High Court's orthodox interpretive method), this suggested that the derivation of constitutional implications was no longer deemed appropriate.

Such a simple picture of legalism, constitutional implications and the relationship between the two, however, has not endured. Much of the credit for this rests with Sir Owen Dixon, legalism's most prominent supporter in the High Court's history.[90]

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constitutional law prior to *Engineers* as well as in common law regarding statutory interpretation: Kirk 324.

[86] (1920) 28 CLR 129.

[87] *Engineers* (1920) 28 CLR 129, 145.

[88] Leslie Zines, 'Sir Owen Dixon's Theory of Federalism' (1965) 1 *Federal Law Review* 221, 221-222; *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 681. Reading these references to this prohibition on constitutional implications in context, it is possible that they are referring to specific categories of implications – namely, implied powers and limitations akin to the reserved State powers doctrine and the immunity of instrumentalities that were jettisoned in *Engineers* (1920) 28 CLR 129 as well as general principles such as federalism that might be deemed 'vague individual conception[s] of the spirit of the compact': 145. It is difficult to see how they could be referring to, for instance, minute implications derived to tease out the meaning of specific words and phrases in the Constitution.

[89] Zines, 'Theory of Federalism', above n 88, 221-222.

[90] Sir Owen Dixon, 'Swearing in of Sir Owen Dixon as Chief Justice' (1952) 85 CLR xi, xiii-xiv; Daryl Dawson and Mark Nicholls, 'Sir Owen Dixon and Judicial Method' (1986) 15 *Melbourne University Law Review* 543. For discussion on (including scepticism of) Dixon's faithfulness to the tenets of legalism in his judgments see: Frank Carrigan, 'A Blast From The Past: The Resurgence of Legal Formalism' (2003) 27 *Melbourne University Law Review* 163; John Gave, 'Another Blast

He challenged the view that *Engineers* signalled a general prohibition on the derivation of constitutional implications from his earliest days on the bench, arguing that such a prohibition 'would defeat the intention of any instrument, but of all instruments a written constitution seems the last to which it could be applied.'[91] This is because written constitutions must be 'expressed in general propositions wide enough to be capable of flexible application to changing circumstances'.[92] Dixon went on to help establish, first as Justice then as Chief Justice, some of the most important implications in Australian constitutional law. These include the *Melbourne Corporation* limitation (established primarily utilising Dixon's formulation of federalism as implied in the Constitution);[93] the *Boilermakers* limitation (adopting Dixon's long-held vision of an extensive formulation of separation of powers implied in the Constitution);[94] and the nationhood power (though the High Court seems to have more recently distanced itself from his particular formulation of the implied power).[95] This not only demonstrates the firmly entrenched role implications play in Australian constitutional law despite suggestions to the contrary that gained traction in *Engineers*' aftermath. It demonstrates that adherence to legalism (a Dixonian version of it, at least) and the establishment of constitutional implications are far from antithetical.

Further complicating this picture is the question of the High Court's commitment to legalism in contemporary constitutional law. Legalism remains difficult to define, as noted above, raising practical challenges in determining exactly what is the conception of 'legalism' to which these judges are supposedly beholden. Further, judges remain free to interpret the Constitution as they see fit, distinct from their peers, and may change their interpretive method from provision to provision,

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From The Past Or Why The Left Should Embrace Strict Legalism: A Reply To Frank Carrigan' (2003) 27 *Melbourne University Law Review* 186.

[91] *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 681; Zines, 'Theory of Federalism', above n 88, 223-224.

[92] *ANA* (1945) 71 CLR 29, 81; Goldsworthy, 'Language', above n 5, 71.

[93] Stellios, above n 47, 476.

[94] Fiona Wheeler, 'The Boilermakers Case' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 160, 163-164.

[95] *Burns v Ransley* (1949) 79 CLR 101, 116; *R v Sharkey* (1949) 79 CLR 121, 148; *Davis* (1988) 166 CLR 79, 103-4, 119; *Pape* (2009) 238 CLR 1, 63; Anne Twomey, 'Pushing the Boundaries of Executive Power - Pape, the Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313, 332-334.

and even from case to case.[96] Judges generally resist categorising their approach to constitutional interpretation and some reject the notion that judges do or should interpret the Constitution based on a set interpretive method in the first place.[97] In *Commonwealth v Australian Capital Territory* ('*Same Sex Marriage Case*'), French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ state that '[t]he utility of adopting or applying a single all-embracing theory of constitutional interpretation has been denied.'[98] In *SGH Ltd v Commissioner of Taxation*, Gummow J similarly states that '[q]uestions of construction of the Constitution are not to be answered by the adoption and application of any particular, all-embracing and revelatory theory or doctrine of interpretation.'[99] The hallmarks of a diversity of interpretive methods can be seen in the High Court's judgments throughout its history, including those determining the doctrinal merits of constitutional implications.[100] Thus, not only has the notion been dispelled that the Court's faithfulness to legalism forbids it from

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[96] Justice Bradley Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 250; Justice Susan Kenny, 'The High Court on Constitutional Law: The 2002 Term' (2003) 26 *University of New South Wales Law Journal* 210; Nicholas Aroney, 'The High Court on Constitutional Law: The 2012 Term - Explanatory Power and the Modalities of Constitutional Reasoning' (2013) 36 *University of New South Wales Law Journal* 863, 864-865; Chief Justice Robert French, 'Theories of Everything and Constitutional Interpretation' (Speech delivered at the University of New South Wales, 19 February 2010).

[97] Aroney, 'High Court', above n 96, 864; Selway, above n 96, 250; Kenny, 'Modes', above n 45, 48-49.

[98] (2013) 250 CLR 441, 455. Also see Chief Justice French's extra-judicial comments that he sees 'little evidence of 'isms' in the current methodology of the Court': above n 96.

[99] *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51, 75.

[100] Kirk, 'Evolutionary Originalism', above n 4. With regard to the framers' intentions informing the derivation of constitutional implications in line with intentionalism, for example, Deane and Toohey JJ state that the 'general approach of the framers of the Constitution' was to 'incorporate underlying doctrines or principles' in order to justify their view that a principle of legal equality is implied in the Constitution: *Leeth v Commonwealth* (1992) 174 CLR 455, 484 ('*Leeth*'). With regard to common law principles informing the derivation of constitutional implications in line with legalism, for example, Griffith CJ held that the common law position on the finality of a jury's verdict of acquittal is implied in s 73: 'The common law doctrine as to the effect of a verdict of acquittal is too well settled to require exposition … so revolutionary a change would have been expressed in the clearest language': *R v Snow* (1915) 20 CLR 315, 322. With regard to contemporary societal needs informing the derivation of constitutional implications in line with progressivism, for example, French CJ held that the Commonwealth's power to pass a law to combat the economic turmoil caused by the Global Financial Crisis is implied by the notoriously vague words of s 61 (in combination with the incidental power in s 51(xxxix): *Pape* (2009) 238 CLR 1; for discussion on the vagueness of s 61 see: Peter Gerangelos, 'The Executive Power of the Commonwealth of Australia: Section 61 of the Commonwealth Constitution, 'Nationhood' and the Future of the Prerogative' (2012) 12 *Oxford University Commonwealth Law Journal* 97. This was due, in part, to the fact that s 61 should be read as including an inherent Commonwealth executive power derived from the needs of a 'modern national government': *Pape* (2009) 238 CLR 1, 61 quoting Geoffrey Sawer, 'The Executive Power of the Commonwealth and the Whitlam Government' (Speech delivered at the Octagon Lecture, The University of Western Australia, 1976). As French CJ concludes, '[w]hile history and the common law inform [s 61's] content, it is not a locked display cabinet in a constitutional museum': 60.

deriving implications. The notion that the Court must adhere to legalism, in itself, is contentious.

While the extent of legalism's hold on the contemporary High Court and its influence as a restraining force on the derivation of constitutional implications are debatable, they cannot be wholly dismissed. As will be seen in the discussion that follows, a commitment to legalism seemed to play a significant role in the development of the Court's current approach to deriving constitutional implications, the text and structure approach.[101] This commitment also seemed to act as, or at least seemed to signal, a restraining force on their derivation.[102]

My focus in this chapter, thus far, has been on defining key terms for use in this thesis. In Part II, I define a 'constitutional implication' and, in this Part, I define three interpretive methods that feature particularly prominently in this and subsequent chapters – legalism, progressivism and intentionalism. The discussion in these two Parts intersect. That is, a judge's choice of interpretive method informs their conceptualisation of constitutional implications. It shapes their view on how words convey ideas and do so indirectly (the defining attributes of constitutional implications) as well as how they understand the act of deriving implications itself – whether it is an act of finding these ideas, making them, or some combination of the two. These definitions assist in the discussion that follows on the High Court's development of the text and structure approach (in this chapter), my critique of this approach (in Chapter 3) and the application of this approach to determine the doctrinal merits of the ecological limitation (in Chapters 4, 5 and 6). To understand this approach to deriving implications, the events that led up to its establishment must first be examined.

[101] See discussion in: Parts IV and V. For discussion on the extent to which the text and structure approach's link with the tenets of legalism is superficial see: Chapter 3(III)(A).
[102] See discussion in: Part V.

IV THE 'REPRESENTATIVE DEMOCRACY' IMPLICATIONS

In the 1990s, members of the Mason court voiced support for a range of 'new' constitutional implications grounded in the concept of representative democracy and focusing on individual rights and freedoms.[103] Deane and Toohey JJ held that the Constitution houses an implied guarantee of equality (broadly speaking, a constitutional guarantee of equal treatment for all people of Australia under the law) which would render Commonwealth (and possibly State) legislation unconstitutional if breached.[104] The Hon John Toohey argued extra-judicially that the Constitution may be read as implicitly protecting basic common law liberties.[105] Gaudron, Toohey and McHugh JJ recognised the potential existence of a freedom of association and a freedom of movement implied in the Constitution.[106] These proposed implications led some commentators (as well as the Hon John Toohey himself) to suggest that the High Court may be on the verge of effectively deriving an 'implied bill of rights' from the Constitution.[107]

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[103] The political communication limitation and other proposed implications from this era are sometimes held in the case law to be grounded in the concepts of 'representative democracy', 'representative government' and/or 'responsible government'. The first two of these terms seem broadly interchangeable: Jeremy Kirk, 'Administrative Justice and the Australian Constitution' in Robin Creyke and John McMillan (eds), *Administrative Justice - The Core and the Fringe* (2000) 78, 99-101. 'Responsible government' is sometimes framed as a component of 'representative democracy'/'representative government': for example see: *Nationwide News* (1992) 177 CLR 1, 71 (Deane and Toohey JJ). For the sake of convenience, I use the term 'representative democracy' (and it should be considered to include 'responsible government' where appropriate).

[104] *Leeth* (1992) 174 CLR 455. This purported implication, however, did not gain majority support. This was made clear when it was rejected by five judges in *Kruger v Commonwealth* (1997) 190 CLR 1, 44-45 (Brennan CJ), 63-68 (Dawson J), 112-113 (Gaudron J), 142 (McHugh J), 153-155 (Gummow J) ('*Kruger*').

[105] John Toohey, 'A Government of Laws, and Not of Men' (1993) 4 *Public Law Review* 158, 170.

[106] *ACTV* (1992) 177 CLR 106, 212 (Gaudron J), 142 (McHugh J); *Kruger* (1997) 190 CLR 1, 115 (Gaudron J), 142 (McHugh J). This purported implication, or at least the notion that it may be considered an implication in its own right, was rejected by a majority in *Wainohu v New South Wales* (2011) 243 CLR 181 (and confirmed in *Tajjour v New South Wales* (2014) 54 CLR 508): *Wainohu v New South Wales* (2011) 243 CLR 181, 220 (French CJ and Kiefel J), 230 (Gummow, Hayne, Crennan and Bell JJ); *Tajjour v New South Wales* (2014) 54 CLR 508, 553-554 (French CJ), 566-567 (Hayne J), 577-578 (Gageler J), 605-606 (Keane J); See discussion in: Chapter 3(VI)(B).

[107] Toohey, above n 105, 170; David Smallbone, 'Recent Suggestions of an Implied Bill of Rights in the Constitution, Considered as Part of a General Trend in Constitutional Interpretation' (1993) 21 *Federal Law Review* 254; Leslie Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166; Michael Coper, 'The High Court and Free Speech: Visions of Democracy or Delusions of Grandeur' (1994) 16 *Sydney Law Review* 185, 186; Greg Craven, 'The High Court of Australia: A Study in the Abuse of Power' (1999) 22 *University of New South Wales Law Journal* 216, 225.

The most prominent constitutional implication to emerge in this era was the political communication limitation. It would be the only one of these implications to gain majority support and achieve longevity. The limitation was first recognised by a High Court majority in *Nationwide News Pty Ltd v Wills* ('*Nationwide News*') and *Australian Capital Television Pty Ltd v Commonwealth* ('*ACTV*').[108] In *Nationwide News*, a provision of the *Industrial Relations Act 1988* (Cth), which stated that a 'person shall not ... by writing or speech use words calculated ... to bring a member of the [Australian Industrial Relations] Commission or the Commission into disrepute', was found to unduly burden Australians' freedom of communication about political and government matters and was, thus, held to be in breach of this limitation. In *ACTV*, the majority held that the limitation was breached by provisions in the *Broadcasting Act 1942* (Cth) that restrained political advertising and when and how governmental matters were discussed on radio and television during election periods.

[108] *Nationwide News* (1992) 177 CLR 1; *ACTV* (1992) 177 CLR 106. Murphy J first identified the possibility of an implied freedom of speech in the Constitution (as well as other implied rights and freedoms, such as a freedom of movement and guarantee against slavery) in a series of decisions in the 1970s and 1980s: *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 88; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 670; *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 312; *Miller v TCN Nine Pty Ltd* (1986) 161 CLR 556, 581. The influence of Justice Murphy's judgments on the Court's subsequent interest in implied rights and freedoms, and establishment of the political communication limitation in particular, is debatable. In *Nationwide News* and *ACTV*, the only majority judge to explicitly reference Justice Murphy's judgments was Gaudron J: *ACTV* (1992) 177 CLR 106, 212. George Winterton asserts that Justice Murphy's contribution in this area might have received greater acknowledgment 'had he directed more attention to specific provisions of the Constitution' when explaining the argument for deriving such implications: 'Constitutionally-Entrenched Common Law Rights' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 121, 130-131. George Williams similarly concludes that this lack of acknowledgment is due to the 'threadbare reasoning' offered by Murphy J to justify the existence of these implications: 'Lionel Murphy and Democracy and Rights' in Michael Coper and George Williams (eds), *Justice Lionel Murphy: Influential or Merely Prescient?* (Federation Press, 1997) 50, 63. Williams notes, however, that Justice Murphy's judgments may have played a vital role in the Court's eventual establishment of the political communication limitation despite (or perhaps because) of this lack of sufficient reasoning: 'In taking a series of extreme positions in the field of implied freedoms, … (h)e created a climate in which the development of the implied freedom of political discussion could be perceived to be less radical (and hence more legitimate) than it otherwise might have been': 63. For further discussion on Justice Murphy's influence on the High Court's subsequent approach to implied rights and freedoms see: Justice Michael Kirby, 'Lionel Murphy and the Power of Ideas' (1993) 18 *Alternative Law Journal* 253; Geoffrey Kennett, 'Individual Rights, the High Court and the Constitution' (1994) 19 *Melbourne University Law Review* 581; Michael Coper, 'Commentary: Michael Coper' in Michael Coper and George Williams (eds), *Justice Lionel Murphy: Influential or Merely Prescient?* (Federation Press, 1997) 64.

While judges in *Nationwide News* and *ACTV* differed in their specific articulation of the political communication limitation's rationale, this rationale can be summarised essentially as follows: the Constitution demands a system of representative democracy be maintained.[109] This is purportedly evident from provisions such as sections 7 and 24, which state that members of Commonwealth Parliament be 'directly chosen by the people'.[110] Such a system can only be maintained, however, if Australians can speak freely and remain informed about political and government matters. The system of representative democracy demands a level of political communication be protected and so the Constitution must, therefore, also implicitly demand such protection. As Brennan J explains: 'where a representative democracy is constitutionally entrenched, it carries with it those legal incidents which are essential to the effective maintenance of that form of government'.[111] A freedom of communication about government and political matters is such a 'legal incident'.

Several judges signalled that their approach to deriving the political communication limitation aligned with the tenets of the High Court's orthodox interpretive method, legalism.[112] Brennan J, drawing on the declaratory theory of law, saw the task of deriving constitutional implications as one of 'uncovering' rather than 'developing' implications.[113] He asserted that 'judicial policy has no role to play'.[114] McHugh J emphasised that the political communication limitation must be conceptualised faithfully in line with the legalist interpretive principles of *Engineers*.[115] This requires its derivation to be restrained and shaped by a close adherence to the Constitution's words.[116] Mason CJ, in part, justified the political communication limitation's establishment by drawing on Justice Dixon's reasoning underpinning the *Melbourne Corporation* limitation's establishment.[117] Gaudron J similarly drew

[109] This summation is similar to that provided by Kirk: 'Implications II', above n 5, 44.
[110] For discussion on the relationship between the concept of representative democracy and the Constitution see: Parts IV and V.
[111] *Nationwide News* (1992) 177 CLR 1, 48.
[112] Aroney, 'Seductive Plausibility', above n 27, 256.
[113] *Theophanous* (1994) 182 CLR 104, 143.
[114] Ibid 143. Brennan J defined 'judicial policy' as 'a court's opinion as to what the law should be as distinct from what the law is or has hitherto been generally thought to be': 142.
[115] Ibid 198.
[116] Ibid 198.
[117] *ACTV* (1992) 177 CLR 106, 134-135.

comparisons between the political communication and *Melbourne Corporation* limitations and another constitutional implication linked to Dixonian legalism - the *Boilermakers* limitation – to justify her support for the former's establishment.[118] These judges seemed to be suggesting that the political communication limitation was more or less consistent with legalist orthodoxy.

Many observers, however, viewed its derivation differently. They viewed the establishment of the political communication limitation and consideration of these other 'representative democracy' implications as representing a profound shift towards progressivism and away from legalism in the High Court's approach to constitutional interpretation.[119] While this shift had supporters on and off the bench, it also attracted a number of critics.[120] On the bench, the main critics of this shift during these early years of discussion of 'representative democracy' implications were Dawson and McHugh JJ. Dawson J was the sole judge to reject the establishment of the political communication limitation in *ACTV*.[121] He viewed other judges' derivation of constitutional implications 'from extrinsic sources' as tantamount to a 'gigantic leap away from the *Engineers' Case*, guided only by personal preconceptions of what the Constitution should, rather than does, contain.'[122] McHugh J held that the political communication limitation can be established in line with the interpretive principles laid out in *Engineers* as noted above. He objected, however, to some of his colleagues treating representative democracy as an 'external political theory' or 'free-standing principle' untethered to the Constitution's words from which various supplementary concepts such as

[118] Ibid 209-210.
[119] Williams, above n 57, 62-63; Michael Detmold, 'The New Constitutional Law' (1994) 16 *Sydney Law Review* 228, 228; McHugh, above n 63, 7; Craven, 'Heresy as Orthodoxy', above n 42, 91. This was already a growing critique of the Mason court due to its decisions in other areas of law, most notably *Mabo v Queensland (No 2)* (1992) 175 CLR 1 decided the same year as *Nationwide News* (1992) 177 CLR 1 and *ACTV* (1992) 177 CLR 106: Williams 62-63; McHugh 15.
[120] On the bench, the most overt supporter of a progressivist interpretive method during these early years of discussion of 'representative democracy' implications was Deane J: *Theophanous* (1994) 182 CLR 104, 171-174; Williams, above n 57, 69-70. For examples of contemporary supporters of (some of) these implications and the approach taken with regard to their derivation off the bench see: Detmold, above n 119; Kirk, 'Implications II', above n 5, 44-57; Michael Chesterman, 'Book Review' (1998) 3 *Media and Arts Law Review* 227.
[121] *ACTV* (1992) 177 CLR 106, 184. Dawson J, however, does posit that a more narrowly-focused limitation might exist in the Constitution to invalidate legislation denying voters access to the information required to make a 'true choice' during elections: 187.
[122] *Theophanous* (1994) 182 CLR 104, 193-194.

'free speech' and 'equality' could be imported into Australian constitutional law.[123] McHugh J likened it to treating the 128-section-long Constitution as containing a 's 129' establishing representative democracy and all that flows from it.[124]

Off the bench, scholars and even some politicians echoed these sentiments. In the academic sphere, this move towards progressivism was characterised as relying too little on the Constitution's words and traditional methods of legal reasoning, too much on judges' personal and political views and ultimately resulting in an undue shift of power towards the judiciary.[125] Craven, for example, argued that these 'representative democracy' implications

> owe nothing to any genuine process of implication, nor indeed to any general process of interpretation, properly understood. Instead, they have as their true basis merely the belief of the Court that they should be part of the Constitution, rather than any interpretative conviction that they indeed are. This is the very essence of progressivism.[126]

Nicholas Aroney emphasised the anti-democratic nature of these constitutional implications.[127] He considered it a 'constitutional irony … that the principle of representative government should be used as the basis of the implication of a guarantee of freedom of communication, meaning a limitation of the powers of a *democratically* elected Parliament.'[128] In the political sphere, HP Lee states that the decisions of *Nationwide News* and *ACTV* caused 'a political storm'.[129] One federal minister, John Brown, asserted that the *ACTV* decision amounted to an 'unconscionable grab for power' and that the federal Cabinet should 'hold

[123] *McGinty* (1996) 186 CLR 140, 235, 236. Also see: Aroney, 'Seductive Plausibility', above n 27, 257-259.
[124] *McGinty* (1996) 186 CLR 140, 234.
[125] Craven, 'High Court of Australia', above n 107, 223; Aroney, 'Seductive Plausibility', above n 27, 256-257, 268; Goldsworthy, 'Language', above n 5, 183-184.
[126] Craven, 'High Court of Australia', above n 107, 223.
[127] Aroney, 'Seductive Plausibility', above n 27, 268.
[128] Ibid 268. McHugh J made a similar point on the bench. He argued that such 'political questions' regarding what representative democracy entails are generally better 'left to be answered by the people and their elected representatives': *McGinty* (1996) 186 CLR 140, 235-236.
[129] HP Lee, 'The Implied Freedom of Political Communication' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 383, 392.

discussions on limitations on the court's powers'.[130] Another, Michael Tate, passionately criticised the High Court in Parliament, asserting that the 'breathtaking idea that the High Court is on the side of common law enshrining of [sic] the right to representative government is absolute nonsense.'[131] Thus, both on and off the bench, serious questions were being raised regarding the High Court's establishment of the political communication limitation and approach to deriving constitutional implications more generally.

The High Court seemingly felt the need to reconsider, or at least clarify, its approach to deriving such implications.[132] This seems, in part, motivated by a desire to address these criticisms. This seems also, in part, motivated by the fact that the Court's composition changed during this period of debate.[133] Gummow J replaced Mason CJ in 1995 with Sir Gerard Brennan appointed the new Chief Justice, and Kirby J replaced Deane J in 1996. As Dawson J stated in the hearing of *Levy v Victoria*, '[i]t would seem that there is now not a majority of the Court which would support' the 1994 political communication limitation decisions of *Theophanous v Herald & Weekly Times Ltd* ('*Theophanous*') and *Stephens v West Australian Newspapers Ltd* in which much of the tension regarding the High Court's formulation of the limitation came to the fore.[134] Kirby J noted the atmosphere in his early days at the Court: 'I … find myself faced with an almost daily barrage of verbal injunctions either to hold the line on constitutional free speech or to retreat to the proper role of judicial restraint.'[135] The High Court ultimately took the opportunity to clarify its approach to deriving constitutional implications in the landmark joint, unanimous decision of *Lange*.

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[130] Lenore Taylor, 'Regulate Top Court or Elect Judges – Minister', *Weekend Australian*, 9-10 January 1993, 2 as cited in ibid 392.
[131] Commonwealth, *Parliamentary Debates*, Senate, 7 October 1992, 1280 as cited in Lee, above n 129, 392.
[132] Lee, above n 129, 397.
[133] Ibid 397-398.
[134] *Levy* (1997) 189 CLR 579; Transcript of Proceedings, *Levy v Victoria* (High Court, M42/1995, Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow, Kirby JJ, 6 August 1996); *Theophanous* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.
[135] Kirby, above n 55, 4.

V *LANGE* AND THE TEXT AND STRUCTURE APPROACH

A *Lange*

In *Lange*, former New Zealand Prime Minister David Lange claimed that the Australian Broadcasting Corporation ('ABC') had defamed him in its current affairs program, *Four Corners*. The ABC, in part, argued that certain relevant sections of the *Defamation Act* were unconstitutional for they breached the political communication limitation. Namely, they were an unacceptable breach of the people's freedom to express political views and access political information. The High Court ultimately held that this was not a breach of the limitation. In doing so, it reasserted the existence of this implied limitation, refined the test for determining when this limitation is considered breached, and clarified for the first time in a united fashion what it considered the proper approach to deriving constitutional implications generally, the text and structure approach.[136]

The text and structure approach is an interpretive approach that demands that constitutional implications only be drawn from the text and structure of the Constitution. The High Court in *Lange* seemed to be strongly influenced by Justice McHugh's reasoning in preceding 'representative democracy' implication cases in its formulation of the text and structure approach.[137] In particular, it seemed guided

[136] *Lange* (1997) 189 CLR 520, 566-567. The High Court established a two-step test for determining whether the political communication limitation has been breached:

> First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people … If the first question is answered "yes" and the second is answered "no", the law is invalid: 567-568.

This test has been questioned and reconfigured in subsequent cases. See in particular: *Coleman v Power* (2004) 220 CLR 1, 50; *McCloy v New South Wales* (2015) 257 CLR 178, 193-195; See discussion in: Chapter 4(V).

[137] Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, 674-675.

by his concerns that representative democracy not be treated as an 'external political theory' untethered to the particular wording of the document.[138] The relevant portion of *Lange* is as follows:

> Since *McGinty* [*v Western Australia*] it has been clear, if it was not clear before, that the Constitution gives effect to the institution of "representative government" only to the extent that the text and structure of the Constitution establish it. In other words, to say that the Constitution gives effect to representative government is a shorthand way of saying that the Constitution provides for that form of representative government which is to be found in the relevant sections. Under the Constitution, the relevant question is not, "What is required by representative and responsible government?" It is, "What do the terms and structure of the Constitution prohibit, authorise or require?"[139]

In *Lange*, therefore, the High Court clarified that representative democracy is not an 'external political theory' but a manifestation arising from the text and structure of the Constitution. Specifically, it manifests from 'the whole set of relevant electoral and democratic provisions', particularly sections 7 and 24.[140] The political communication limitation, therefore, is framed as being derived from representative democracy to the extent that representative democracy manifests from these provisions.

Subsequent case law indicates that the text and structure approach is the approach to be used when determining the possible existence of any constitutional implication.[141] As Heydon, Crennan and Kiefel JJ state in *MZXOT v Minister for Immigration and Citizenship* ('*MZXOT*'), for example, '[*a*]*ny* implication can "validly extend only so far as is necessary to give effect to [the sections from which the implication is drawn]" and an implication drawn from specific sections of the Constitution can "give effect only to what is inherent in the text and structure of the

[138] *McGinty* (1996) 186 CLR 140, 235; Ibid 674-675.
[139] (1997) 189 CLR 520, 566-567; *McGinty* (1996) 186 CLR 140.
[140] Kirk, 'Implications II', above n 5, 49; *Lange* (1997) 189 CLR 520, 557-558. These provisions include ss 1, 6, 7, 8, 13, 24, 25, 28, 30, 49, 62, 64, 83 and 128. For discussion on the lack of clarity on the provisions anchoring the structural element of representative democracy see: Chapter 3(VI).
[141] Catherine Penhallurick, 'Commonwealth Immunity as a Constitutional Implication' (2001) 29 *Federal Law Review* 151, 162; Kirk, 'Implications I', above n 5, 647.

Constitution"'.[142] In this case, the High Court rejected the argument that it held an 'implied power' to remit matters to lower courts under the Constitution regardless of the presence of legislation to the contrary.[143] In doing so, all seven High Court judges (as well as the plaintiff, defendant and intervener in the matter) accepted that the text and structure approach was the requisite approach to be used in determining the possible existence of this implication.[144] The text and structure approach, therefore, does not appear to be used only to confirm the political communication limitation's existence or to be used only with regard to determining other 'representative democracy' implications' existence. It appears to be the approach to be used for deriving all constitutional implications.

B *The Text and Structure Approach*

Despite the use of the text and structure approach in *Lange* and in numerous cases after it, the High Court has never straightforwardly defined what is meant by 'text' or 'structure'. 'Text' seems to refer to the entirety of the Constitution's words in its multiple provisions and accompanying headings. 'Structure' seems to carry two meanings.[145] First, it seems to refer to foundational principles underpinning the Constitution such as federalism, separation of powers and representative democracy ('systemic structure').[146] I refer to each of these principles that make up the Constitution's systemic structure as 'structural elements'. Second, 'structure' seems to refer to the ordering of the Constitution's chapters and provisions ('organisational structure').[147] An example of a constitutional implication flowing, at least in part, from the Constitution's organisational structure can be seen in *Newcrest Mining (WA) Ltd v Commonwealth*.[148] Several judges noted that the territories power (section 122) sits in a separate chapter (Chapter IV) from that which contains the bulk of the Commonwealth's other legislative powers (Chapter

[142] (2008) 233 CLR 601, 656 (emphasis added). The statement in square brackets ('the sections from which the implication is drawn') is the judges' own addition.
[143] (2008) 233 CLR 601, 615.
[144] *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 623 (Gleeson CJ, Gummow and Hayne JJ), 635 (Kirby J), 656 (Heydon, Crennan and Kiefel JJ).
[145] Kenny, 'Modes', above n 45, 62; Kirk, 'Implications I', above n 5, 664.
[146] Kenny, 'Modes', above n 45, 62; Kirk, 'Implications I', above n 5, 664. These foundational principles appear to be constitutional implications themselves. See discussion in: Chapter 3(VI).
[147] Kenny, 'Modes', above n 45, 62; Kirk, 'Implications I', above n 5, 664.
[148] (1997) 190 CLR 513.

I).[149] This led them to conclude that the restraints on the Commonwealth's power to make laws for the territories differs from those for the remainder of Australia.[150]

Constitutional implications, therefore, can only be derived from the text, systemic structure and organisational structure of the Constitution according to the text and structure approach. A constitutional implication could ostensibly be derived from the Constitution's text without any reference to the Constitution's (systemic or organisational) structure. The implications that flow from the word 'jury' discussed in Part II, for example, may be drawn purely from that single word. Of course, if an implication flowing from the word 'jury' is informed by reference to the structural element of the rule of law, for example, then it would be a constitutional implication derived both from the Constitution's text *and* systemic structure.[151] If the constitutional implication is derived from the structural element of separation of powers, for another example, then it would be an implication derived from the Constitution's text, systemic structure *and* organisational structure. This is because separation of powers is a structural element forming part of the Constitution's systemic structure and one which was partially justified with reference to the Constitution's organisational structure.[152] Specifically, the dedication of individual chapters of the Constitution to each of the branches of power – executive, legislative and judicial – was instrumental in explaining the separation of powers' constitutional entrenchment.[153]

While a constitutional implication can ostensibly be derived from the Constitution's text without any reference to the Constitution's structure, the reverse is not true. Any constitutional implication drawn from the Constitution's organisational structure is a product of its words (that is, 'text') – specifically, the *arrangement* of its words. Any constitutional implication drawn from the Constitution's systemic structure is similarly a product of its words (that is, 'text'). This is because structural

[149] *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 535 (Brennan CJ); 550-551 (Dawson J); 577 (McHugh J).
[150] Ibid.
[151] Kirk, 'Implications I', above n 5, 666. This is assuming that the rule of law is a structural element. See discussion in: Chapter 3(VI)(A).
[152] *Boilermakers* (1956) 94 CLR 254, 275.
[153] Ibid 275.

elements are seemingly not conceptualised as distinct from the Constitution's text. They are conceptualised as manifestations of this text.[154] As noted above, representative democracy was held in *Lange* to manifest from a collective reading of the words of sections 7 and 24 – specifically the phrase that members of Commonwealth Parliament be 'directly chosen by the people' – as well as other provisions on the democratic process established by the Constitution.[155] Thus, both the Constitution's organisational and systemic structure are intertwined with the Constitution's text. An implication derived from the Constitution's structure, therefore, is effectively an implication derived from its text as well. As Dawson J states in *McGinty v Western Australia*, '[w]hether or not an implication is categorised as structural or not, its existence must ultimately be drawn from the text. One is brought back to the text in the end'.[156]

A final notable aspect of the text and structure approach is the assertion that implications drawn from the Constitution's structure ('structural implications') may only be established when 'necessary'.[157] The High Court held in *Lange* that the political communication limitation 'can validly extend only so far as is necessary to give effect to sections 7, 24, 64, 128 and related sections of the Constitution'.[158] This seems to be drawing upon Chief Justice Mason's frequently invoked statement in *ACTV* on structural implications more broadly:

> It may not be right to say that no implication will be made unless it is necessary. In cases where the implication is sought to be derived from the actual terms of the Constitution it may be sufficient that the relevant intention is manifested according to the accepted principles of interpretation. However, where the implication is structural rather than textual it is no doubt correct to say that the term sought to be

[154] For further discussion of the High Court's conceptualisation of structural elements as manifesting from the Constitution's words see: Chapter 3(VI).
[155] *Lange* (1997) 189 CLR 520, 566-567.
[156] *McGinty* (1996) 186 CLR 140, 184.
[157] Some precedent suggests that all constitutional implications, not just structural ones, must pass a necessity test: Kirk, 'Implications I', above n 5, 649; Goldsworthy, 'Constitutional Implications Revisited', above n 5, 18. For example see: *Engineers* (1920) 28 CLR 129, 155.
[158] *Lange* (1997) 189 CLR 520, 567.

> implied must be logically or practically necessary for the preservation of the integrity of that structure.[159]

This necessity requirement appears intended to limit the opportunity for judicial choice, and limit the potential for the derivation of constitutional implications generally. That is, constitutional implications may only be derived if they are indispensable to the maintenance and efficacy of the Constitution, not merely desirable.[160] According to Kirby J in *MZXOT*, it has been successful in these regards.[161] He notes that 'this Court has exercised great restraint in deriving implications. Effectively, implications have been confined to those matters deemed truly necessary to give effect to the express constitutional provisions'.[162]

The High Court's decision in *Lange* and declaration of the text and structure approach was a significant achievement. Leslie Zines described the Court's ability to construct this unanimous joint judgment in such a controversial area of constitutional law as 'a major miracle explicable only by divine interference with the forces of nature.'[163] It was significant because it clarified the reasoning for the establishment of the political communication limitation specifically and the approach to deriving constitutional implications more broadly.

It was also significant because it signalled a post-Mason court pivot back to legalism as the High Court's orthodox interpretive method.[164] While a staunch

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[159] (1992) 177 CLR 106, 135; Goldsworthy, 'Constitutional Implications Revisited', above n 5, 19; Kirk, 'Implications I', above n 5, 664. For an example of its recent invocation by the High Court see: *Burns v Corbett* (2018) 92 ALJR 423, 446, 462, 465.

[160] See discussion in: Chapter 3(VI)(C).

[161] (2008) 233 CLR 601, 635.

[162] Ibid 635. For a contrary view on the High Court has applied (and should apply) the necessity test see: Goldsworthy, 'Constitutional Implications Revisited', above n 5, 18-31; Aroney, 'Seductive Plausibility', above n 27, 264-267.

[163] Leslie Zines, 'Sir Maurice Byers Lecture: Legalism, Realism and Judicial Rhetoric in Constitutional Law' (Speech delivered at New South Wales Bar Association, 16 October 2002).

[164] Stellios, above n 47, 657; McHugh, above n 63, 7-8; Lee, above n 129, 390-392; Nicholas Aroney, 'The Structure of Constitutional Revolutions: Are the Lange, Levy and Kruger Cases a Return to Normal Science?' (1998) 21 *University of New South Wales Law Journal* 645. For discussion on why the High Court's establishment of the text and structure approach does not necessarily equate to a legalist approach to deriving constitutional implications, despite appearances, see: Chapter 3(III)(A).

legalist might argue that *Lange* did not go far enough in restraining judges' ability to derive constitutional implications with reference to their own personal and political proclivities, the hallmarks of legalism in *Lange* and the text and structure approach are nevertheless evident: a desire to limit judicial choice, an emphasis on the Constitution's 'internal' content rather than 'external' factors, and a focus on *revealing* implications through principled interpretive techniques rather than *making* implications creatively.[165] These hallmarks are particularly evident from the High Court's shift in how it conceptualised representative democracy. It was not a 'free-standing principle' liberally imported from outside of the Constitution, but the product of reading multiple provisions collectively – a triumph of nuanced inductive legal reasoning seemingly restrained by the parameters of the Constitution's words.[166]

On its face, it seemed a degree of clarity and judicial restraint had been restored.[167] On closer inspection, however, the High Court's formulation of the text and structure approach retains significant uncertainty. The next chapter examines these uncertainties and the additional hurdle that they present for assessing the doctrinal arguments for and against the ecological limitation.

VI CONCLUSION

In this chapter, I have outlined the High Court's conceptualisation and derivation of constitutional implications. I have defined a 'constitutional implication', in line with doctrine, as an idea conveyed indirectly by the Constitution's words that identifies a feature or features of the Australian constitutional system. I have also defined three interpretive methods to assist in the discussion carried out in this chapter and subsequent chapters. In essence, 'legalism' can be defined as an interpretive method emphasising the need for judges to interpret the Constitution as objectively as possible. 'Progressivism' can be defined as an interpretive method

[165] Stellios, above n 47, 657. See discussion in: Part III.
[166] *McGinty* (1996) 186 CLR 140, 236; Stellios, above n 47, 657.
[167] Aroney, 'Constitutional Revolutions', above n 164, 653.

emphasising the ambiguity of language and importance of interpreting the Constitution to fit the needs of modern Australian society. Finally, 'intentionalism' can be defined as an interpretive method emphasising the importance of the framers' intentions.

I have explained the High Court's development and establishment of its approach to deriving constitutional implications: the text and structure approach. This approach demands that such implications can only be derived from the Constitution's text and structure. The Constitution's 'text' seemingly refers to the Constitution's words. The Constitution's 'structure' seemingly refers to what I call its 'organisational structure' (the arrangement of its provisions and chapters) and 'systemic structure' (the foundational principles underpinning the Constitution, such as separation of powers and representative democracy). I refer to each of these principles that make up the Constitution's systemic structure as 'structural elements'. A final significant characteristic of the text and structure approach is the requirement that 'structural implications' (those constitutional implications derived from the Constitution's structure) may only be established when 'logically or practically necessary'.[168] In summary, this chapter has defined key terms and explained the High Court's approach to deriving constitutional implications, the text and structure approach. This lays the foundation for the critique of this approach in the next chapter.

[168] *ACTV* (1992) 177 CLR 106, 135.

CHAPTER 3: CRITIQUING THE TEXT AND STRUCTURE APPROACH

I INTRODUCTION

In this chapter, I critique the text and structure approach and, for the purposes of subsequent chapters, outline my methodology for assessing the doctrinal merits of the ecological limitation. The fundamental problem with this approach is that it provides little practical guidance for assessing the case for such proposed implications. This is for a number of reasons. First, despite the approach's apparent connection to legalism as was discussed in Chapter 2, it does little to restrain judges' choice of interpretive method.[1] This allows judges to hold divergent visions of the content of the Constitution's 'text' and 'structure' and how implications are to be derived from them. Further, despite appearances to the contrary, the approach does little to restrain judges from drawing on an array of 'external' sources when assessing the bona fides of a proposed implication.[2] Finally, determining the implications that may be drawn from the Constitution's systemic structure presents particular challenges due to the range of discretionary decisions required of judges to tease out its content. The end result of these various dimensions of the text and structure approach is that different judges can claim to be looking only at the Constitution's 'text' and 'structure' and come to vastly different conclusions on the implications that they permit.[3]

Thus, the text and structure approach, on its own, fails to provide the guidance required to explain whether the ecological limitation, or any proposed implication,

[1] See discussion in: Chapter 2(V).
[2] Ibid.
[3] Adrienne Stone 'Limits of Constitutional Text and Structure Revisited' (2005) 28 *University of New South Wales Law Journal* 842, 850.

can be derived from the Constitution. In acknowledgment of the shortcomings of this approach, the chapter concludes with an examination of how I propose to assess the doctrinal merits of the ecological limitation. The starting point must be to adhere to the tenets of the text and structure approach as closely as possible.[4] This includes focusing on the question of whether the ecological limitation (which is posited as a structural implication) is 'logically or practically necessary'.[5] Further guidance is gained by drawing comparisons between the ecological limitation and established implications, such as the political communication and *Melbourne Corporation* limitations. The fact that such implications ostensibly derive from the Constitution's 'text' and 'structure' means that they offer insights on the traits of proposed implications that the Court deems acceptable and unacceptable.

This chapter is structured as follows. In order to critique the text and structure approach in this chapter, I first deconstruct the concepts of 'text' and 'structure'.[6] In Part II, I demonstrate that the 'text' and 'structure' collectively represent a set of ideas. This means that the act of deriving a constitutional implication (an idea conveyed indirectly by the Constitution's words) is essentially an act of determining if this idea exists in this set. The High Court's lack of commitment to an interpretive method, however, allows judges to hold differing views on the content of this set of ideas and the implications that might be drawn from it. In Part III, I discuss how this lack of commitment to an interpretive method undermines the utility of the text and structure approach. In Part IV, I examine how the text and structure approach permits judges to employ 'external' sources to shed light on the ideas that they believe to be conveyed by the Constitution's 'text' and 'structure'. This is despite the claim made by some scholars that the use of 'external' sources conflicts with the Court's commitment to being restrained by the 'text' and 'structure' when deriving implications. I address and refute this claim in Part V. The High Court's vision of the Constitution's systemic structure raises particular issues regarding the

[4] See discussion in: Part VII.

[5] *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 135 ('*ACTV*'). See discussion in: Chapter 2(V)(B). For discussion on the framing of the ecological limitation as a structural implication see: Chapter 4(II).

[6] I use the term 'deconstruct' here in the layperson sense, not as a term evoking the works of Jacques Derrida on deconstructive criticism. For example see: *Of Grammatology* (Gayatri Chakravorty Spivak trans, JHU Press, 2016) [trans of: *De la grammatologie* (first published 1967)]

utility of the text and structure approach that I discuss in Part VI. I conclude this chapter, in Part VII, by outlining the ways in which the viability of the ecological limitation can be determined, in light of these problems with the text and structure approach.

II DECONSTRUCTING THE 'TEXT' AND 'STRUCTURE'

In this Part, I deconstruct the Constitution's 'text' and 'structure' to demonstrate how each represent (interconnected) sets of ideas. The reason it is important to deconstruct these two concepts to this level is that this is the level at which constitutional implications operate. That is, constitutional implications are ideas – specifically, ideas conveyed indirectly by the Constitution's words.[7] These ideas, according to the Court, must be gleaned from the Constitution's 'text' and 'structure'. Understanding how the 'text' and 'structure' represent sets of ideas, therefore, assists the discussion in this chapter on the ways in which these specific ideas (constitutional implications) are expected to be drawn from these two sources. More generally speaking, it is important to deconstruct the 'text' and 'structure' because these terms should not be thought of as possessing some clear or self-evident meaning. The Court's treatment of these terms as such has been the subject of criticism. As noted in Chapter 1, the phrase 'text and structure' is too often used as some form of 'mantra' or 'ritual incantation' by the High Court.[8] Judges use the phrase to derive or reject a certain implication without explaining precisely how this 'text and structure' has led these judges to their conclusion.[9] Thus, in this Part, I will deconstruct the concepts of the Constitution's 'text' and 'structure' for the sake of clarity and to ground the discussion that follows.

[7] See discussion in: Chapter 2(II).
[8] Jeremy Kirk, 'Constitutional Implications I: Nature, Legitimacy, Classification, Examples' (2000) 24 *Melbourne University Law Review* 645, 647 ('mantra'); George Williams and Andrew Lynch, 'The High Court on Constitutional Law: The 2010 Term' (2011) 34 *University of New South Wales Law Journal* 1006, 1026 ('ritual incantation'). See discussion in: Chapter 1(II)(A).
[9] See discussion in: Chapter 1(II)(A).

To tease out this conceptualisation of 'text' and 'structure', I connect the discussion in Chapter 2 regarding defining constitutional implications with that regarding the Court's formulation of the text and structure approach.[10] To begin, the Constitution's 'text' ostensibly refers to the Constitution's words.[11] These words are essentially 'black marks on a white background' conveying ideas.[12] The Constitution's 'text', therefore, can be understood as representing a set of ideas – the accumulation of all of the ideas conveyed, both directly and indirectly, by the Constitution's words. For the sake of convenience, I will refer to this as the 'grand-set of ideas.'

The Constitution's 'structure' ostensibly refers to the Constitution's organisational and systemic structure.[13] Each represents their own set of ideas. More acutely, they each represent sub-sets of this grand-set. This is because the organisational and systemic structure are, themselves, products of the Constitution's words (the 'text').[14] Organisational structure represents the particular set of ideas conveyed by the arrangement of the Constitution's words (into chapters and provisions).[15] Systemic structure represents the particular set of ideas conveyed by the Constitution's words that form structural elements (the foundational principles underpinning the Constitution, such as federalism and representative democracy).[16] It can be concluded from this, therefore, that the entirety of ideas conveyed by both the Constitution's 'text' and 'structure' is the grand-set of ideas, with the ideas conveyed by the Constitution's organisational and systemic structure each being particular sub-sets of this grand-set.

[10] See discussion in: Chapter 2(II) and (V)(B).
[11] See discussion in: Chapter 2(V)(B).
[12] Stanley Fish, 'Intention Is all There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law' (2008) 29 *Cardozo Law Review* 1109, 1112; See discussion in: Chapter 2(II).
[13] See discussion in: Chapter 2(V)(B).
[14] Ibid.
[15] Ibid.
[16] As discussed in Chapter 2(V)(B), the High Court frames structural elements as deriving entirely from the Constitution's words. Recall in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*') that the structural element of representative democracy is framed as manifesting solely from the words of sections 7, 24 and other relevant provisions on democratic and electoral process: 566-567. For further discussion on the relationship between the Constitution's words and structural elements see: Part VI.

The role of this grand-set of ideas, drawing on discussion in Chapter 2, is to identify various features of the Australian constitutional system – the participants and institutions that make up this system, their powers and limitations within this system and so forth.[17] The specific ideas in this grand-set (and the features of the Australian constitutional system they represent) are, to some extent, unclear. This is because the Constitution is perpetually in the process of being interpreted. While the ideas conveyed by some segments of the Constitution are largely settled in Australian constitutional law (it is generally clear, for a simple example, who is being referred to by the words 'Justices of the High Court' in section 2), others remain unknown or contentious (the precise operation of section 100 regarding transboundary rivers is unclear due to the little judicial attention it has received).[18] The fact that judges may employ differing interpretive methods to resolve the interpretive questions in these unknown or contentious areas, as will be discussed in Part III, adds a dimension of unpredictability as to the content of the grand-set. It means that the ideas in this grand-set are subject to change depending on the interpretive method judges use to interpret the words that convey them.

The ideas in this grand-set are not neatly distinguishable from each other. They interconnect with, and inform, each other in complex ways. Consider, for example, the idea of 'Parliament'. It is an idea, itself, that draws on, or is made up of, an array of other ideas involving the workings of the House of Representatives, Senate, elections and so forth. The idea of 'Parliament' also interconnects with, and is informed by, ideas that do not fall as strictly under the banner of 'Parliament' such as the idea of the 'Crown'.[19] This latter idea informs how we understand the idea of 'Parliament' (and, to an extent, forms part of the construct of Parliament) but also informs our understanding of aspects of the Australian constitutional system beyond Parliament. In these ways, the ideas within the grand-set of ideas overlap and intersect.

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[17] See discussion in: Chapter 2(II).

[18] For discussion on s 100 see: Adam Webster, *Defining Rights, Powers and Limits in Transboundary River Disputes: A Legal Analysis of the River Murray* (PhD thesis, University of Adelaide, 2014) 77-87.

[19] For discussion on the conceptualisation of the Crown in Australian constitutional law see: Cheryl Saunders, 'The Concept of the Crown' (2015) 38 *Melbourne University Law Review* 873; Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2006).

The relationship between ideas in the grand-set provides us with some insight into the act of deriving constitutional implications. The text and structure approach demands that judges only derive implications from the Constitution's 'text' and 'structure'. This means that the act of deriving a constitutional implication is essentially an act of determining if this particular idea is part of the grand-set of ideas. This determination is generally carried out based on the existence of other ideas that are more firmly established as part of the grand-set (this latter collection of ideas is typically ideas conveyed directly by the Constitution's words). The political communication limitation, for example, is a constitutional implication. It is, therefore, an idea in the grand-set. The political communication limitation's existence in this set was determined based on the existence of other ideas in this set that were already established – the existence of the idea of Members of Parliament chosen via elections (conveyed by the words in sections 7 and 24), the existence of the idea of people having the power to change the Constitution via referendum (conveyed by the words in section 128) and so forth.[20] Their existence in the grand-set assisted the Court in recognising the existence of the idea of the political communication limitation as part of the grand-set. In this way, ideas conveyed indirectly by the Constitution's words (constitutional implications) and ideas conveyed directly by the Constitution's words are interconnected and inform each other.

Thus, the text and structure approach demands that judges only derive constitutional implications from the Constitution's 'text' and 'structure'. This means that they can only derive constitutional implications from the vast set of ideas that are collectively represented by the 'text' and 'structure', the grand-set of ideas. The ideas within this grand-set (both those conveyed directly and indirectly by the Constitution's words) interconnect with, and inform, each other. The act of deriving a constitutional implication is an act of determining the existence of this idea in the grand-set. This generally involves drawing some logical link between the proposed constitutional implication and other ideas that are more firmly established as part of the grand-set. The text and structure approach, therefore, restrains judges to

[20] *Lange* (1997) 189 CLR 520, 567. See discussion in: Chapter 2(V).

derive constitutional implications from the grand-set of ideas. As will be seen in the discussion that follows, however, the fact that the grand-set is vast, malleable and capable of being informed by ideas found in sources 'external' to the Constitution means that being 'restrained' to this grand-set is not much of a restraint at all.

III INTERPRETIVE METHOD

A *Judges' Freedom to Choose Interpretive Methods*

The text and structure approach does little to restrain judges' choices of interpretive method when assessing the doctrinal merits of a proposed implication. As discussed in Chapter 2, the High Court's general position is that judges are free to employ the interpretive method that they deem appropriate when engaging in constitutional interpretation.[21] They may even shift from one interpretive method to the other on a case by case or provision by provision basis.[22] The text and structure approach does not significantly alter this position. This approach emphasises that implications stem from the Constitution's words (as they form the 'text' and 'structure') and not from outside of them. On this point, it would likely only restrain judges from employing extreme interpretive methods that allow for an utter disregard of the Constitution's words. It would still allow interpretive methods with a generous vision of the indirectness with which words can convey ideas, including various versions of progressivism.[23] This aspect of the text and structure approach also does not restrict judges from employing interpretive methods that sanction the use of 'external' sources when interpreting the Constitution as one might suspect, as will be seen in Part IV.

[21] See discussion in: Chapter 2(III)(B).
[22] Ibid.
[23] Further, a generous vision of the indirectness with which words can convey ideas is, to some extent, intrinsic to the act of constitutional interpretation. This is due to the fact that the meagre set of words that make up the Constitution is expected to convey a vast set of ideas to explain the fundamental operation of the Australian constitutional system. See discussion in: Part V.

Further, the approach clarifies that constitutional implications can be derived from a particular construct, the Constitution's 'structure', and such implications must be 'necessary' when derived from the Constitution's systemic structure specifically.[24] This construct does little to change judges' choices of interpretive method other than require them to accept its existence. With regard to the necessity test, as will be seen in Part VI, this requirement of 'necessity' is not as restrictive as it might seem.[25] This is due to the fact that a structural implication can be deemed 'necessary' based on a judge's view of what would promote the efficacy of (some aspect of) the Australian constitutional system.[26] What judges might view as required for the efficient operation of this constitutional system could differ substantially based on their interpretive method and will not always equate to what could be considered strictly necessary for its operation.[27] Thus, as long as a judge's chosen interpretive method respects these minimal conditions, it seems to be permitted by the text and structure approach.[28]

The fact that this approach allows judges to employ almost any interpretive method that they see fit significantly limits the guidance that this approach can provide when determining the doctrinal merits of proposed implications. This is because, as discussed in Chapter 2, an interpretive method does the essential work of providing a theory for how the Constitution's words convey ideas and how they do so indirectly.[29] Simply put, it provides the vital details for how ideas can be deemed to be implied in the Constitution. Consider, for example, Jeffrey Goldsworthy's intentionalist perspective.[30] He provides a specific vision for how the Constitution's

[24] See discussion in: Part VI(C) and Chapter 2(V)(B).
[25] See discussion in: Part VI(C).
[26] Ibid.
[27] Ibid. Jeffrey Goldsworthy makes a similar point, stating that the necessity test does not restrain judges' interpretive method and require them to consider the 'necessity' of a proposed implication with regard to what the framers' intended (as he suggests that it should): 'Constitutional Implications Revisited – The Implied Rights Cases: Twenty Years On', (2011) 30 *University of Queensland Law Journal* 9, 18-31.
[28] This is also evident from Justice McHugh's comments in *McGinty v Western Australia* (1996) 186 CLR 140 ('*McGinty*'): 'The Constitution contains no injunction as to how it is to be interpreted. Any theory of constitutional interpretation must be a matter of conviction based on some theory external to the Constitution itself': 230. As noted previously, Justice McHugh's views in *McGinty* were influential on the court's formulation of the text and structure approach in *Lange* (1997) 189 CLR 520: Chapter 2(V)(A).
[29] See discussion in: Chapter 2(III).
[30] 'Implications in Language, Law and the Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 150; 'Constitutional Implications and

words should be understood as conveying ideas. He asserts that written words essentially convey ideas that reflect the intentions of the person who wrote them (subject to certain constraints regarding the context and evidence available on those intentions).[31] In the case of the Constitution, therefore, the ideas conveyed by the Constitution's words, therefore, can generally be determined with reference to the framers' intentions.[32]

Goldsworthy also provides a specific vision for how the Constitution's words can be understood as conveying ideas indirectly. He lists four ways in which this might occur: 'logical implications' (the ideas conveyed are clear through logical reasoning. Recall the example provided in Chapter 2 – 'all men are mortal and Socrates is a man' logically implies that Socrates is mortal); 'deficient expression' (the framers failed to use words that convey their ideas clearly but it remains evident what they 'really meant to say'); 'deliberate implications' (the framers deliberately chose to convey certain ideas through implication); and 'implicit assumptions' (the framers may not have actually consciously considered a particular idea to be conveyed but simply took this idea for granted).[33] In this way, an interpretive method offers details on, and refines, what is an acceptable and unacceptable way to derive constitutional implications.

I do not raise this point to suggest that judges should commit to Goldsworthy's interpretive method or any other method in particular. Good reasons exist for allowing judges to employ the interpretive method that they see fit, and shifting methods where they consider it appropriate, when engaged in constitutional

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Freedom of Political Speech: A Reply to Stephen Donaghue' (1997) 23 *Monash University Law Review* 362; 'Constitutional Implications Revisited', above n 27.

[31] Goldsworthy, 'Reply', above n 30, 362-363; Goldsworthy, 'Language', above n 30. His understanding of how words convey ideas is based on the work of philosopher of language Paul Grice: *Studies in the Way of Words* (Harvard University Press, 1989); Goldsworthy, 'Implications in Language, Law and the Constitution', 154-155.

[32] For discussion on Goldsworthy's view on why the framers' intentions are his focus (as opposed to those of other plausible candidates: namely, the Australian people of the 1890s who approved the Constitution at referenda or the Imperial Parliament who enacted the Constitution) see: Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1, 26; Chapter 5, n 74.

[33] Goldsworthy, 'Language', above n 30, 152-162. Also see discussion in: Chapter 2, n 7 and accompanying text. Goldsworthy suggests that this list is non-exhaustive but, as Kirk notes, 'a clear aim of this project of classification is to limit the legitimate scope for inferring implications from the Constitution': 'Language', 154; Kirk, 'Constitutional Implications I', above n 8, 657.

interpretation.[34] As the Hon Murray Gleeson states, writing extra-judicially, judges must 'start with the question, not the answer' and be open to resolving the complex interpretive questions raised in constitutional law by drawing on the appropriate factors, regardless of the particular interpretive method to which these factors might "belong".[35] Further, attempting to secure a uniform interpretive method that all judges can agree on would be foolhardy.[36] My point is merely that one specific drawback to this stance exists for present purposes. The text and structure approach's lack of restraint on judges' interpretive method leaves the approach less able to fulfil its fundamental function: providing guidance on what proposed constitutional implications may be deemed doctrinally acceptable and unacceptable. This specific drawback means that the text and structure approach is less capable of providing such guidance with regard to assessing the viability of the ecological limitation.

The fact that judges can employ almost any interpretive method that they see fit in tandem with the text and structure approach means that a substantial link between the text and structure approach and legalism cannot be sustained. This is despite appearances to the contrary noted in Chapter 2.[37] On its surface, the text and structure approach appears to be restraining judges to act in a relatively objective manner. Namely, judges are restrained to look only at the Constitution's words (as they form both the 'text' and 'structure') and only derive constitutional implications from the systemic structure where 'necessary'.[38] On closer inspection, however, this approach does little to restrain judges acting subjectively in their assessment of

[34] For discussion on the benefits of a court's stance of non-committal to a particular interpretive method see: Chief Justice Robert French, 'Theories of Everything and Constitutional Interpretation' (Speech delivered at the University of New South Wales, 19 February 2010); Murray Gleeson, 'Foreword' in Michael White and Aladin Rahemtula (eds), *Queensland Judges on the High Court* (Supreme Court of Queensland Library, 2003) vii, viii-ix; Cass Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press, 2001) 50-51; Daniel Farber, 'The Originalism Debate: A Guide for the Perplexed' (1989) 49 *Ohio State Law Journal* 1085, 1103.

[35] Gleeson, above n 34, viii-ix. This could be considered an interpretive method of its own. Goldsworthy refers to such a method as 'pluralism': 'Constitutional Implications Revisited', above n 27, 12.

[36] Justice Susan Kenny, 'The High Court of Australia and Modes of Constitutional Interpretation' in *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission of New South Wales, 2007) 45, 46.

[37] See discussion in: Chapter 2(V).

[38] With regard to necessity, Kirk says that this requirement 'has overtones of claiming judicial objectivity in stating implications': 'Constitutional Implications I', above n 8, 649.

a proposed implication. Judges are free to choose interpretive methods that sanction, or at least view as unavoidable, a substantial use of value judgments and policy considerations and a wide range of 'external' sources – despite such an interpretive method appearing to be anathema to legalism.[39] This is as long as these judges genuinely hold that drawing on these value judgments, policy considerations and 'external' sources is a suitable means of determining the collection of ideas that are conveyed by the relevant segment of the 'text' or 'structure' in question.

The text and structure approach's compatibility with such interpretive methods is not merely theoretical. As will be discussed in Part IV, the High Court can, and does, rely substantially on 'external' sources when determining the content of the Constitution's 'text' and 'structure' and deriving implications from it. As will be discussed in Part VI, the High Court can, and does, rely substantially on the use of value judgments and policy considerations when deriving implications from the 'systemic' structure, in particular. This includes when determining the 'necessity' of deriving such implications. While legalism (as with all interpretive methods) is difficult to precisely define, the text and structure approach's relationship to legalism appears to be largely superficial.

This lack of guidance provided by the text and structure approach helps explain why, as other commentators have noted, a significant change in the High Court's approach to deriving implications before and after *Lange* cannot be detected.[40] As Nicholas Aroney concludes, the 'restraint' exercised by the High Court since *Lange*

[39] See discussion in: Chapter 2(III)(B). With regard to 'external' sources, a legalist is not necessarily adverse to any use of 'external' sources in the process of constitutional interpretation. The use of certain 'external' sources might be viewed as assisting a legalist judge in their pursuit of interpreting the Constitution in as objective a manner as possible. The 'external' sources I refer to here are specifically those that a legalist might deem inappropriate. With regard to the 'representative democracy' implication cases of the 1990s, for example, drawing on 'external' theories of 'representative democracy' with an insufficient connection to the particular dimensions of the Constitution seemed to indicate to some judges a betrayal of legalist orthodoxy: Chapter 2(IV). For my definition of 'external' sources and discussion on its relationship to judges' interpretive method see: Part IV.

[40] James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 657; Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (2008) 30 *Sydney Law Review* 5, 20-25; Nicholas Aroney, 'Towards the Best Explanation of the Constitution: Text, Structure, History and Principle in Roach v Electoral Commissioner' (2011) 30 *University of Queensland Law Journal* 145, 151; Leslie Zines, 'Gleeson Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 307, 308.

has been 'ambiguous'.[41] In the 2007 case of *Roach v Electoral Commissioner* ('*Roach*'), for instance, the High Court held that legislation disqualifying prisoners from voting in federal elections regardless of the duration of their sentence was unconstitutional.[42] While the majority judgment was willing to derive from the Constitution what is essentially an implied right to vote in federal elections, it refrained from explicitly calling it that.[43] This is indicative of what some commentators note regarding the High Court's post-*Lange* decisions: there was more a change in style (the High Court generally emphasised the primacy of the Constitution's words, resisted referring openly to value judgments or other such factors informing their decisions, and were reluctant to openly champion the establishment of 'new' constitutional implications as members of the Mason court were more inclined to do) than substance (decisions significantly reliant on judges making value judgments or otherwise reminiscent of those made in the Mason court era, such as *Roach*, continued to be made).[44]

B *Interpretive methods and the 'text' and 'structure'*

Judges' freedom to choose the interpretive method that they see fit also leads to a more rudimentary observation on the limitations of the text and structure approach. Namely, judges' different interpretive methods lead to different interpretations of the Constitution's 'text' and 'structure'. To put this more acutely, judges' choice of interpretive method changes the ideas held to be in the grand-set of ideas represented by the 'text' and 'structure'. With regard to the Constitution's 'text', consider the word 'race' in section 51(xxvi). This provision holds that the Commonwealth can pass laws regarding '[t]he people of any race for whom it is deemed necessary to make special laws'. An intentionalist judge might interpret this word as signifying a pseudo-scientific category of people anchored in a belief in the existence of a racial hierarchy based on the likely meaning given to this word

[41] Aroney, 'Towards the Best Explanation', above n 40, 151.
[42] (2007) 233 CLR 162.
[43] Aroney, 'Towards the Best Explanation', above n 40, 151.
[44] McHugh, above n 40, 20-25; Stellios, above n 40, 656-658; Leslie Zines, 'Gleeson Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 307, 308.

by the framers.[45] A progressivist judge, in contrast, might interpret the word 'race' as signifying a socially constructed category of people anchored, at least in part, in the concept of community identity based on the likely meaning given to the word by a modern reader.[46] In this way, the content of the Constitution's 'text', the grand-set of ideas, is relatively unstable. The ideas held to be in this grand-set changes depending on the interpretive lens placed on it.

As the grand-set of ideas changes in this manner, so too do the opportunities to determine that a specific constitutional implication forms part of the grand-set. In *Kartinyeri v Commonwealth*, for example, Gaudron J argues for the derivation of an implication from section 51(xxvi) stipulating that the Commonwealth cannot pass laws under this head of power depriving people of a specified race their fundamental human rights.[47] This is rooted in her progressivist (or at least modern) interpretation of the word 'race'. According to Gaudron J, a law on a race of people is only 'necessary' if based on what distinguishes them as a race of people.[48] Since people of all races are inherently equal (as opposed to inferior or superior based on a premise of racial hierarchy) and so all possess fundamental human rights, it would never be 'necessary' to strip people of these rights due to their membership of any particular race.[49] Deriving this implication would not be possible if the word 'race' was held to convey a different collection of ideas – namely, the collection of ideas stipulated by the intentionalist judge discussed above.[50] The Constitution's 'text' is not a fixed or clear source from which constitutional implications may be derived.

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[45] Justin Malbon, 'The Race Power under the Australian Constitution: Altered Meanings' (1999) 21 *Sydney Law Review* 80, 87-98, 106; George Williams, 'Race and the Australian Constitution' (2013) 28 *Australasian Parliamentary Review* 4, 6-7. One of the framers and subsequently Australia's first Prime Minister, Edmund Barton, for example, states at the 1898 Convention Debate that the Commonwealth 'should have the power to regulate the affairs of the people of coloured or inferior races who are in the Commonwealth': *Official Report of the National Australasian Convention Debates*, Melbourne, 27 January 1898, 228-229.

[46] Sarah Pritchard, 'The 'Race' Power in Section 51(xxvi) of the Constitution' (2011) 15 *Australian Indigenous Law Review* 44, 50-51; Malbon, above n 45, 109.

[47] *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 366. An argument can be made that this is not a constitutional implication but an idea directly conveyed by the Constitution's words. The directness with which this idea flows from the Constitution's words, however, cannot be conclusively determined. As discussed in Chapter 2(II), this is a question of degree.

[48] f 365.

[49] Ibid 366.

[50] Malbon, above n 45, 109.

Its content changes based on the interpretive method judges opt to employ and the opportunity to derive particular implications consequently changes with it.

A similar result can be seen in the context of the Constitution's 'structure'. With regard to its organisational structure, judges may come to different conclusions on the ideas conveyed by the ordering of the Constitution's chapters and provisions depending on their interpretive method. The High Court views the separation of powers, for example, as an entrenched feature of the Australian constitutional system. This is partly based on the organisation of the Constitution's chapters in a manner to distinctly represent the executive, legislative and judicial branches of power.[51] A stronger adherence to an intentionalist perspective might have led the High Court to a different conclusion. This is because, according to Sir Robert Garran, this formatting of the Constitution was merely a 'draftman's neat arrangement, without any hint of further significance'.[52] Even the ordering of the Constitution's chapters and provisions carries meaning (or lacks meaning) depending on judges' chosen interpretive method.

With regard to the Constitution's systemic structure, judges may disagree considerably on the content of structural elements based on their chosen interpretive method. As discussed in Chapter 2, Sir Owen Dixon, first as Justice and later as Chief Justice of the Court, was instrumental in formulating key structural elements and deriving implications from them, most notably the *Melbourne Corporation* limitation from federalism and the *Boilermakers* limitation from separation of powers.[53] This was achieved via his particular brand of legalism, in contrast to the brand of legalism that seemed to take root after *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (which was more antagonistic to the recognition of structural elements and derivation of such implications).[54] In *Australian Capital*

[51] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275 ('*Boilermakers*'). See discussion in: Chapter 2(V)(B).
[52] Sir Robert Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958) 194. Within the framework of intentionalism, however, one might question Garran's assessment of the framers' views on this topic and the extent to which they were shared. See discussion in: Fiona Wheeler, 'Original intent and the Doctrine of the Separation of Powers in Australia' (1996) 7 *Public Law Review* 96.
[53] See discussion in: Chapter 2(III)(B).
[54] (1920) 28 CLR 129; Ibid.

Television v Commonwealth ('*ACTV*'), for another example, Dawson J takes on an intentionalist bent when conceptualising the structural element of representative democracy: 'those responsible for the drafting of the Constitution saw constitutional guarantees of freedoms as exhibiting a distrust of the democratic process. They preferred to place their trust in Parliament'.[55] This helps lead Dawson J to his conclusion that the vision of representative democracy embedded within the Constitution does not include a (judicially-enforced) political communication limitation.[56] Other judges who conceptualised the content of representative democracy differently either did not take on such an intentionalist bent, or their intentionalism was of a kind that did not lead them to the same conclusions.[57] As will be seen in Part VI, judicial choice plays a substantial role in determining the content of the Constitution's systemic structure. This choice is guided by the interpretive method that judges employ.

This is not to suggest that the Constitution's words – whether making up the Constitution's 'text' or its organisational or systemic 'structure' – is completely devoid of meaning and hence able to convey whatever an interpreter chooses. As Goldsworthy notes, such an extremist version of the legal realists' position would 'acknowledge only creative interpretation, as if legal documents possess no meaning until an interpreter breathes life into them.'[58] Such a position is incoherent.[59] It proposes that the Constitution's words convey *no* ideas and *some* ideas (that is, whatever ideas the interpreter chooses) simultaneously.[60] I am also not suggesting that the entirety of ideas conveyed by the Constitution's 'text' and 'structure' are constantly the subject of disagreement among judges. Agreement can often be reached to at least a certain point in the interpretive process before judicial choice presents itself and judges' particular interpretive method starts to lead them

[55] *ACTV* (1992) 177 CLR 106, 186.
[56] Ibid 184. For discussion on Justice Dawson's view of the political communication limitation and other 'representative democracy' implications see: Chapter 2(IV).
[57] See discussion in: Chapter 2(IV). The most explicit statement of disagreement on the significance of the framers' intentions regarding the freedom of communication about government and political matters in *ACTV* (1992) 177 CLR 106 was made by Mason CJ: 135-136.
[58] Goldsworthy, 'Language', above n 30, 162.
[59] Ibid 162.
[60] Ibid 162.

to substantially different conclusions.[61] Further, precedent has been established in large tracts of Australian constitutional case law. While precedent can always be overturned, many questions on the meaning given to particular segments of the Constitution's 'text' and 'structure' are effectively settled. As will be seen in Part VII, this precedent gives us vital bearings to determine the doctrinal merits of the ecological limitation.

Interpretive methods explain how words convey ideas and how they do so indirectly.[62] This means that they explain, in essence, how implications can be drawn from the Constitution. The High Court's lack of commitment to any particular interpretive method means that its text and structure approach cannot provide sufficient guidance when determining the doctrinal merits of proposed implications, including the ecological limitation. While the text and structure approach does little to change judges' choice of interpretive method, judges' choice of interpretive method has the power to substantially change the 'text' and 'structure'. That is, the ideas that form the 'text' and structure' are subject to change depending on the interpretive method that judges employ. While many of these ideas are settled by way of precedent (or have the potential to be settled in a relatively uncontentious manner), this adds a dimension of unpredictability when attempting to glean the doctrinal merits of a proposed implication. In the next Part, I consider a further dimension of unpredictability: judges' use of 'external' sources under the text and structure approach.

[61] Kirk, 'Constitutional Implications I', above n 8, 650; Rosalind Dixon, 'The Functional Constitution: Re-Reading the 2014 High Court Constitutional Term' (2015) 43 *Federal Law Review* 455, 458.
[62] See discussion in: Chapter 2(III)(B).

IV 'EXTERNAL' SOURCES

A *Introducing 'External' Sources*

The text and structure approach infers that implications cannot be derived from sources 'external' to the 'text' and 'structure'. This is on display in *Lange v Australian Broadcasting Corporation* ('*Lange*').[63] In that case, the High Court emphasises that the political communication limitation cannot be derived from 'external' theories of representative democracy, whether drawn from scholarly writings, the judges' own minds or gleaned from some other place.[64] They can only be derived from the structural element of representative democracy, the specific formulation of representative democracy that manifests from the Constitution's words.[65] This appears to restrain judges – if a proposed implication cannot be viewed as conveyed indirectly by the Constitution's words (in the form of its 'text' or 'structure') then it cannot be established. As will be seen in this Part, however, the extent to which this actually restrains judges' use of 'external' sources when deriving implications is minimal. Judges are permitted to draw on 'external' sources as aids of interpretation under the text and structure approach. This means that such sources can play a significant role in a judge's interpretive process when considering the doctrinal merits of a proposed implication.

I use the term 'external' sources' here to refer to any sources considered outside of the Constitution's 'text' and 'structure'. Such sources, in essence, are entities conveying a set of ideas of their own. The particular kinds of entities that this might include, however, are unclear. Judges have made various statements opposing the use of 'external' sources in vague terms. These include statements opposing the use of 'extrinsic sources' and 'extrinsic circumstances.'[66] Such sources include

[63] (1997) 189 CLR 520.
[64] *Lange* (1997) 189 CLR 520, 566-567; See discussion in: Chapter 2(V)(A).
[65] *Lange* (1997) 189 CLR 520, 566-567. As discussed in Part VI(A), the structural element of representative democracy, itself, is ostensibly a constitutional implication.
[66] *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 231 (Brennan J) ('extrinsic sources'); *ACTV* (1992) 177 CLR 106, 181 (Dawson J) ('extrinsic circumstances'). For discussion on the ambiguity of these statements see: Kirk, 'Constitutional Implications I', above n 8, 666-667.

'external' theories, such as free-standing conceptualisations of representative democracy that exist beyond Australian constitutional law, as the judgment in *Lange* suggests. It presumably also includes materials distinct from the document of the Constitution, such as books and journal articles. The extent to which such sources can be considered 'external' to the Constitution – considering that judges are drawing on ideas encapsulated by these sources to aid them in determining the ideas 'internal' to the Constitution – is examined in the discussion that follows.

Several scholars discuss the relationship between the Constitution's 'text' and 'structure' and 'external' sources.[67] Adrienne Stone's work in this area is prominent, outlining the ways in which judges are drawing on a substantial amount of (what she, at least, views as) 'external' sources in their derivation of the political communication limitation.[68] The particular point I am raising in this Part, however, is not only that judges are drawing on a substantial amount of 'external' sources. It is that, despite appearances to the contrary, drawing on these sources as aids of interpretation aligns with the text and structure approach. Kirk's work has been particularly useful in this endeavour.[69] He highlights and examines the line of argument running through certain judgments that frames 'external' sources as such interpretive aids (though he does not explicitly connect this discussion to analysis of the text and structure approach as I am doing here).[70] In this Part, therefore, I focus on the issue of judges' use of 'external' sources as aids of interpretation. In the next Part, I critique a particular segment of scholarship that views the relationship between 'external' sources and the Constitution's 'text' and 'structure' differently.

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[67] For example see: Stone, 'Limits', above n 3; Stone, 'Revisited', above n 3; Kirk, 'Constitutional Implications I', above n 8; Jeremy Kirk, 'Constitutional Implications II: Doctrines of Equality and Democracy' (2001) 25 *Melbourne University Law Review* 24; Stellios, above n 40 (see in particular: 562-563); Williams and Lynch, above n 8 (see in particular: 1026-1027); Tom Campbell and Stephen Crilly, 'The Implied Freedom of Political Communication, Twenty Years On' (2011) 30 *University of Queensland Law Journal* 59 (see in particular: 59-60).

[68] Stone, 'Limits', above n 3; Stone, 'Revisited', above n 3. For discussion on Stone's work with regard to 'external' sources also see: n 84.

[69] Kirk, 'Constitutional Implications I', above n 8; Kirk, 'Constitutional Implications II', above n 67.

[70] Kirk, 'Constitutional Implications I', above n 8, 666-667; Kirk, 'Constitutional Implications II', above n 67, 51.

B *'External' Sources as Aids of Interpretation*

While the fundamental premise of the text and structure approach is that implications cannot be derived from sources 'external' to the 'text' and 'structure', it appears to permit judges to draw on 'external' sources as aids of interpretation. In *McGinty v Western Australia* ('*McGinty*'), for example, Brennan CJ explains that the 'text of the Constitution can be illuminated by reference to ['external' versions of] representative democracy but the concept neither alters nor adds to the text.'[71] McHugh J similarly asserts that '[u]nderlying or overarching doctrines may explain or illuminate the meaning of the text or structure of the Constitution but such doctrines are not independent sources of the powers, authorities, immunities and obligations conferred by the Constitution.'[72] 'External' sources, therefore, can be used to 'illuminate' the ideas conveyed by the Constitution's words. They are helpful tools (or torches) in the interpretive process.

While not directly discussed in *Lange*, this framing of 'external' sources as aids of interpretation is instrumental to the logic of the text and structure approach. To start with, it explains why the High Court draws on 'external' sources in *Lange* itself. The Court draws on Anthony Harold Birch's book, *Representative and Responsible Government*, and the Convention Debates of the 1890s in order to tease out the vision of representative democracy entrenched in the Constitution and the role of the political communication limitation within it.[73] Further, as seen above, this framing of 'external' sources as aids of interpretation forms part of Justice McHugh's understanding of how implications are derived from the Constitution's 'text' and 'structure'. This suggests that such an understanding aligns with the text and structure approach given the fact that its establishment in *Lange* is generally viewed as an endorsement of Justice McHugh's approach to deriving implications in the pre-*Lange* 'representative democracy' implication cases.[74]

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[71] (1996) 186 CLR 140, 169.
[72] Ibid 231-232. Also see: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70 ('*Nationwide News*').
[73] *Lange* (1997) 189 CLR 520, 557, 559-560; Anthony Harold Birch, *Representative and Responsible Government* (Allen and Unwin, 1964); *Official Report of the National Australasian Convention Debates*, Adelaide, 24 March 1897.
[74] Stone, 'Limits', above n 3, 674-675.

Further again, one can see this reasoning used in post-*Lange* cases in the application of the text and structure approach. In *Roach*, for example, Gummow, Kirby and Crennan JJ state that 'an understanding of [the Constitution's] text and structure may be assisted by reference to the systems of representative government with which the framers were most familiar as colonial politicians. They do not necessarily limit or control the evolution of the constitutional requirements to which reference has been made.'[75] Judges, therefore, are permitted to use the framers' 'external' conceptualisation of representative democracy in order to illuminate what could be deemed conveyed by the Constitution's 'text' and 'structure'. For these reasons, the conceptualisation of 'external' sources as 'illuminators' of the ideas conveyed by the Constitution's words appears to form part of, or at least complement, the text and structure approach.

Such a conclusion might at first blush appear contradictory. How can judges be permitted to derive implications with reference to sources 'external' to the 'text' and 'structure' of the Constitution when the key requirement of the text and structure approach appears to be a prohibition on precisely this interpretive move? I posit that this is not a contradiction. The reasoning for this once again raises the issue of interpretive method. As first noted in Chapter 2, the Constitution's words are essentially 'black marks on a white background'.[76] Such 'marks' are meaningless on their own. Humans invest them with meaning. This is the basis of written language.[77] Such 'marks' can only be given meaning via some theory explaining how they convey ideas and an accompanying practice to determine those ideas.[78] This theory and accompanying practice, with regard to the Constitution's words, is what I have been referring to in this thesis as an interpretive method. If an

[75] *Roach v Electoral Commissioner* (2007) 233 CLR 162, 188-189.
[76] Stanley Fish, 'Intention Is all There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law' (2008) 29 *Cardozo Law Review* 1109, 1112. See discussion in: Chapter 2(II).
[77] For discussion on the relationship between legal interpretation in the field of law and the fundamental ways in which meaning is drawn from written language in the fields of linguistics and philosophy of language see: Lawrence Solan and Peter Tiersma (eds), *The Oxford Handbook of Language and Law* (Oxford University Press, 2012).
[78] As Kirk notes, a 'Constitution cannot be applied without employing some theory of interpretation' which answers the fundamental question '[i]n what sense are words in the text to be understood?': 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323, 323.

intentionalist judge believes that the ideas conveyed by the 'text' and 'structure' (via the Constitution's words) are reflections of the framers' intentions, for example, then it is consistent with this method that this judge determine these intentions with the aid of 'external' sources such as the Convention Debates or framers' speeches.[79] These sources shed light on what ideas the words 'truly' convey, according to this judge. If a progressivist judge believes that the ideas conveyed by the 'text' and 'structure' (via the Constitution's words) are to be understood with regard to modern sensibilities, for another example, then the judge presumably can determine these sensibilities with the aid of 'external' sources such as social scientific books or journal articles.[80] These sources shed light on what ideas the words 'truly' convey, according to this judge. In this way, judges are not deriving constitutional implications from outside of the 'text' and 'structure'. They are not circumventing or ignoring the 'text' and 'structure'. They are using these 'external' sources to determine the ideas conveyed by, or held within, the 'text' and 'structure'.[81]

One might be tempted to argue that the text and structure approach should be understood as demanding that judges determine the constitutional implications that stem from the Constitution's 'text' and 'structure' through a plain reading of the document 'on its face' without looking at 'external' sources. This argument is problematic. First, the High Court has never indicated, at least with any sort of

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[79] See discussion in: Chapter 2(III)(A)(3). For discussion on the kinds of 'external' sources an intentionalist might be willing to consider see: Goldsworthy, 'Language', above n 30, 181; Jeffrey Goldsworthy, 'Moderate versus Strong Intentionalism: Knapp and Michaels Revisited' (2005) 42 *San Diego Law Review* 669, 671-672; Ibid 328-330.

[80] See discussion in: Chapter 2(III)(A)(2). For examples of works on the ongoing debate with regard to the use of social scientific materials being used in legal adjudication see: Alexander Tanford, 'The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology' (1990) 66 *Indiana Law Journal* 137; Michael Heise, 'Brown Undone?: The Future of Integration in Seattle After Pics v Seattle School District No 1' (2008) 31 *Seattle University Law Review* 863; Matthew Matusiak, Michael Vaughn and Rolando del Carmen, 'The Progression of "Evolving Standards of Decency" in US Supreme Court Decisions' (2014) 39 *Criminal Justice Review* 253.

[81] This ties in with Kirk's discussion of judges' use of 'external doctrine' to determine the ideas conveyed by the 'text' and 'structure':

> If an external doctrine is invoked in order to resolve ambiguity, or to fill out the text, or to influence interpretation in some way, then that doctrine is given some effect to the extent that it makes a difference. The Court in *Cheatle* [*v the Queen* (1993) 177 CLR 541] did not merely take account of the historical requirement of unanimity in jury verdicts; it gave this aspect of the concept hard effect. The particular construction would not have been adopted but for the influence of the external doctrine': Kirk, 'Constitutional Implications I', above n 8, 667 (citations omitted).

consensus, that that is what it means by deriving implications only from the 'text' and 'structure'.[82] The Court's use of 'external' sources when determining the meaning of the 'text' and 'structure', such as their use of Birch's work and the Convention Debates in *Lange*, indicates that this is not its position. Second, the ideas contained in one's mind come from *somewhere*, be it books they have read, discussions they have had, observations they have made of the world around them or otherwise. In this way, judges are drawing on (what appear to be) 'external' sources when interpreting the Constitution even when engaged in a plain reading of the Constitution's words. Consider the word 'race', discussed in Part III.[83] It is not self-evident that a judge is aligning more strictly with the 'text' and 'structure' if they define this word based on a book that they read on the topic in their leisure time (or a more dubious source like a conversation with friends on the topic) five years ago, than a book that they read and openly reference in the judgment at hand in the present. Both, in theory, can be viewed as a valid means of determining the ideas conveyed by the 'text' and 'structure' depending on one's interpretive method. There is no reason to conclude that the former is truer to the text and structure approach than the latter.

Thus, judges are restrained by the text and structure approach to only derive constitutional implications from the 'text' and 'structure'. They are not restrained from drawing on 'external' sources to help determine what ideas make up this 'text' and 'structure'. They are also not restrained from drawing on a wide range of 'external' sources when carrying out this task. They have the discretion to draw on any 'external' sources that they wish that corroborate with any interpretive method that they deem appropriate. In short, the text and structure approach does little to circumscribe the range of 'external' sources that are acceptable or unacceptable in the process of deriving constitutional implications, let alone prohibit 'external' sources per se. The minimal guidance one might hope to gain from the text and

[82] As Sir Dyson Heydon states, extra-judicially, in the context of determining the definition of the interpretive method of 'literalism': 'If by "literalism" is meant examining the words in isolation, no-one advocates it. If by "literalism" is meant examining the words in the context of the Constitution as a whole, and nothing more, no-one advocates it': 'Sir Maurice Byers Lecture: Theories of Constitutional Interpretation: A Taxonomy' (Speech delivered at the New South Wales Bar Association, 3 May 2007).
[83] See discussion in: Part III(B).

structure approach on these grounds when determining a proposed implication's doctrinal merits (namely, that the approach functions to delimit or circumscribe the range of permissible interpretive sources) is absent. A potential challenge to this understanding of the relationship between the Constitution's 'text' and 'structure' and 'external' sources, however, is put forward in some scholarly works on the subject. I address this challenge in the next Part.

V 'BEYOND' TEXT AND STRUCTURE

Some scholars put forward a particular critique of the text and structure approach based on their use of 'external' sources.[84] They assert that the 'text' and 'structure' are not providing enough information (that is, conveying enough ideas) to justify

[84] Stellios, above n 40, 562-563; Campbell and Crilly, above n 67, 59-60; Williams and Lynch, above n 8, 1026-1027. It is possible that other scholars' works fit into this category of literature as well, including Stone's prominent work critiquing the text and structure approach: 'Limits', above n 3; 'Revisited', above n 3; 'Insult and Emotion, Calumny and Invective: Twenty Years of Freedom of Political Communication' (2011) 30 *University of Queensland Law Journal* 79. Stone argues that the Constitution's 'text and structure' is simply 'too bare to provide clear guidance in any given case': 'Revisited', 844. This indicates that she views the 'text' and 'structure' as not conveying enough ideas to anchor (at least) the establishment of the political communication limitation, which is the constitutional implication at the centre of her discussion. Other comments in her work compound this view, such as her statement that judges developing the 'standard of review' (which ended up being a proportionality test as discussed in Part VI(C)) requires 'reference to values or principles external to the Constitution': 'Limits', above n 3, 668. Stone concludes that this amounts to a 'depart[ure]' from the text and structure approach.

In other segments of her work, however, Stone seems to be arguing something different. She argues that the judges in *Coleman* (2004) 220 CLR 1 are 'adher[ing]' to the text and structure approach, despite coming to vastly different conclusions on the protection of insulting language under the political communication limitation: 'Revisited', 850; Chapter 1(II)(A). Similarly, she concludes that '[i]n almost every case, there will be competing, and often vastly different, conceptions of political communication *any of which could satisfy* the text and structure method': 'Insult and Emotion', 90 (emphasis added).

Thus, in some segments of her work, she seems to be arguing that judges are departing from the text and structure approach when drawing on seemingly 'external' sources because the 'text' and 'structure' are too 'bare'. In other segments of her work, she seems to be arguing that judges are adhering to the text and structure approach when drawing on seemingly 'external' sources (she infers that this is what has led these judges to come to such vastly different conclusions). This argument appears to frame the 'text' and 'structure' not as 'bare', but vague and broad enough to justify such differing views. If she is making the former argument, her view of the text and structure approach and the role of 'external' sources in it seems to align with these scholars I am discussing in this Part. If she is making the latter argument, her view of the text and structure approach and the role of 'external' sources in it seems to align (at least in some ways) with mine, as expressed in Part IV and in this Part.

the establishment of implications the High Court has claimed to derive from these two sources. James Stellios, for example, states that judges must be looking beyond the Constitution's 'text' and 'structure' when determining the precise content of the structural element of responsible government and deriving implications from it.[85] He explains that nowhere in the Constitution 'do we find any statement as to the accountability of the executive to Parliament or the duty of a prime minister (who is not mentioned) to resign if there is a resolution of no confidence in, or a refusal of supply, by the House of Representatives.'[86] He concludes that '[i]t is impossible to believe that someone with no prior knowledge and understanding of the system [of responsible government] could discover it in the text and structure of the Constitution.'[87] George Williams and Andrew Lynch state that the judges of the High Court 'rarely acknowledge that the text and structure of the Constitution may just be a helpful starting point that can take a judge only so far. Beyond such assistance, value judgements and questions of policy and degree necessarily arise.'[88] Tom Campbell and Stephen Crilly equate 'determining what is necessarily implied by the text and structure of the Constitution' with not 'taking into account material external to the Constitution'.[89] The text and structure approach, therefore, is viewed as a falsehood. Judges claim to be only looking at the 'text' and 'structure' but are, in fact, looking beyond them when deriving (certain) constitutional implications.

This is an understandable reading of the High Court's position in a sense. As discussed in Chapter 2, the text and structure approach was formulated, at least partially, in response to the view that some judges were not paying proper regard to the specific wording of the Constitution (and drawing too much on their own personal or political proclivities) when assessing the viability of 'representative democracy' implications in cases prior to *Lange*.[90] The text and structure approach,

[85] Stellios, above n 40, 562-563. Note discussion in Part VI(A) that structural elements (which 'responsible government' ostensibly is) appear to be constitutional implications in themselves.
[86] Stellios, above n 40, 563.
[87] Ibid 563. Stellios presumably means the word 'structure' here to refer to the Constitution's organisational structure. It would be nonsensical to suggest that one cannot determine the content of the Constitution's systemic structure (the structural element of responsible government) from itself.
[88] Above n 8, 1026-1027.
[89] Above n 67, 59-60.
[90] See discussion in: Chapter 2(IV)-(V).

therefore, can plausibly be understood as an attempt to restrain judges to a more refined set of ideas from which to derive implications. As Brennan CJ states in *McGinty*, judges must be '*confined* by the text and structure' when deriving such implications.[91] These critics seem to be agreeing with judges that the Constitution's 'text' and 'structure' is a form of restraint on judges. Their particular view, however, is that these two sources are so restraining, that judges must be drawing substantially on 'external' sources when deriving complex implications, ostensibly in breach of the text and structure approach.

While the Court signals that the 'text' and 'structure' are somehow a restraining force on judges, its formulation of this approach contradicts this. To start with, judges' ability to employ almost any interpretive method that they see fit means that the approach does not contain how narrowly or broadly the grand-set of ideas represented by the 'text' and 'structure' is understood.[92] Judges can sanction generous visions of the indirectness with which words can convey ideas and, therefore, view the 'text' and 'structure' as conveying a vast set of ideas. Further, while the 'smallness' or 'vastness' of a set of ideas is relative, it is difficult to see how the 'text' and 'structure' could convey anything other than a set described as vast. These two sources are not tasked with conveying ideas that describe a simple object. They convey all of the ideas required to explain the workings of a myriad of diverse features of Australia's complex constitutional system.[93] Indeed, this effectively demands that judges employ interpretive methods with a generous vision of the indirectness with which words can convey ideas. This is due to the fact that the Constitution is written in a skeletal fashion. A generous interpretive method is required to draw such a mountain of ideas from such a meagre set of words.[94] Thus, given the breadth of ideas that the Constitution's 'text' and 'structure' are expected to convey (malleable to judges' selection of interpretive method), it is

[91] *McGinty* (1996) 186 CLR 140, 176 (emphasis added).
[92] See discussion in: Part III(B).
[93] See discussion in: Chapter 2(II) and Part II.
[94] Recall Justice Dixon's comments quoted in Chapter 2(III)(B) that describe a written constitution, fundamentally, as a document 'expressed in general propositions wide enough to be capable of flexible application to changing circumstances': *Australian National Airways v Commonwealth* (1945) 71 CLR 29, 81.

difficult to view these two sources as substantially restraining judges' interpretive choices.

Further, as I put forward in Part IV, a judge is not necessarily abandoning the 'text' and 'structure' when drawing on 'external' sources in the process of deriving implications. Such instances can generally be understood as ones in which the judge is using 'external' sources to illuminate the ideas conveyed by the 'text' and 'structure'. Moreover, the proposition that judges are looking beyond the 'text' and 'structure' presupposes knowledge of what set of ideas are conveyed by the 'text' and 'structure' in the first place (or, at least, knowledge of an explanatory theory for how the court determines this set of ideas).[95] These scholars cannot make such a claim. Each puts forth a vision of this set of ideas that the High Court has not endorsed. Stellios suggests that the 'text' and 'structure' only conveys the ideas that could be gleaned from a hypothetical reader of the Constitution who has no prior knowledge of responsible government or (presumably) similar legal concepts. As discussed in Part IV, the Court does not assert that such a plain reading exhaustively captures the ideas conveyed by the Constitution's 'text' and 'structure'. Williams and Lynch suggest that the 'text' and 'structure' only conveys ideas that are gleaned without judges making value judgments and policy considerations. While some judges have made similar comments, no consensus has formed on this point either – and, as will be seen in Part VI, value judgments and policy considerations play a substantial role in determining the content of, at least, the Constitution's systemic structure.[96] Campbell and Crilly suggest that the 'text' and 'structure' only conveys a set of ideas that do not involve judges 'taking into account material external to the Constitution'.[97] As discussed in Part IV, however, the High Court sees a place for 'external' materials as complementary to the text and structure approach. Thus, these scholars seem to be basing their critique on visions of the 'text' and 'structure' that the High Court itself has not asserted it holds.

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[95] This set of ideas is the grand-set of ideas: Part II.

[96] Brennan J, for example, states that '[i]n the interpretation of the Constitution, judicial policy has no role to play. The Court … can do no more than interpret and apply its text, uncovering implications where they exist': *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 143. Brennan J defines 'judicial policy' as 'a court's opinion as to what the law should be as distinct from what the law is or has hitherto been generally thought to be': 142.

[97] Above n 67, 60. This view also contradicts the High Court's use of 'external' sources discussed above: Part IV.

Any assertion that the 'text' and 'structure' convey a specific set of ideas, or that the court has a settled explanatory theory to determine these ideas, conflicts with the court's position that judges may employ almost any interpretive method that they deem appropriate.[98] This is because a judge's interpretive method is effectively such an explanatory theory. Judges *could* envision the 'text' and 'structure' as conveying a set of ideas gleaned by Stellios' uninformed hypothetical reader, devoid of value judgments and policy considerations, as Williams and Lynch suggest, or with no material external to the Constitution taken into account, as Campbell and Crilly claim, if that is what their chosen interpretive method indicates. They are also free, however, to view the ideas conveyed by the Constitution's provisions entirely differently – as reflections of the framers' intentions, for instance, or gleaned from centuries' worth of British common law principles. These scholars, therefore, cannot presume that the 'text' and 'structure' convey the set of ideas that they stipulate above. Nor can they presume that the High Court has a clear vision of the set of ideas that the 'text' and 'structure' convey altogether.

Thus, in my view, these scholars' critique of the text and structure approach is unfounded. Judges' use of 'external' sources is not necessarily an indication that they are illegitimately circumventing the 'text' and 'structure' when deriving implications. Generally speaking, their use of these sources can be understood as interpretive aids to determine the ideas conveyed by the 'text' and 'structure'. These scholars also have not provided a sufficient vision of the grand-set of ideas – the set of ideas represented by the 'text' and 'structure' – in order to demonstrate that judges are drawing on ideas outside of this set when deriving these implications. Providing such a vision is essentially an impossible task considering the fact that this set of ideas changes depending on judges' choice of interpretive method. Finally, the underlying assumption of this critique is that the set of ideas conveyed by the 'text' and 'structure' is somehow small or insubstantial. This assumption is understandable based on the court's own framing of the text and structure approach. On closer inspection of this approach, however, it is clear that the 'text' and

[98] See discussion in: Part III.

'structure' are conveying a vast set of ideas in order to describe a complex array of features that make up the Australian constitutional system.

The fact that this vast set of ideas is stemming from a small set of words means that judges must be drawing on interpretive methods with a generous vision of the indirectness with which words can convey ideas. This is particularly on display in the next Part, where I examine the substantially indirect link between (some) implications and the Constitution's systemic structure from which they are drawn.

VI THE SYSTEMIC STRUCTURE OF THE CONSTITUTION

The Constitution's systemic structure is a particularly significant aspect of the text and structure approach. To start with, it has been the primary source from which a number of important implications have been drawn, such as the political communication and *Melbourne Corporation* limitations. Further, the construct of the 'systemic structure' fundamentally informs how we envision the Constitution. The High Court's recognition of the 'systemic structure' as part of the Constitution establishes (or at least, confirms) that the Constitution must be conceptualised as housing a web of foundational principles. These principles (which I refer to as 'structural elements') are conceptualised as requiring preservation and as entities from which constitutional implications may be derived.[99] The systemic structure also holds a particular significance for present purposes. It plays a vital role in the potential derivation of the ecological limitation, as will be seen in Chapter 4.[100]

In this Part, I examine the systemic structure for two reasons. First, the fact that the systemic structure plays a vital role in the potential derivation of the ecological limitation means that a closer inspection of this construct is useful to the discussion in subsequent segments of this thesis. Second, a closer examination of the systemic

[99] See discussion in: Chapter 2(V)(B).
[100] See discussion in: Chapter 4(II).

structure further reveals the lack of practical guidance offered by the text and structure approach. This is because, as will be seen, a substantial amount of judicial choice is required in teasing out the content of the Constitution's systemic structure and deriving implications from it. This level of discretion can invite, and has invited, judges to draw substantially on value judgments, policy considerations and 'external' sources.[101] To be clear, I am not arguing that this necessarily delegitimises the High Court's conceptualisation of the systemic structure or any particular implications derived from it. The Court generally accepts that a substantial degree of judicial choice is unavoidable in constitutional interpretation.[102] Further, as discussed in Part III, judges may employ almost any interpretive method that they see fit, including those that sanction (or view as unavoidable) the substantial use of value judgments, policy considerations and 'external' sources in constitutional interpretation.[103] My argument here is that the substantial amount of judicial choice involved in determining the content of the Constitution's systemic structure and deriving implications from it makes both this content and these implications difficult to predict. The text and structure approach makes clear that judges can derive implications from this source, the Constitution's systemic structure. It does not make clear the particular content of this source from which to do so.

Before I examine the systemic structure, it is important to deconstruct the multi-layered nature of the systemic structure's content. On its most basic level, the systemic structure is made up of various structural elements, such as federalism and representative democracy. Deconstructed further, each structural element is made up of a set of ideas. The ideas in each of these sets represent, what I refer to as, the 'attributes' and 'mechanisms' of the structural element. These attributes are the foundational tenets or hallmarks of a structural element. These mechanisms are conceptual apparatuses utilised to operationalise or maintain these attributes. Consider, for example, the structural element of representative democracy. It contains the (express) attribute that the Australian people hold the power to change

[101] For discussion on how such value judgments and policy considerations might be made (within the context of a 'functionalist' view of constitutional interpretation) see: Rosalind Dixon (ed), *Australian Constitutional Values* (Bloomsbury Publishing, 2018).
[102] Kirk, 'Evolutionary Originalism', above n 78, 327-328.
[103] Also see: Dixon, *Australian Constitutional Values*, above n 101, 24.

the Constitution and the (express) accompanying mechanism for operationalising this attribute, the referendum process in section 128. It also contains the (implied) attribute that the Australian people hold some standard of freedom of communication about government and political matters and the (implied) accompanying mechanism for maintaining this attribute, the judicially-enforced political communication limitation.[104] As can be seen, a structural element's attributes and mechanisms are conveyed both directly (express) and indirectly (implied) by the Constitution's words. As will be seen in the discussion that follows, the act of deriving implications from the systemic structure is generally one of determining what attributes and mechanisms (which are not conveyed directly by the Constitution's words) form part of structural elements.[105]

A *Structural Elements*

The High Court has never conclusively stated which principles are considered structural elements. The court seems to align with the view espoused by Deane and Toohey JJ in *Nationwide News Pty Ltd v Wills* that '[t]here are *at least* three main general doctrines of government which underlie the Constitution': federalism, separation of powers and representative democracy.[106] Deane and Toohey JJ question whether 'responsible government' is its own structural element or a subsidiary of 'representative democracy'.[107] Other possible structural elements might include parliamentary supremacy or the rule of law. These are principles that (at least some) judges view as foundational to the Constitution's operation and have at least provided assistance in the process of assessing the doctrinal merits of proposed implications.[108] The High Court, however, has not provided sufficient

[104] While I will discuss other structural elements, attributes and mechanisms, I will pay particular attention to this trinity: representative democracy, freedom of communication about government and political matters and the political communication limitation. This is because they are the subject of *Lange* (1997) 189 CLR 520 (and related cases) and provided the context in which the High Court articulated its vision of systemic structure with regard to the text and structure approach.

[105] The fact that structural elements appear to be constitutional implications, themselves, means that the act of deriving implications from the systemic structure may also include the act of determining what structural elements make up the systemic structure in the first place. See discussion in: Part VI(A).

[106] *Nationwide News* (1992) 177 CLR 1, 69-70 (emphasis added).

[107] Ibid 71.

[108] Kirk, 'Constitutional Implications I', above n 8, 658, 663. For examples of parliamentary supremacy providing assistance in the process of assessing the doctrinal merits of proposed

details on how it views these principles' precise relationship to the Constitution, let alone the Constitution's 'structure'.[109] This, in itself, makes the systemic structure a somewhat vague source from which constitutional implications may be drawn. The fact that the High Court has not precisely explained what principles compose the Constitution's systemic structure means that the extent or range of the systemic structure's content from which to derive implications remains unclear.

The specific content of individual structural elements – the set of ideas that make up these guiding principles – is also unclear. This stems from the fact that structural elements, themselves, appear to be constitutional implications. I will focus on the three principles that are known to be structural elements. Their recognition in case law as implications is evident from the fact that some judges refer to them as such (and no judges appear to reject this assessment).[110] They also seem to fit the definition of ideas conveyed indirectly by the Constitution's words. The words of certain provisions indicate the existence of structural elements.[111] Sections 7, 24 and 128, for example, indicate the existence of the structural element of representative democracy.[112] The words of these provisions can aptly be described as conveying this existence *indirectly*. That is, both representative democracy and separation of powers are not named in the Constitution. Their basic function as structural elements – guiding principles underpinning the Constitution which might inform the derivation of constitutional implications – is also not conveyed in any kind of direct manner by these founding provisions. This is evident from how

implications see: *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, 74; *Williams v Commonwealth* (2012) 248 CLR 156, 370. For examples of the rule of law providing assistance in the process of assessing the doctrinal merits of proposed implications see: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193; *Thomas v Mowbray* (2007) 233 CLR 307, 342.

[109] For discussion on the unclear positions of the rule of law and parliamentary supremacy in Australian constitutional law see: David Kinley, 'Constitutional Brokerage in Australia: Constitutions and the Doctrines of Parliamentary Supremacy and the Rule of Law' (1994) 22 *Federal Law Review* 194; Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017).

[110] In *McGinty* (1996) 186 CLR 140, for example, McHugh J refers to representative democracy and separation of powers as 'implication[s]': 232, 233. In *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, for example, Murphy J refers to federalism as an 'implication': 312.

[111] In the case of separation of powers, the words of certain provisions indicate the existence of this structural element, in part, through the arrangement of these words and provisions into designated chapters on distinct branches of powers. See discussion in: Chapter 2(V)(B).

[112] Ibid.

heavily disputed their existence as structural elements providing this function has been in case law.[113]

Federalism is named, or at least referred to, in a direct manner. The Constitution's preamble states that the people of various States 'have agreed to unite in one indissoluble Federal Commonwealth' and the word 'federal' (and its derivatives) appears in various other contexts.[114] Similar to representative democracy and separation of powers, however, the existence of this concept as a structural element serving the function of a guiding principle underpinning the Constitution which might inform the derivation of constitutional implications is not conveyed in a direct manner and was, itself, heavily disputed in the Court.[115] For these reasons, it appears safe to conclude that a structural element is a form of constitutional implication. When the court derives constitutional implications from structural elements, therefore, it is deriving implications from implications.

This adds a dimension of complexity to the task of determining the content of the Constitution's systemic structure. If structural elements were explicitly named in the Constitution and their attributes and mechanism were written out in detail, their content would not be such a mystery. The fact that structural elements' existence is only conveyed indirectly by the Constitution's words, however, means that many of their attributes and mechanisms are difficult to discern. This is not the case with all of them. Some attributes and mechanisms of structural elements are directly conveyed by the Constitution's words. As noted above, for example, section 128 makes clear that the particular vision of representative democracy underpinning the Constitution that makes up this structural element is one carrying a certain attribute (the Australian people hold the power to change the Constitution) and accompanying mechanism (the relevant referendum process). Section 109, for

[113] With regard to separation of powers, see: *New South Wales v Commonwealth* (1915) 20 CLR 54 ('*Wheat Case*'); *Boilermakers* (1956) 94 CLR 254; Fiona Wheeler, 'The Boilermakers Case' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 160, 161-162. With regard to representative democracy, see: Chapter 2(IV)-(V).
[114] The Constitution, Preamble; Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 1, 4. For examples of the word 'federal' used in other segments of the Constitution see: ss 1, 62, 71.
[115] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129; *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 ('*Melbourne Corporation*'). See discussion in: Chapter 2(III)(B); Stellios, above n 40, 476.

another example, makes clear that the particular vision of federalism underpinning the Constitution that makes up this structural element is one carrying a certain mechanism to deal with a typical problem in federal nations – what happens when laws of different levels of government conflict? This provision stipulates that Commonwealth laws shall prevail over State ones to the extent of any inconsistency. Such provisions broadly sketch the picture of structural elements. In the remainder of this Part, I will demonstrate the substantial role judicial choice is playing (and minimal role the Constitution's words are playing) in determining the implied attributes and mechanisms that make up these elements.

B *Structural Elements' Attributes*

The Constitution's words provide little practical assistance in determining the implied attributes of structural elements. This is on display in *Lange* itself - the case in which the High Court stressed the links between the Constitution's words and the implications derived from them.[116] The Court goes into great detail on the various provisions that demonstrate the existence of the structural element of representative democracy.[117] The Court's reliance on such provisions when demonstrating that the freedom of communication about government and political matters is an inherent attribute of representative democracy, however, is minor.[118] It briefly mentions the fact that sections 7 and 24 state that the members of Parliament be 'directly chosen by the people' then teases out the importance of this freedom to the concept of representative democracy with reference to an 'external' source, the work of Birch.[119] Kirk makes a similar point with regard to the structural element of federalism. He notes that the majority of judgments determining the attributes of this structural element in order to derive implied immunities

[116] See discussion in: Chapter 2(V).
[117] *Lange* (1997) 189 CLR 520, 557-559.
[118] Ibid 559-562.
[119] Ibid 559-560; Anthony Harold Birch, *Representative and Responsible Government* (Allen and Unwin, 1964).

> have invoked no specific text. Judges have contented themselves with references to the purported requirements of the Constitution's "frame" or its federal "system", "conception", "nature", "compact" or "structure".[120]

Thus, the Constitution's words make relatively clear the existence of structural elements and some of their (express) attributes. They are less helpful in articulating the range of their other (implied) attributes.

The fact that judicial choice is playing a prominent role in determining the implied attributes of structural element is particularly evident when we consider the lack of a logical basis for determining the attributes judges do and do not recognise. Contrast the freedom of communication about government and political matters with the freedom of association. George Williams succinctly explains the argument for the latter freedom's recognition as an intrinsic attribute of the structural element of representative democracy:

> The ability to associate for political purposes is obviously a cornerstone of representative government in Australia. How could the people 'directly choose' their representatives if denied the ability to form political associations and to collectively seek political power?[121]

Judges have argued for and against the freedom of association's recognition across several cases.[122] A majority position has been reached in *Wainohu v New South Wales* ('*Wainohu*') (and confirmed in *Tajjour v New South Wales*), rejecting the recognition of this freedom as an intrinsic part of the structural element of

[120] Kirk, 'Constitutional Implications I', above n 8, 673-674. With regard to parliamentary supremacy and the rule of law (if these can be deemed structural elements as discussed above), judges have also provided little to no specific explanation of the constitutional wording that establishes them and their content: Kirk 658, 663.

[121] 'Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform' (1996) 20 *Melbourne University Law Review* 848, 861.

[122] *ACTV* (1992) 177 CLR 106, 212 (Gaudron J), 142 (McHugh J); *Kruger v Commonwealth* (1997) 190 CLR 1, 69 (Dawson J); *Mulholland v Australian Electoral Commission* (2014) 220 CLR 181, 277 (Kirby J), 297 (Callinan J), 234 (Gummow and Hayne JJ); *Wainohu v New South Wales* (2011) 243 CLR 181, 220 (French CJ and Kiefel J), 230 (Gummow, Hayne, Crennan and Bell JJ), 251 (Heydon J) ('*Wainohu*'); *Tajjour v New South Wales* (2014) 54 CLR 508, 577-578 (Gageler J), 605-606 (Keane J) ('*Tajjour*').

representative democracy in its own right.[123] This majority is only willing to recognise the freedom as part of the structural element of representative democracy to the extent that the freedom of communication about government and political matters requires some form of freedom of association. In other words, the freedom of association was viewed as an adjunct of the freedom of communication about government and political matters. Judicial choice seems to have played a substantial role in drawing this conclusion in *Wainohu* and in the judges' reasoning for and against the freedom's recognition in the cases leading up to it. These judges make little reference to the particular wording of the Constitution's provisions to justify their position. The logical basis for why the freedom of communication about government and political matters should be recognised in its own right, but the freedom of association should not is left unclear.[124] Daniel Reynolds asserts that the judges that offer some sustained explanation for this position in *Wainohu* (Gageler and Keane JJ) seem to be basing it merely on 'observed reality' – the two freedoms seem to frequently overlap.[125] In these ways, judges appear to be operating with a generous amount of discretion when determining the implied attributes that do and do not form part of structural elements. Such discretionary choices are difficult to predict.

C *Structural Elements' Mechanisms*

Judicial choice also plays a substantial role in determining the mechanisms that are 'necessary' to preserve the various attributes of structural elements. Such mechanisms include the political communication limitation (to preserve the freedom of communication about government and political matters, an attribute of

[123] *Wainohu* (2011) 243 CLR 181, 220 (French CJ and Kiefel J), 230 (Gummow, Hayne, Crennan and Bell JJ); *Tajjour* (2014) 54 CLR 508, 553-554 (French CJ), 566-567 (Hayne J), 577-578 (Gageler J), 605-606 (Keane J).

[124] Murray Wesson, 'Tajjour v New South Wales, Freedom of Association, and the High Court's Uneven Embrace of Proportionality Review' (2015) 40 *University of Western Australia Law Review* 102, 104; Daniel Reynolds, 'An Implied Freedom of Political Observation in the Australian Constitution' (2018) 42 *Melbourne University Law Review* 199, 217. Also see Stephen Donaghue's broader argument on the lack of logical consistency with the Court's position on what attributes structural elements do and do not possess: 'The Clamour of Silent Constitutional Principles' (1996) 24 *Federal Law Review* 133, 160-161.

[125] Above n 124, 217.

representative democracy), *Melbourne Corporation* limitation (to preserve the States' autonomy, an attribute of federalism) and *Boilermakers* limitation (to preserve the distinct powers exercised by Commonwealth bodies, an attribute of the separation of powers).[126] The High Court derives such implications only if they satisfy the 'necessity' test put forth by Mason CJ in *ACTV*.[127] This test stipulates that 'structural implications' may only be derived where 'logically or practically necessary for the preservation of the integrity of [the Constitution's] structure.'[128] Despite its frequent invocation, what is meant by 'logical' or 'practical' necessity has been given little detailed explanation by the Court.[129] Goldsworthy asserts that the High Court's necessity test in Australian constitutional law seems to mirror the 'practical necessity' test in Australian and British case law regarding statutory and contractual implications.[130] The necessity test, therefore, ostensibly proposes that a structural implication may be established if it enables 'some or all of the provisions of [the Constitution] to be efficacious or achieve their intended purposes.'[131]

This focus on efficacy leaves judges room to employ value judgments and policy considerations on what makes for an 'efficient' representative democracy, federal system or other such structural element. With regard to the political communication limitation, for example, Goldsworthy argues that it is not 'necessary' to derive such a limitation to protect the freedom of communication about government and political matters.[132] He notes that 'Australia had an effective representative democracy for nearly a century' without it.[133] Rigorous political mechanisms

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[126] *Lange* (1997) 189 CLR 520; *Melbourne Corporation* (1947) 74 CLR 31; *Boilermakers* (1956) 94 CLR 254.

[127] (1992) 177 CLR 106, 135. See discussion in: Chapter 2(V)(B). An argument could be made that the High Court might also require the 'necessity' test to be applied when determining the implied attributes of structural elements, as well as these mechanisms. From the context in which the 'necessity' test was articulated by Mason CJ and subsequently referred to in case law, however, the test seems to apply specifically to these mechanisms derived to preserve structural elements' attributes.

[128] *ACTV* (1992) 177 CLR 106, 135.

[129] Donaghue, above n 124, 159.

[130] Goldsworthy, 'Constitutional Implications Revisited', above n 27, 18-19.

[131] Ibid 19. In *Lange* (1997) 189 CLR 520, for example, the court states that the political communication limitation 'is limited to what is necessary for the *effective* operation of that system of representative and responsible government provided for by the Constitution': 561 (emphasis added). Also see: Nicholas Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1994) 18 *University of Queensland Law Journal* 249, 264-267.

[132] Goldsworthy, 'Reply', above n 30, 371-374. Also see: Aroney, 'Seductive Plausibility', above n 131, 260.

[133] Goldsworthy, 'Reply', above n 30, 372.

inherent to Australia's parliamentary system can be relied upon to preserve this purported facet of the Constitution's 'structure'. Thus, the judges' decision to establish this mechanism, the political communication limitation, as part of the Constitution's 'structure' is, at least in part, a discretionary one. Judicial choice is not only playing a substantial role in determining structural elements' implied attributes, but the implied mechanisms to preserve them.

Judicial choice also plays a substantial role in the formulation of such mechanisms. Adrienne Stone examines this issue with regard to the political communication limitation across two articles – 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' and 'Limits of Constitutional Text and Structure Revisited.'[134] She states that 'two well-known models' exist for determining 'which burdens on political communication are permissible and which are not.'[135] One is a flexible standard known as proportionality, drawn from European and Canadian law.[136] The other is a more rigid series of standards each tailored to address different categories of communication, drawn from United States law.[137] The High Court could choose either of these standards or fashion some sort of combination of the two.[138] As Stone concludes, making this choice is largely a value judgment depending on whether one prefers the flexibility of proportionality or the more rule-based specificity of the United States' approach. Judges gain little to no guidance from the wording of the Constitution's provisions: 'it cannot be said that only one of these two broad approaches is consistent with the idea that the federal parliament be 'directly chosen by the people''.[139] As will be discussed in Chapter 4, the High Court opted for the flexibility offered by proportionality in their formulation of the test for the political communication limitation.[140] This decision, however, was largely a discretionary one.[141]

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[134] Stone, 'Limits', above n 3; Stone, 'Revisited', above n 3.
[135] Stone, ''Revisited', above n 3, 844.
[136] Ibid 844. For discussion on the concept of proportionality see: Chapter 4(IV).
[137] Stone, ''Revisited', above n 3, 844.
[138] Ibid 844.
[139] Ibid 845.
[140] See discussion in: Chapter 4(IV).
[141] In *Coleman* (2004) 220 CLR 1, McHugh J addresses and effectively rejects Stone's critique of the text and structure approach with regard to this formulation of the test for the political

Structural elements not only inform the derivation of such mechanisms and their formulation. They also inform these mechanisms' application. The act of applying such mechanisms is ultimately an act of determining the details of structural elements' attributes. That is, judges must glean from the Constitution's systemic structure the precise details of what the attribute of freedom of communication about government and political matters entails (with regard to the structural elements of representative democracy), the attribute of States' autonomy entails (with regard to the structural elements of federalism) and so forth. Consider the protection that the political communication limitation offers to preserve the freedom of communication about government and political matters. What specific forms of 'communication' require protection – a student newspaper?[142] A sit-in protest?[143] Donations to a political party?[144] What makes communication 'political' – communication about animal cruelty?[145] Police corruption?[146] Abortion?[147] What objectives are 'legitimate' that might justify the relevant burdens on such communication – Public safety?[148] Preserving the reputation of government bodies?[149] Upholding the integrity of political advertising?[150] And so forth.

These decisions are not being made with reference to *any* vision of representative democracy. They are ostensibly being made with reference to the specific vision of representative democracy that forms part of the Constitution's 'structure' as a structural element. This indicates that the set of ideas that make up structural elements are conceptualised as vast and detailed.[151] Some assistance can be gained

communication limitation: 46-53. For Stone's response (where she retains her position) see: Stone, 'Revisited', above n 3, 845-847. Also see discussion in: Chapter 4, n 62.

[142] *Brown v Members of Classification Review Board of Office of Film & Literature Classification* (1998) 82 FCR 225.

[143] *O'Flaherty v City of Sydney Council* (2014) 221 FCR 382.

[144] *Unions NSW v New South Wales* (2013) 252 CLR 530.

[145] *Levy v Victoria* (1997) 189 CLR 579 ('*Levy*').

[146] *Coleman* (2004) 220 CLR 1.

[147] *Clubb v Edwards; Preston v Avery* (2019) 93 ALJR 448. For discussion on the forms of communication that may trigger the political communication limitation see: Dan Meagher, 'What Is 'Political' Communication? The Rationale of the Implied Freedom of Political Communication' (2004) 28 *Melbourne University Law Review* 438; Stone, 'Revisited', above n 3, 847-849.

[148] *Levy* (1997) 189 CLR 579.

[149] *Nationwide News* (1992) 177 CLR 1.

[150] *ACTV* (1992) 177 CLR 106.

[151] See discussion in: Part V.

in determining the details of structural elements' attributes and mechanisms from the Constitution's provisions. The Court, for instance, gleans from sections 6, 49, 62, 64, 83 and 128 that the freedom of communication about government and political matters cannot be confined to election periods.[152] The fact remains, however, that once the Constitution's provisions have done the work of indicating a structural element's existence, the assistance they offer in determining an element's content is limited. Again, judicial choice is playing a substantial role in filling this void.

Thus, the content of the Constitution's systemic structure is difficult to discern. This is due, in part, to the fact that the High Court has not clarified which structural elements form part of the systemic structure. It is also due, in part, to the fact that judges are relying little on the Constitution's words and relying substantially on judicial choice when determining much of the content of structural elements. This is evident in the court's determination of structural elements' attributes; the conceptual mechanisms 'necessary' to maintain or action these attributes; and these mechanisms' formulation and application. The fact that judicial discretion plays such a substantial role in determining the content of structural elements makes it difficult to predict the implications that might be derived from them. This presents an obstacle for determining the doctrinal merits of the ecological limitation. As will be seen in Chapter 4, this limitation is proposed as a conceptual mechanism 'necessary' to preserve one or more of the Constitution's structural elements.[153] The vagueness surrounding the content of such elements complicates the task of assessing the doctrinal argument for establishing the ecological limitation.

To be clear, judge's substantial reliance on judicial choice and lack of reliance on the Constitution's words when (considering) deriving structural implications do not necessarily mean that these judges have acted illegitimately. Rather, it signals that judges are operating with a generous understanding of the indirectness with which words can convey ideas (whether they willingly admit it or not). This understanding

[152] *Lange* (1997) 189 CLR 520, 561.
[153] See discussion in: Chapter 4(II).

of indirectness is essentially as follows. Multiple provisions generally indicate the existence of a structural element. These provisions also indicate some of the (express) attributes and mechanisms that give these structural elements their basic shape. Beyond this, the Constitution's words provide little assistance and judicial choice plays a more prominent role in determining the structural element's other attributes and mechanisms and their operation. These latter attributes and mechanisms are the implications derived from the systemic structure.

The reason such a generous understanding of indirectness does not necessarily signal that judges are acting illegitimately when deriving structural implications again comes down to the issue of interpretive method. Various interpretive methods permit, or recognise the unavoidability of, a substantial amount of judicial choice in constitutional interpretation.[154] As discussed in Part III, judges can choose almost any interpretive method that they deem appropriate. Such interpretive methods are evidently what many of these judges, who have employed such judicial choice in determining the content of structural elements, have deemed appropriate. Thus, while the substantial role of judicial choice in judges' determination of the content of the Constitution's systemic structure makes predicting this content more difficult, it does not serve as an indication of judges acting untowardly.

VII ASSESSING THE ECOLOGICAL LIMITATION

The discussion in this chapter, thus far, has clarified the workings of the text and structure approach and highlighted its shortcomings. That is, as examined in Part III, the text and structure approach does little to restrain judges from employing almost any interpretive method that they see fit. This means that judges can hold vastly different views on the proper way to derive implications as well as on the content of the Constitution's 'text' and 'structure' from which the ecological limitation must be derived. As discussed in Part IV, the text and structure approach also does little to mark out what 'external' sources can and cannot be utilised when

[154] See discussion in: Chapter 2(III)(A).

assessing the potential for deriving proposed implications such as the ecological limitation, despite appearances to the contrary. Finally, as will be seen in Chapter 4 and was noted in Part VI, the ecological limitation is conceptualised as a structural implication drawn from the Constitution's systemic structure.[155] The fact that the systemic structure remains a particularly opaque source from which implications can be derived, as explored in Part VI, presents additional challenges for assessing the potential for deriving the ecological limitation.

I have not articulated these shortcomings with the text and structure approach in order to propose changes or an alternative to this approach. That would be beyond the scope of this thesis. The central task of this thesis is assessing the possibility of deriving a proposed implication, the ecological limitation. This can only be done by clarifying the operation of the High Court's approach to deriving such implications and being cognisant of the shortcomings with this approach. The reason why I have explored these shortcomings in such detail in this chapter is due, in part, to their conceptual complexity. A nuanced discussion is required to sufficiently articulate these shortcomings. The reason for this detailed exploration is also due, in part, to my disagreement with a substantial segment of scholarship on the shortcomings of the text and structure approach, as examined in Part V. Explaining my disagreement with this scholarship also requires nuanced discussion. I do not view these shortcomings of the text and structure approach as indicating that this approach is incoherent or inoperable when engaging in the task of assessing the doctrinal merits of a proposed implication. I will, therefore, adhere to the guidance that this approach does offer in the task of assessing these merits with regard to the ecological limitation. The shortcomings with this approach, however, means that the guidance it can provide in pursuit of this task is limited.

With regard to adhering to the text and structure approach to the extent possible, Chief Justice Mason's well-accepted necessity test for establishing structural implications within the framework of this approach makes clear the overarching question that must be answered in order to establish the ecological limitation: *Is such a limitation 'logically or practically necessary for the preservation of the*

[155] See discussion in: Chapter 4(II).

integrity of [the Constitution's] structure"?[156] If the answer is yes, then the ecological limitation is eligible for establishment in Australian constitutional law. Further, some basic tendencies of the High Court also seem to be encapsulated by, or informed the formulation of, the text and structure approach. The High Court is less inclined to establish a constitutional implication the less clearly it appears from the Constitution's words.[157] It is also less inclined to establish an implication the more it conflicts with the judiciary's constitutional role (at least, as traditionally viewed from a legalist perspective).[158] This may be because its application requires too much political decision-making that takes judges beyond their skills, resources or democratic mandate.[159] The emphasis on structural implications that are 'logically or practically necessary' suggests that this sort of reasoning (namely, what is logically inferred by the Constitution's word? What is practically required to maintain the Australian constitutional system?) particularly aligns with the text and structure approach. This provides broad guidance on the kinds of doctrinal arguments that need to be made to establish the ecological limitation.

While these various interpretive factors provide some assistance for the task at hand, significant guidance also comes from drawing comparisons between the ecological limitation and established constitutional implications. Particular attention will be given to how the ecological limitation compares to the *Melbourne Corporation* and political communication limitations. This is because they are, what I refer to as, 'implied structural limitations' – constitutional implications derived to restrain government action posing a threat to the Constitution's systemic structure. This is the type of constitutional implication the ecological limitation is proposed to be.[160] Further, these two implied structural limitations were prominent in framing Chief Justice Mason's formulation of the necessity test in *ACTV*. In this case, he was drawing comparisons between (and attempting to harmonise) the reasoning of the High Court in establishing the *Melbourne Corporation* limitation and the reasoning of the High Court he was contemporaneously presiding over as

[156] *ACTV* (1992) 177 CLR 106, 135. See discussion in: Chapter 2(V)(B).
[157] Kirk, 'Constitutional Implications I', above n 8, 655. See discussion in: Chapter 2(V).
[158] Kirk, 'Constitutional Implications I', above n 8, 656. See discussion in: Chapters 2(V) and 5(II).
[159] See discussion in: Chapter 5(II).
[160] See discussion in: Chapter 4(II).

Chief Justice in establishing the political communication limitation.[161] The text and structure approach and the High Court's approach to deriving the *Melbourne Corporation* and political communication limitations broadly appear to be of a piece.

The strength of drawing such comparisons rests on the High Court's general respect for precedent in Australian constitutional law. While the Court is not bound to follow its own precedent, it has traditionally been reluctant to use this discretion.[162] The Court generally adheres closely to past authorities and sees this as a vital tool for constitutional interpretation.[163] This is due to the judiciary's common law roots as well as the lauded pragmatic benefits of this approach, such as the consistency and certainty that following past authorities bring.[164]

The reasoning being employed here is primarily analogical.[165] As will be seen in Chapter 4, I compare the material similarities and differences between the ecological limitation and other established implications to help determine if they deserve similar treatment by the Court. The more material similarities (and the less material differences) they have, the more likely it is that they deserve similar treatment by the Court – that is, the more likely that the ecological limitation deserves to be established as these other implications have been. Analogical reasoning is a foundational facet of the common law tradition and part of accepted practice in Australian constitutional law.[166] It is substantially through analogical

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[161] *ACTV* (1992) 177 CLR 106, 133-135.
[162] Gian Boeddu and Richard Haigh, 'Terms of Convenience: Examining Constitutional Overrulings by the High Court' (2003) 31 *Federal Law Review* 167, 170-171.
[163] Ibid 170-171.
[164] Kenny, 'The High Court on Constitutional Law: The 2002 Term' (2003) 26 *University of New South Wales Law Journal* 210, 219.
[165] The precise definition of analogical reasoning (and how it differs from other forms of reasoning such as inductive reasoning) in law is debatable: John Farrar, 'Reasoning by Analogy in the Law' (1997) 9 *Bond Law Review* 149. For present purposes, analogical reasoning is defined as a form of reasoning which essentially posits that one item (or set of items) be treated the same as another item (or set of items) because they share material similarities (and do not share a substantial amount of material differences): John Farrar, *Legal Reasoning* (Thomson Reuters, 2010) 102-103; Alastair MacAdam and John Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (Butterworths, 1998) 237. The term 'analogy' usually denotes that the likeness between these items is imperfect: MacAdam and Pyke, 237. Analogical reasoning is generally employed, therefore, when various differences exist between the items and one's task is to determine if the similarities outweigh the differences: Farrar, 'Reasoning by Analogy', 151.
[166] Farrar, 'Reasoning by Analogy', above n 165, 150-152; Rupert Cross and James Harris, *Precedent in English Law* (Oxford University Press, 1991) 26; Cheryl Saunders and Adrienne Stone,

reasoning that the common law has been able to extend incrementally to new and emerging situations while ostensibly retaining its claim to consistency.[167]

This means of complementing the text and structure approach by drawing parallels between 'new' and 'old' constitutional implications, however, has its own challenges. First, analogical reasoning presents challenges in its application and utility. How one determines the materiality of similarities and differences between the items being compared (in this situation, the ecological limitation and other constitutional implications) is not a straightforward matter. It is often a qualitative determination that relies on one's assessment of various interests and values.[168] John Farrar notes a lack of substantial or coherent scholarship and judicial discussion on determining materiality which makes this task more difficult.[169] The ecological and political communication limitations, for example, differ in what they are protecting the Australian constitutional system from. The former is protecting it from burdens on Australia's habitability. The latter is protecting it from burdens on the people's freedom of communication about government and political matters. How significant or material *is* this difference in subject-matter? How does it weigh against the fundamental similarity that they both ultimately represent a threat to the Constitution's structure? Such questions are examined in more detail in Chapters 4 and 5. Further, it is important to note that analogical reasoning can never be determinative. One can make a case that two items are so materially similar that it would be unwise or unreasonable to treat them differently but, unlike deductive reasoning, it cannot lead one to a definitive result.[170] Analogical reasoning can help one make a compelling argument but not a conclusive one.[171]

'The High Court of Australia' in András Jakab et al, *Comparative Constitutional Reasoning* (Cambridge University Press, 2017) 36, 56-57. For an example of analogical reasoning being employed in Australian constitutional law see: *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1, 32.

[167] Cross and Harris, above n 166, 186; MacAdam and Pyke, above n 165, 237; Farrar, *Legal Reasoning*, above n 165, 102; John Farrar, 'Reasoning by Analogy', above n 165, 150-152. This is not to suggest analogical reasoning is the only form of reasoning employed in common law. Other forms of reasoning, such as inductive and deductive reasoning, also have deep roots in the common law tradition: Cross and Harris, 187-192.

[168] Farrar, 'Reasoning by Analogy', above n 165, 172.

[169] Ibid 172-173.

[170] Martin Golding, *Legal Reasoning* (Broadview Press, 2001) 49.

[171] A related complication is the fact that established constitutional implications differ from each other. The *Melbourne Corporation* limitation, for example, is different to the political

Second, one must ultimately interpret the Constitution based on the Constitution itself and be wary of relying too heavily on its interpretation in constitutional case law. Windeyer J makes this point in *Damjanovic & Sons Pty Ltd v Commonwealth*:

> The words of the enactment provide the major premise. The result is not, or ought not to be, the establishment of any secondary principle embodied in new words, but at most the provision of an illustration of the effect in a new setting of the original principle expressed in the original words.[172]

For Windeyer J, the 'original words' of the Constitution must anchor one's interpretation. The 'new words' gleaned from deriving 'secondary principles' analogously from constitutional case law could never be as authoritative, and overreliance upon them runs the risk of distorting or distracting from the meaning of the Constitution's 'original words'. Simply put, one's interpretation of the Constitution should generally be drawn from the document, not its paler (and possibly warped) reflection in doctrine.[173] Nevertheless, drawing upon the reasoning evident in past precedent is still a central part of the High Court's interpretive orthodoxy. Further, a stronger case can be made for employing past precedent when assessing the legitimacy of constitutional implications over other ideas more explicitly communicated in the Constitution. This is because the former, by definition, only has an indirect relationship to the 'original words' of the Constitution. One must, therefore, engage in analysis of 'new words' in constitutional case law in order to understand the reasoning behind the derivation of implications in Australian constitutional law. Windeyer J, ultimately, is not suggesting that precedent be ignored, but that caution be taken when relying upon it.[174]

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communication limitation in various ways. This will also be taken into account in the following chapters.

[172] (1968) 117 CLR 390, 409. Henry Burmester asserts that Windeyer J was compelled to make these comments because '[t]he Dixon Court in areas such as the interpretation of s 92 had become very much captives of verbal formulae and Windeyer J was indicating his dislike of that approach': 'Justice Windeyer and the Constitution' (1987) 17 *Federal Law Review* 65, 70.

[173] For discussion on this point in the United States context see: Akhil Amar, 'The Document and the Doctrine' (2000) 114 *Harvard Law Review* 134.

[174] Burmester, above n 172, 70-72.

VIII CONCLUSION

In this chapter, I have demonstrated that the text and structure approach provides insufficient guidance for conclusively determining the doctrinal merits of the ecological limitation (and proposed implications more generally). This is due, in part, to its lack of restraint on judges' choice of interpretive method (which both frames a judge's fundamental view of how implications are derived and what ideas are conveyed by the Constitution's 'text' and 'structure') and use of 'external' sources. It is also due, in part, to the fact that the content of the Constitution's systemic structure is vaguely defined and invites judges to make a range of discretionary decisions when considering the derivation of structural implications, such as the ecological limitation.

Despite these shortcomings, the text and structure approach provides the requisite foundation for assessing the viability of deriving this limitation. It sets up the preliminary question for inquiry: *Is the proposed ecological limitation 'logically or practically necessary for the preservation of the integrity of [the Constitution's] structure"*?[175] It also provides some general parameters for answering this question – the High Court is inclined towards recognising implications the more closely they appear from the Constitution's words, align with the judiciary's constitutional role and are drawn from reasoning based on what is 'logically or practically necessary'. Analogical analysis of other implications provides further guidance for assessing the bona fides of the ecological limitation. This is because the High Court is more likely to accept a proposed implication the more closely it resembles established ones. Through these measures, the potential for deriving the ecological limitation can be evaluated. In the chapter that follows, I draw on this guidance from the text and structure approach (and these measures beyond it) to articulate the argument for establishing this proposed implication.

[175] *ACTV* (1992) 177 CLR 106, 135.

CHAPTER 4: THE ECOLOGICAL LIMITATION

I INTRODUCTION

In this chapter, I outline the overarching doctrinal argument for deriving the ecological limitation. In the process, I formulate a test for this proposed limitation's application ('ecological limitation test'). The High Court's starting point for deriving implications is normally a real-world dispute that brings a contentious or never considered issue in Australian constitutional law to the Court's attention.[1] Constitutional implications may have to be derived in order to address such issues and resolve such disputes. This chapter, however, focuses on the ecological limitation at a level of generality in order to tease out the basic argument for its derivation. Rather than use a real-world dispute as the catalyst for this discussion, instead, I will use a theoretical dispute itself framed at a level of generality. This dispute is as follows: a litigant objects to legislative or executive action by an Australian government ('government action') that burdens Australia's habitability.[2] Can a constitutional implication – the proposed ecological limitation – be derived to restrain this action?

This theoretical dispute mirrors the concern of this thesis – Australian government activity worsening climate change. Government action, rather than non-government action, has been selected because this is generally the focus of constitutional law.[3]

[1] This is in accordance with *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, which establishes that the High Court generally cannot determine hypothetical questions of law but only questions of law raised in pursuit of resolving a 'matter', a dispute with immediate rights, duties or liabilities at play: 265; the Constitution, s 76.

[2] The reason legislative and executive (and not judicial) action has been selected for the purposes of this theoretical dispute is discussed in Part V(C).

[3] Geoffrey Stone et al, *Constitutional Law* (Wolters Kluwer Law & Business, 8th ed, 2017) 1529; Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melbourne University Law Review* 374, 401-404; George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 143.

As Dixon J states, '[p]rima facie a constitution is concerned with the powers and functions of government and the restraints upon their exercise.'[4] Further, the restraint of government action (burdening Australia's habitability) rather than the compelling of government action (to protect or improve Australia's habitability) has been selected because constitutional implications on the extent of government power generally operate in a 'negative' rather than 'positive' manner.[5] The High Court is inclined to derive constitutional implications that shield the nation from objectionable laws and executive decisions rather than dictate the laws or executive decisions a government should implement.[6] Thus, while this dispute offers a relatively neutral starting point for this chapter's discussion, some conscious decisions have gone into its selection.

In this thesis, I use the term 'habitability' to refer to a site's ability to provide the basic ecological conditions for humans to survive and thrive such as those that bear food, water, air and shelter. 'Australia's habitability', therefore, refers to the ability of the site known as Australia to provide such conditions. 'Habitability' is a term

[4] *James v Commonwealth* (1939) 62 CLR 339, 362.

[5] Stone, 'Rights', above n 3, 400-401. The High Court has discussed this preference for constitutional implications operating in a 'negative' manner most clearly in case law on the political communication limitation. Brennan J, for example, states that this limitation 'is negative in nature: it invalidates laws and consequently creates an area of immunity from legal control': *Cunliffe v Commonwealth* (1994) 182 CLR 272, 327 ('*Cunliffe*'). In *McClure v Australian Electoral Commission* (1999) 163 ALR 734, for another example, the High Court rejected the argument that the political communication limitation operates in a 'positive' sense and, thus, the Commonwealth was not constitutionally obliged to ensure sufficient media coverage was provided for independent candidates during a federal election.

[6] This position seems to be grounded in a desire to ensure the extent to which judges engage in political decision-making is minimised: see discussion in: Chapter 5(II). Stone suggests that this position also seems to be grounded in the liberal philosophical tradition: 'Negative rights can be seen as a manifestation of a preference for a negative concept of liberty, ie, a concept of liberty as freedom from interference': 'Rights', above n 3, 401; also see: Williams and Hume, above n 3, 154-155; Isaiah Berlin, 'Two Concepts of Liberty' in Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press, 1969) 118; Susan Bandes, 'The Negative Constitution: A Critique' (1990) 88 *Michigan Law Review* 2271. Stone, however, questions the interpretive validity of this restriction with regard to the political communication limitation. If one accepts that political communication needs to be protected for the preservation of the Constitution's structural integrity, which the High Court does, nothing in the Constitution's text indicates whether this protection should be provided in a positive or negative way nor does any assessment of what is 'logically or practically necessary' in accordance with Chief Justice Mason's test for structural implications: 401. Further, Stone notes the conceptual difficulties that sometimes arise when attempting to delineate government *action* from *inaction*: 402-403; also see Williams and Hume, 155. This suggests that the political communication limitation (and perhaps other implications, such as the ecological limitation, if established) need not be confined to only applying in a 'negative' rather than 'positive' sense. For the sake of conceptualising the ecological limitation for the purposes of this thesis, however, I will assume the High Court will continue to preference limitations applying in a 'negative' sense and frame the limitation accordingly.

with different meanings in different contexts.[7] Perhaps most notably, the term 'habitability' is typically not limited to environments for human life.[8] Astrobiologists, for example, use the term to define when a given physical space can support at least one known organism, on Earth or elsewhere.[9] In this thesis, however, 'habitability' only refers to the ecological conditions required for humans to survive and thrive. Further, I do not use the term 'habitability' in the binary sense that a physical site can either support the existence of human life or it cannot.[10] In this thesis, the term is used in a manner that recognises degrees of habitability. Human life may be able to continue on the Earth's surface in various states and the term 'habitability' encapsulates all of them, from the bountiful to the scant and everything in between. If a physical space is made uninhabitable that means that even the bare minimum physical conditions needed for life to continue have been extinguished.

This latter point is particularly important for the purposes of this thesis. The Constitution does not require humans to merely exist in Australia, but for them to have a certain standard of life – a standard that allows the integrity of the Constitution's form of democracy, government, judiciary and so forth to thrive. As this chapter explores, the Constitution requires a standard of habitability be maintained in Australia and this is important in the conceptualisation of the ecological limitation. Thus, I do not use the term 'habitability' in a manner tied to any particular application of it in the physical or social sciences. This term ultimately takes on its own significance in this thesis as a term of art that describe a particular concept tethered to the ecological limitation's formulation. While this term is informed by concepts in physical and social sciences (what is required to

[7] Charles Cockell et al, 'Habitability: A Review' (2016) 16 *Astrobiology* 89, 89; Eugene Odum, *Fundamentals of Ecology* (WB Saunders Company, 3rd ed, 1971) 234; Linnea Hall, Paul Krausman and Michael Morrison, 'The Habitat Concept and a Plea for Standard Terminology' (1997) 25 *Wildlife Society Bulletin* 173, 173; Robert Whittaker, Simon Levin and Richard Root, 'Niche, Habitat, and Ecotope' (1973) 107 *The American Naturalist* 321, 321; William Block and Leonard Brennan, 'The Habitat Concept in Ornithology' (1993) 11 *Current Ornithology* 35, 35; Christopher McKay and Margarita Marinova, 'The Physics, Biology and Environmental Ethics of Making Mars Habitable' (2001) 1 *Astrobiology* 89, 91.

[8] For example see: Cockell et al, above n 7, 90; Odum, above n 7, 234; Block and Brennan, above n 7, 35.

[9] Cockell et al, above n 7, 90.

[10] Ibid 92-93.

keep Australia 'habitable', for example, is informed by climate science literature as will be explored more in Chapter 6) it is distinct from them.[11]

The arc of this chapter sees the proposed ecological limitation drawn in broad strokes then gradually refined until the point where a test for its application is formulated. In Part II, I explain why the proposed ecological limitation should be viewed as an 'implied structural limitation' akin to others such as the *Melbourne Corporation* limitation. This narrows down what needs to be demonstrated in order for the ecological limitation to be derived. Namely, I must demonstrate that government action burdening Australia's habitability is causally linked to the compromising of one or more structural elements. In Part III, I make this link with regard to the ecological limitation. I examine the anatomy of implied (structural) limitations more closely in Part IV and propose that the ecological limitation be framed via the concept of proportionality. Based on this assessment, in Part V, I formulate the ecological limitation test.

In this chapter, I do not confront all of the issues or concerns that this argument for deriving the ecological limitation (and formulating its test) might raise. These issues or concerns, such as the extent to which the limitation invites judges to engage in political decision-making, will be addressed in Chapter 5. Further insights on deriving the limitation will be gained from its application in a 'test case' in Chapter 6. This chapter, therefore, does the work of outlining the essential case for the ecological limitation and distilling the limitation into some articulated form in order for it to be critiqued. Subsequent chapters do the work of providing this critique in order for a more complete picture of the doctrinal merits of the ecological limitation to be provided.

[11] See discussion in: Chapter 6(III).

II THE ECOLOGICAL LIMITATION AS STRUCTURAL IMPLICATION

Government action burdening Australia's habitability poses a threat to Australian people's lives, health and wellbeing. Nothing in the Constitution's text or structure, however, appears to justify the derivation of a constitutional implication restraining such action based on this fact alone.[12] Courts in other nations have been able to derive implications regarding environmental protection on such grounds by drawing on rights-based provisions in their respective constitutions.[13] In *Irazu Margarita v Copetro SA*, for example, the Supreme Court of Argentina derived an implication protecting people's 'right to a healthy environment' from the 'right to life' expressly enshrined in the nation's constitution.[14] The court held:

> The right to live in a healthy environment is a fundamental attribute of people. Any aggression to the environment ends up becoming a threat to life itself and to the psychological and physical integrity of the person, which is based on ecological balance.[15]

[12] Government action burdening Australia's habitability also potentially poses a threat to animals' and ecosystems' (lives,) health and wellbeing. A constitutional implication derived based on this fact alone, however, also lacks support from the Constitution's text and structure. While some nations have enshrined the rights of nature into their constitution (namely, Ecuador and Bolivia), Australia's constitution is inherently anthropocentric: *Constitution of the Republic of Ecuador 2008* art 71; *Constitution of the Plurinational State of Bolivia 2009* art 108.16 (also see the *Framework Law of Mother Earth and Integral Development for Living Well 2012* (Bolivia)); Nicole Rogers, 'Who's Afraid of the Founding Fathers? Retelling Constitutional Law Wildly' in Michelle Maloney and Peter Burdon (eds), *Wild Law - In Practice* (Routledge, 2014); Nicole Rogers, 'Duck Rescuers and the Freedom to Protest: Levy v Victoria' in Nicole Rogers and Michelle Maloney (eds), *Law as if Earth Really Mattered: The Wild Law Judgment Project* (Routledge, 2017); Aidan Ricketts, 'Exploring Fundamental Legal Change through Adjacent Possibilities: The Newcrest Mining Case' in Nicole Rogers and Michelle Maloney (eds), *Law as if Earth Really Mattered: The Wild Law Judgment Project* (Routledge, 2017). The derivation of a constitutional implication on these terms, therefore, is even less likely than one based on the Australian people's lives, health and wellbeing.

[13] David Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (UBC Press, 2012) 86-87; David Boyd, 'The Implicit Constitutional Right to Live in a Healthy Environment' (2011) 20 *Review of European Community & International Environmental Law* 171, 171-172.

[14] Supreme Court of Argentina, 10 May 1993.

[15] Quoted in Boyd, 'Implicit Constitutional Right', above n 13, 172.

While Australia's constitution contains some protections for the rights or freedoms of the people, they are relatively few.[16] Even fewer are understood by the High Court as protecting such rights or freedoms due to the intrinsic value of people's lives, health or wellbeing such as those in Argentina's constitution.[17] Thus, a constitutional implication derived to restrain government action burdening Australia's habitability based solely on the intrinsic value of preventing such a harm seems unlikely to have any basis in Australian constitutional law.

Government action burdening Australia's habitability, however, also holds the potential to threaten the structural integrity of the Australian constitutional system (as will be demonstrated in Part III). The High Court will derive constitutional implications on these grounds.[18] This is the basis for establishing a range of constitutional implications, such as the *Melbourne Corporation* limitation (an implication derived to restrain Commonwealth laws that pose a threat to the structural element of federalism) and political communication limitation (an implication derived to restrain Commonwealth and State legislative and executive action that pose a threat to the structural element of representative democracy).[19] I refer to such implications restraining government action for the sake of preserving the Constitution's systemic structure as 'implied structural limitations.'[20] In this vein, a constitutional implication restraining government action burdening Australia's habitability may be valid to the extent that it poses a threat to the structural integrity of the Australian constitutional system.[21]

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[16] Williams and Hume, above n 3, 111-115. For discussion on the place of rights in Australian constitutional law see: Williams and Hume; Chief Justice Robert French, 'The Constitution and the Protection of Human Rights' (Speech delivered at the Edith Cowan University, 20 November 2009); Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27 *Sydney Law Review* 29. For further discussion of constitutional guarantees in Australian constitutional law see: Part IV(B).

[17] Williams and Hume, above n 3, 113. An example of a provision understood as protecting a constitutional guarantee due to people's intrinsic value is s 80 (guaranteeing a right to a trial by jury in Commonwealth indictable offence matters): 113. This provision 'has been understood by some judges to serve the individual's interest in liberty': 113. For example see: *Brown v The Queen* (1986) 160 CLR 171, 189 (Wilson J).

[18] See discussion in: Chapter 2(V)(B).

[19] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*').

[20] See discussion in: Chapter 3(VII).

[21] Constitutional implications derived to protect the structural integrity of the Australian constitutional system often provide protections to the citizenry's individual and collective rights and interests indirectly: Williams and Hume, above n 3, 114; See discussion in: Part IV(B)(1).

The ecological limitation, therefore, is proposed as a form of structural implication.[22] This means that Chief Justice Mason's necessity test must be satisfied for it to be established.[23] According to Mason CJ, structural implications may only be derived if 'logically or practically necessary for the preservation of the integrity of [the Constitution's systemic] structure.'[24] What degree and kind of damage needs to be done to the Constitution's systemic structure for one to declare an implication restraining such damage 'necessary'? As discussed in Chapter 3, the High Court's necessity test seems to mirror the 'practical necessity' test in Australian and British case law regarding statutory and contractual implications.[25] The necessity test, therefore, ostensibly proposes that a structural implication may be established if it enables 'some or all of the provisions of [the Constitution] to be efficacious or achieve [one or more of its] intended purposes.'[26]

It is clear from the operation of established implied structural limitations that government action does not need to present a threat to the *entirety* of the Constitution's systemic structure for an implied structural limitation restraining such action to be deemed 'necessary'. It only needs to present a threat to one or more structural elements, such as federalism or separation of powers.[27] The *Melbourne Corporation* limitation, for example, 'only' preserves the structural element of federalism while the *Boilermakers* limitation 'only' preserves the structural element of separation of powers. Thus, it seems acceptable to formulate the ecological limitation as being triggered if a single structural element, rather than the entirety of the Constitution's systemic structure, is under threat.

Further, the High Court generally regards the derivation of an implied structural limitation 'necessary' if government action compromises a structural element. By

[22] It is proposed, specifically, as a structural implication with regard to the Constitution's systemic, rather than organisational, structure. See discussion in: Chapter 2(V)(B).
[23] *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 135 ('*ACTV*'). See discussion in: Chapters 2(V)(B) and 3(VI)(C).
[24] *ACTV* (1992) 177 CLR 106, 135.
[25] Jeffrey Goldsworthy, 'Constitutional Implications Revisited - The Implied Rights Cases: Twenty Years On' (2011) 30 *University of Queensland Law Journal* 9, 18-19. Also see: Ibid 159. See discussion in: Chapter 3(VI)(C).
[26] Goldsworthy, above n 25, 19.
[27] See discussion in: Chapter 3(VI)(A).

'compromise', I mean partially but substantially weaken or render defective a structural element enough to necessitate, in the Mason CJ sense, the derivation of an implied structural limitation to restrain such action. The government action in question, therefore, does not need to destroy a structural element (that is, totally obliterate a structural element) in order to trigger the establishment of an implied structural limitation. Such destruction may be seen as the compromising of a structural element at its most extreme.

The fact that this lesser form of impairment of a structural element seems to satisfy the necessity test is evident in a few ways. To begin, the necessity test is framed in terms of preserving 'the *integrity* of [the Constitution's] structure'.[28] This suggests that there is a standard or level of quality of these structural elements that must be upheld. One may be in breach of an implied structural limitation, therefore, even if one is far from destroying the relevant structural element. This can also be seen in the framing of the tests for particular implied structural limitations. The *Melbourne Corporation* limitation, for example, is framed as prohibiting a Commonwealth law that '*restricts* or *burdens* one or more of the states in the exercise of their constitutional powers'.[29] The political communication limitation, for another example, is framed as prohibiting legislative or executive action that operates to 'effectively *burden* freedom of communication about government or political matters' and is not 'reasonably appropriate and adapted to serve a legitimate' objective.[30] These phrasings denote that something substantially less that total obliteration of a structural element can breach these implied structural limitations.

This is further evident when one examines the specific application of such implied structural limitations in case law. No government action which has been held in breach of an implied structural limitation by the High Court has come close to destroying the structural element in question. They would all be classed as compromising this element; as being a contributing factor to its undermining. In *Austin v Commonwealth* ('*Austin*'), for example, the High Court held that a

[28] *ACTV* (1992) 177 CLR 106, 135 (emphasis added).
[29] *Austin* v *Commonwealth* (2003) 215 CLR 185, 258 ('*Austin*') (emphasis added).
[30] *Lange* (1997) 189 CLR 520, 567 (emphasis added). For further discussion on the framing of the political communication limitation (and how it has transformed since *Lange*) see: Part V.

Commonwealth tax on State judges' superannuation breached the *Melbourne Corporation* limitation.[31] This is not because such a tax singlehandedly destroyed the federalism that forms an element of the Constitution's systemic structure or even destroyed the States' ability to organise its judiciary with a high level of autonomy. It is because this tax presented an unacceptable *contribution* to the destruction of the Constitution's federal nature. Specifically, the setting of judges' remuneration was held to be a critical function of the States and this tax impeded upon this function and, thereby, compromised the federal compact underpinning the Constitution.[32]

Finally, it would be illogical for implied structural limitations to only be derived and applied to prevent government action destroying the structural element in question. This would effectively mean, for example, that nothing short of a law cancelling elections could be deemed to trigger the derivation and application of an implied structural limitation to protect representative democracy (possibly placing the political communication limitation itself, which only protects a facet of representative democracy – the people's freedom to converse on government or political matters – in doubt) or a Commonwealth attempt to take full control of, or abolish, the States could be deemed to trigger the *Melbourne Corporation* limitation. The High Court is sensitive to how individual laws or executive decisions, while not wholly or directly destroying the foundational principles the Constitution seeks to maintain, may nevertheless undermine them in a piecemeal fashion. Protecting the integrity of the Constitution's systemic structure requires protection from incremental attack. While this is not to suggest that *any* weakening or minor burdening of a structural element is enough to trigger the derivation and application of an implied structural limitation, it seems doctrinally and logically sound to conclude that government action *substantially* weakening or burdening – 'compromising' – a structural element may do so.[33]

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[31] (2003) 215 CLR 185.

[32] Ibid 219 (Gleeson CJ), 267 (Gaudron, Gummow and Hayne JJ), 283-285 (McHugh J). Kirby J, in dissent, held that the burden placed on the State's autonomy by this law was not substantive enough to breach the *Melbourne Corporation* limitation: 304.

[33] For discussion on the difficulty in determining when a structural element has been compromised by particular government action see: Part III(B) and Chapter 6(III)(B)(5)(a).

Thus, it is accepted in Australian constitutional law that a proposed implied structural limitation may be deemed 'logically or practically necessary', and therefore eligible for establishment, if it restrains government action that compromises (as opposed to destroys) one or more structural elements (as opposed to the entirety of the Constitution's systemic structure). The question that flows from this is: can government action *burdening Australia's habitability* be causally linked to the compromising of one or more structural elements?

III THE CAUSAL LINK BETWEEN AUSTRALIA'S HABITABILITY AND THE CONSTITUTION'S STRUCTURE

A *Drawing the Causal Link in Theory*

The requisite causal link can be theoretically demonstrated. To begin, the Australian constitutional system requires humans. They make up the 'electors', 'judges', 'senators' and others that run the Australian constitutional system, are served by this system and (if one accepts the theory of popular sovereignty) provide this system its foundational authority.[34] Humans can only take on these roles within a physical site. This site is essentially the continent of Australia. This point is made clear in various segments of the Constitution. The 'Commonwealth of Australia' is formed from the relevant 'colonies' situated across the Australian continent 'including the northern territory of South Australia'.[35] The 'seat of Government of the Commonwealth' must be placed 'not less than one hundred miles from

[34] The Constitution, ss 8, 9 and 72. The theory of popular sovereignty gained the support of various judges and scholars from the 1970s onwards: William and Hume, above n 3, 100. For examples of judges' support see: *Bistricic v Rokov* (1976) 135 CLR 552, 566 (Murphy J); *McGinty v Western Australia* (1996) 186 CLR 140, 275 (Gummow J). For examples of scholars' support see: Geoffrey Lindell, 'Why Is Australia's Constitution Binding - The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29, 37; George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *Federal Law Review* 1, 7-8.

[35] The Constitution, cls 3, 6.

Sydney.'[36] The Constitution arranges the governance of 'land', 'rivers' and other facets of Australia's geography.[37] The landmass of Australia is where the Australian constitutional system was designed to operate and essentially the only place within which it can operate.[38]

It logically follows that Australia must remain habitable, at least to some extent and in some manner, in order for humans to carry out their constitutional roles within this physical site.[39] As Latham CJ states:

> The continued existence of the community under the Constitution is a condition of the exercise of all the other powers contained in the Constitution, whether executive, legislative or judicial.[40]

If Australia's habitability is destroyed, not only one or more structural elements but the Australian constitutional system in its entirety is destroyed. If the destruction of Australia's habitability can lead to such a result, then it logically follows that something less than the total obliteration of Australia's habitability can substantially weaken – that is, compromise – one or more structural elements. How far removed the damage gets from total obliteration so as to no longer register as 'compromising' one or more structural elements is debatable. This does not take away from the fact that such a 'compromising' has occurred before one reaches such a threshold. Thus, in theory, the burdening of Australia's habitability can be causally linked to the compromising (and destruction) of one or more (or all) structural elements.

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[36] Ibid s 125.
[37] Ibid ss 85, 100.
[38] As noted in Chapter 1, the parameters of the physical site within which the Australian constitutional system operates is subject to change if, for example, a new State joins the 'Commonwealth of Australia': the Constitution, ss121-124; Chapter 1, n 3. Further, the Constitution has some extraterritorial reach but is generally considered confined by territorial borders defined in Australian constitutional law and international law: *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363-364; Ivan Shearer, 'Jurisdiction' in Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi (eds), *Public International Law: An Australian Perspective* (Oxford University Press, 2005) 154, 155, 159-162; Anne Twomey, 'Geographical Externality and Extraterritoriality: *XYZ v Commonwealth*' (2006) 17 *Public Law Review* 256.
[39] Recall that the term 'habitability' is not being used in a binary sense. There are degrees of habitability as discussed in Part I.
[40] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 141. Latham CJ makes this statement in the context of his consideration of the Commonwealth's constitutional powers with regard to protecting the nation from the spread of communism.

In order to draw this causal link, a final question remains: does *government action* have the capacity to burden Australia's habitability so significantly that it may be deemed to compromise one or more structural elements? The answer to this is yes. As discussed in Chapter 1, the Commonwealth and States have the capacity to pass laws and make executive decisions on Australian nature (as long as each remains within its jurisdiction regarding *which* facet of this physical site is under its control).[41] This includes legislative and executive actions that may cause significant damage to Australian nature and its life-supporting capacities for current and future generations. That is, of course, unless it is implicit in the Constitution that such government action burdening Australia's habitability is restricted.

The requisite causal link, therefore, may be drawn. Government action burdening Australia's habitability has the capacity to compromise one or more structural elements, if not destroy the Australian constitutional system entirely. When government action has such a capacity, the case law suggests that the necessity test is satisfied and a constitutional implication restraining such action is eligible for establishment. This constitutional implication is the proposed ecological limitation.

B *Drawing the Causal Link in Practice*

The above discussion shows that the requisite causal link may be drawn in theory. This serves the purpose of this chapter – outlining the overarching argument for the derivation of the ecological limitation at a level of abstraction. At this juncture, however, it is useful to provide some illustration of what this causal link might look like in practice. With regard to climate change, government action authorising fossil fuel projects might hold the potential to trigger the ecological limitation. Such projects include the construction of coal mines or coal-fired power stations that lead to the emissions of significant amounts of greenhouse gases for the sake of energy

[41] See discussion in: Chapter 1(II)(B).

production. Government action authorising other projects with detrimental effects on the climate, such as those that weaken carbon sinks, might also hold the potential to trigger the ecological limitation.[42] Deforestation projects, for example, release substantial amounts of greenhouse gases in the process of vegetation clearance and remove valuable forms of carbon sinks for the continued process of minimising such gases from the atmosphere.[43]

The causal link connecting government action approving such projects to the compromising of one or more structural elements can be summarised as follows. Such action contributes to raising global temperature beyond two degrees Celsius above pre-industrial levels ('two degrees'). Breaching this temperature is predicted to lead to runaway climate change.[44] This is a phenomenon which sees global temperature effectively rise of its own volition and generate serious ecological problems for human societies, including Australian society.[45] Generally speaking, these problems escalate as global temperature continues to rise, threatening the stability of such societies in the coming decades, centuries and millennia.[46] This indicates that the Australian constitutional system, which is meant to maintain its structural integrity for (at least) centuries, will face serious threats, if not destruction, if two degrees is breached.[47] In this way, such challenges may be causally linked to the compromising, if not destruction, of one or more structural elements. This is only a broad sketch of the requisite causal link. In Chapter 6, I examine this causal link in more detail with regard to government action approving a particular project contributing to climate change.[48] This is the Queensland

[42] Carbon sinks are reservoirs, such as oceans and forests, which absorb and release carbon where 'the amount absorbed is greater than the amount released': Will Steffen and Lesley Hughes, 'The Critical Decade 2013: Climate Change Science, Risks and Responses' (Climate Commission, 2013) 88.
[43] Corey Bradshaw, 'Little Left to Lose: Deforestation and Forest Degradation in Australia since European Colonization' (2012) 5 *Journal of Plant Ecology* 109, 115-116.
[44] Kevin Anderson and Alice Bows, 'Reframing the Climate Change Challenge in Light of Post-2000 Emission Trends' (2008) 366 *Philosophical Transactions of the Royal Society* 3863, 3863. For discussion on the emergence of this broadly held view see: Christopher Shaw, *The Two Degrees Dangerous Limit for Climate Change: Public Understanding and Decision Making* (Routledge, 2015). For discussion on the level of artifice in framing two degrees as a threshold demarcating when runaway climate change emerges see: Chapter 6(III)(B)(2).
[45] Haydn Washington and John Cook, *Climate Change Denial: Heads in the Sand* (Earthscan, 2011) 30-31. See discussion in: Chapter 6(III)(A).
[46] Washington and Cook, above n 47, 30-31. See discussion in: Chapter 6(III)(A).
[47] See discussion in: Chapter 6(III).
[48] Ibid.

government's approval of the Carmichael coal mine, expected to contribute significant amounts of greenhouse gases into the atmosphere over its projected lifespan.

As discussed in Chapter 1, climate change litigation (and scholarship on this litigation) provides some guidance on the challenges involved in drawing a causal link between specific (fossil fuel or other climate-impacting) projects and the broader ramifications of climate change.[49] This includes the 'death by a thousand cuts' problem.[50] That is, any specific project, such as a coal-fired power station, will only produce a small portion of the greenhouse gases estimated to bring about runaway climate change and its ramifications. Another problem relates to the concept of 'market substitution'.[51] The assertion here is that the actor unearthing fossil fuels, such as coal from a coal mine, is not responsible for the climate impacts caused by the eventual burning of those fuels by another actor. This is purportedly because the same amount of fossil fuels would be burnt regardless – the latter actor would simply accrue those fuels from another source. These issues that frequently arise in climate litigation are also likely to surface in cases pertaining to the ecological limitation.

When considering the possible causal links that might be established in this area, it is important to keep in mind the extended timeline in which Australian constitutional law operates. As McHugh J states, and as noted above, the Constitution is 'an outline for government that is intended to endure for centuries'.[52] This means that a delay between cause and effect – between the projects producing

[49] See discussion in: Chapter 1(III).
[50] Jacqueline Peel, 'Issues in Climate Change Litigation' (2011) 1 *Carbon and Climate Law Review* 15, 17-18.
[51] Nicole Rogers, 'Making Climate Science Matter in the Courtroom' (2017) 34 *Environmental and Planning Law Journal* 475, 478; Justine Bell-James and Sean Ryan, 'Climate Change Litigation in Queensland: A Case Study in Incrementalism' (2016) 33 *Environmental and Planning Law Journal* 515, 524; Kane Bennett, 'Australian Climate Change Litigation: Assessing the Impact of Carbon Emissions' (2016) 33 *Environmental and Planning Law Journal* 538, 543. See discussion in: Chapter 6(III)(B)(3).
[52] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 196. For discussion on the connection between constitutions and the future generations they serve see: Karen Schultz, 'Future Citizens or Intergenerational Aliens?: Limits of Australian Constitutional Citizenship' (2012) 21 *Griffith Law Review* 36, 38; Richard Hiskes, *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice* (Cambridge University Press, 2009) 126-133; Chapter 6(III)(B)(1).

greenhouse gas emissions in the present and the ability of the Australian constitutional system 'to endure for centuries' in the face of runaway climate change – needs to be taken into account. This also means that the possible causal links that might be drawn in practice are yet to be fully known. What government action might trigger the ecological limitation in 2050, 2100, 2200 or beyond? It is difficult to predict the state of Australia's habitability, or the actions of government in response (or denial) of that state, in the years to come.[53] While the future regarding Australia's habitability is unknown, substantial evidence exists that the state of Australia's habitability is expected to become progressively more vulnerable.[54] In such conditions, the opportunities for drawing the requisite causal link between government action burdening Australia's habitability and the compromising of one or more structural elements seems likely to increase.[55]

Ultimately, the question of drawing a causal link between government action burdening Australia's habitability and the compromising of one or more structural elements is a question of fact, depending on the particular matter at hand. The Court's general approach to drawing such a causal link when applying implied structural limitations is to do so on a case by case basis. The particular kinds of government action affecting people's freedom of communication that could be deemed to compromise the structural element of representative democracy, for

[53] For discussion on how this uncertainty regarding the future complicates the application of the ecological limitation see: Chapter 6(III)(B)(5). For discussion on how such uncertainty might lead to questions regarding whether the ecological limitation should be established in the first place see: Chapter 5(II).

[54] See discussion in: Chapter 1(I)(A); Chapter 6(III)(A). Also see: Johan Rockström et al, 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity' (2009) 14(2) *Ecology and Society* <ecologyandsociety.org/vol14/iss2/art32>; Will Steffen et al, 'Planetary Boundaries: Guiding Human Development on a Changing Planet' (2015) 347 *Science* 1259855-1.

[55] This is not to suggest that the frequency with which the ecological limitation might be used is strictly relevant for the purposes of this thesis. The core question of this thesis is whether the ecological limitation exists. Whether the ecological limitation can be used frequently or not, if established, is a separate question. Constitutional implications that have only been used a small amount of times, such as the *Kable* limitation, are established parts of Australian constitutional law, regardless of their minimal use. For discussion of the (in)frequency of the *Kable* limitation's use see: Gabrielle Appleby and John Williams, 'A New Coat of Paint: Law and Order and the Refurbishment of Kable' (2012) 40 *Federal Law Review* 1; Tarsha Gavin, 'Extending the Reach of Kable: Wainotu v New South Wales' (2012) 34 *Sydney Law Review* 395. The frequency with which the ecological limitation might be used ultimately depends on a confluence of factors, such as governments' choice of action impacting Australia's habitability. If Australian governments choose to act in environmentally responsible ways, for example, no reason will exist for utilising this limitation. For discussion on this and other factors that might influence the extent to which ecological limitation matters might be pursued see: Chapter 7(IV).

example, was substantially unclear when the political communication limitation first gained majority support in 1992.[56] A clearer picture of the kinds of government action that fit this description emerged over time as parties sought clarification from the Court on how the political communication limitation applies for the purposes of resolving particular disputes. Such an incremental approach allows judges to cautiously develop the law into new areas, drawing on the foundational strength of the doctrine of precedent in the common law tradition.[57]

In keeping with this approach, I will examine the causal link between government action burdening Australia's habitability and the compromising of one or more structural elements in more specificity by way of the Carmichael coal mine test case in Chapter 6. Through analysis of this hypothetical matter, a better understanding of how this causal link may be established can be gained and the various challenges that present themselves in this pursuit can be critically assessed.

Thus, the requisite causal link between government action burdening Australia's habitability and the compromising of one or more structural elements can be theoretically established. Drawing this causal link in practice depends on the particular facts of the matter in question. While this Part offers a glimpse at what

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[56] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Nationwide News*'); *ACTV* (1992) 177 CLR 106. This lack of clarity was even more acute in the preceding period when the possibility of establishing a limitation of this kind was first proposed by Murphy J in the 1970s and 1980s: *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 88; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 670, *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 312; *Miller v TCN Nine Pty Ltd* (1986) 161 CLR 556, 581.

[57] Jeremy Kirk, 'Rights, Review and Reasons for Restraint' (2001) 23 *Sydney Law Review* 19, 42. As Barwick CJ explains, '[t]he method of constitutional interpretation is the same as that with which we have been long familiar in the common law. The law develops case by case, the Court in each case deciding so much as is necessary to dispose of the case before it': *Strickland v Rocla Concrete Pipes Pty Ltd* (1971) 124 CLR 468, 490. Barwick CJ argues that the lack of commitment to incremental development of the law explains 'fundamental errors' with the High Court's (now abolished) constitutional implication, the reserved State powers doctrine:

> Of course frequently in order to dispose of a case the Court must state and discuss general principles or express concepts which are of value in subsequent cases. But that is a very different thing from setting out to decide at one blow the full ambit of a constitutional power. Indeed, to my mind one of the fundamental errors into which the Court was led by the reserved powers doctrine when deciding *Huddart, Parker & Co Pty Ltd v Moorehead* [(1909) 8 CLR 330] was the endeavour to do that very thing rather than merely to decide whether the law which it had before it was a law with respect to the topic of granted power: 490 (citations omitted).

this causal link might look like in an ecological limitation matter, Chapter 6 provides a more detailed examination of this link in its exploration of the Carmichael mine test case. In order to examine this hypothetical matter (and understand the operation of the ecological limitation in more detail), the ecological limitation must first be refined into an applicable form. As Stephen Donaghue states, '[o]nce it is clear that there *is* something implied, the Court must decide exactly *what* is implied, for it cannot simply wash its hands of cases that come before it.'[58] In the next Part, I refine the ecological limitation further to determine 'exactly *what* is implied', drawing on the concept of proportionality.

IV PROPORTIONALITY AND THE ECOLOGICAL LIMITATION

Proportionality is a conceptual framework that comes in a range of forms based on its diverse usage in Australia and elsewhere.[59] Generally speaking, it can be understood as a framework that focuses a judge on the task of striking the appropriate balance between competing interests on a case by case basis.[60] 'One

[58] 'The Clamour of Silent Constitutional Principles' (1996) 24 *Federal Law Review* 133, 171 (emphasis in original).

[59] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 3; Grant Huscroft, Bradley Miller and Grégoire Webber, 'Introduction' in Grant Huscroft, Bradley Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 1, 3.

[60] Jeremy Kirk, 'Constitutional Guarantees, Characterization and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 5; Justice Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85, 85; Gabrielle Appleby, 'Proportionality and Federalism: Can Australia Learn from the European Community, the US and Canada?' (2007) 26 *University of Tasmania Law Review* 1, 4. McHugh J argues that proportionality does not necessitate a balancing of various interests, at least with regard to proportionality testing in political communication

should not use a sledgehammer to crack a nut' is the phrase commonly used to describe the ethos of proportionality.[61] In Australian constitutional law, the implied structural limitations that employ proportionality are the political communication and voting access limitations established in *Roach v Electoral Commissioner* and *Rowe v Electoral Commissioner* ('voting access limitations').[62] Proportionality is also employed with regard to the interstate trade limitation found in section 92 ('interstate trade limitation') and in other areas of Australian constitutional law including the exercise of purposive legislative powers, incidental legislative powers and purposive grants of delegated legislative power.[63] Beyond Australian constitutional law, proportionality is utilised in a variety of legal areas (such as criminal law and administrative law) and jurisdictions across the world.[64] This includes its birthplace, Germany, where proportionality first emerged as a coherent principle in Prussian administrative courts during the late nineteenth century before steadily gaining acceptance internationally.[65]

Due to the fact that proportionality has various incarnations, I begin this Part by clarifying how I propose incorporating the concept of proportionality into my formulation of the ecological limitation. I then explain my reasoning as to why I view this particular formulation as the most doctrinally appropriate in contrast to

limitation matters: *Coleman v Power* (2004) 220 CLR 1, 48-49 ('*Coleman*'); Nicholas Aroney, 'Justice McHugh, Representative Government and the Elimination of Balancing' (2006) 28 *Sydney Law Review* 505. For criticisms of Justice McHugh's position see: Bonina Challenor, 'The Balancing Act: A Case for Structured Proportionality under the Second Limb of the Lange Test' (2015) 40 *University of Western Australia Law Review* 267, 282-284; Adrienne Stone, 'Limits of Constitutional Text and Structure Revisited' (2005) 28 *University of New South Wales Law Journal* 842, 846-847. For discussion on the concept of 'balancing' as it pertains to proportionality see: Barak, above n 61, 340-370; Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 *Ratio Juris* 131; Martin Luterán, 'The Lost Meaning of Proportionality' in Grant Huscroft, Bradley Miller, Grégoire Webber, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 21.

[61] Kirk, 'Constitutional Guarantees', above n 62, 1.

[62] *Roach v Electoral Commissioner* (2007) 233 CLR 162 ('*Roach*'); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 ('*Rowe*'); Sir Anthony Mason, 'The Use of Proportionality in Australian Constitutional Law' (2016) 27 *Public Law Review* 109, 115.

[63] Mason, above n 64, 114-115.

[64] Kirk, 'Constitutional Guarantees', above n 62, 3-4.

[65] Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013) 24; Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72, 100-101; Barak, above n 61, 178-179. For discussion of versions of proportionality prior to its conceptualisation in Prussian administrative law in the late nineteenth century see: Cohen-Eliya and Porat 24; Barak 175-178.

other possibilities.[66] In Part V, I explain in more specific terms how a test for applying the ecological limitation can be constructed. This includes discussion of more particular facets of proportionality, such as the High Court's conceptualisation of 'legitimate objectives' and a majority of its members' recent embrace of a specific form of proportionality – 'structured proportionality'.

A *Formulating the Ecological Limitation via Proportionality*

I propose framing the ecological limitation employing the concept of proportionality akin to how it is employed with regard to the political communication limitation.[67] Generally speaking, this framing requires one to first define a broad category of government action that has the *potential* to compromise the relevant structural element or elements. With regard to the political communication limitation, this broad category of government action is

[66] The discussion in this Part is informed by literature examining the operation of proportionality. Some of this literature focuses on proportionality's use within the Australian constitutional law context. See in particular: Evelyn Douek, 'All Out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia' [2019] *Federal Law Review* (forthcoming) 5; Kiefel, above n 62; Kirk, 'Constitutional Guarantees', above n 62; Stone, 'Revisited', above n 62; Mark Watts, 'Reasonably Appropriate and Adapted: Assessing Proportionality and the Spectrum of Scrutiny in *McCloy v New South Wales*' (2016) 35 *University of Queensland Law Journal* 349. Due to proportionality's extensive use and origins outside of Australia, I also draw on literature from outside of the Australian constitutional law context: Alexy, above n 62; Barak, above n 61; Cohen-Eliya and Porat, above n 67; Grant Huscroft, Bradley Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014).

[67] The High Court's framing of the political communication limitation via proportionality seems to broadly align with the framing of the voting access limitations - the other implied structural limitations framed via proportionality: *Roach* (2007) 233 CLR 162, 199 (Gummow, Kirby and Crennan JJ); *Rowe* (2010) 243 CLR 1, 59 (Gummow and Bell JJ), 88 (Hayne J), 96 (Heydon J), 144 (Kiefel J). The High Court, however, has not given the voting access limitations (and its relationship to proportionality) anywhere near as much attention as the political communication limitation. For this reason, I am focusing on the political communication limitation and its framing via proportionality in determining the appropriate framing for the ecological limitation.

'Commonwealth and State legislative and executive action burdening people's freedom of communication about government and political matters'.[68] The relevant structural element is representative democracy. Determining which particular action in this category 'crosses the line' and, thus, compromises the relevant structural element or elements (and, thus, may be deemed unconstitutional) is a qualitative assessment made on a case by case basis. This assessment is essentially made based on consideration of the social benefits provided by the action in question, the means in which they are provided and the extent to which it damages the structural element in question (as well as consideration of the overarching constitutional context in which the political communication limitation exists).[69]

The government action doing the relevant harm may be salvaged if the social benefits it provides are sufficiently compelling and its means of providing them are sufficiently justified. Thus, a law prohibiting animal rights protesters from entering duck hunting sites where guns are being fired in *Levy v Victoria*, for example, was held not to breach the political communication limitation.[70] This is because the law provided a 'legitimate' countervailing social benefit (preserving public safety) and did so in an appropriate manner.[71] This ultimately outweighed the burden it placed on people's freedom of communication about government and political matters.

The formulation of the ecological limitation along these lines would look as follows. The broad category of government action with the potential to compromise the relevant structural elements is 'government action burdening Australia's habitability'.[72] The relevant structural elements are any in which a causal link may be drawn to their compromising, as discussed in Part III. Determining which particular action in this category 'crosses the line' and, thus, compromises the relevant structural element or elements (and, thus, may be deemed unconstitutional) should also be a qualitative assessment made on a case by case basis. This

[68] For discussion on why 'Commonwealth and State legislative and executive action' is the subject of the political communication limitation see: Part V(C).
[69] These social benefits are any objective that is 'legitimate'. As discussed in Part V(A), the High Court defines this class of objectives broadly.
[70] *Levy v Victoria* (1997) 189 CLR 579 ('*Levy*').
[71] For discussion on 'legitimate' objectives see: Part V(A).
[72] The levels and branches of government action that make up this category will be refined for the formulation of the ecological limitation test. See discussion in: Part V(C).

assessment should also be made based on consideration of the social benefits provided by the action in question, the means in which they are provided and the extent to which it damages the structural element or elements in question (again, taking into account the broader constitutional context).

Specific instances of government action burdening Australia's habitability may be salvaged if the social benefits this action provides are sufficiently compelling and its means of providing them are sufficiently justified. Consider, for example, government action approving a deforestation project. Under this proportionality framing, judges would need to weigh this government approval's detrimental impact on maintaining one or more structural elements (via this deforestation's expected contribution to burdening Australia's habitability that may be causally linked to such an impact) against this government approval's social benefits (such as the resources produced and jobs created).

Proportionality's use in formulating implied structural limitations effectively means that the extent of damage done to the relevant structural element or elements that equates to a breach of the relevant limitation could differ significantly depending on the case. For the purposes of the political communication limitation, for example, a government action's burden on people's freedom of communication about government and political matters may be small in impact but still breach the limitation if this action has no legitimate objective or this objective does not justify this (minor) burden. Alternatively, a government action burdening people's freedom of communication about government and political matters may be huge in impact but still not trigger the political communication limitation if the legitimate objective is significant enough to justify such a burden. The ecological limitation would operate similarly. A government action may burden Australia's habitability in some relatively minor way but still breach the limitation if this action has no legitimate objective or this objective does not justify this (minor) burden. Alternatively, a government action burdening Australia's habitability may be huge in impact but still not trigger the ecological limitation if the legitimate objective is significant enough to justify this damage.

Again, consider government action approving a deforestation project. If the High Court considers the detrimental impact of this project on maintaining one or more structural elements to be minor (essentially because its detrimental impact on Australia's habitability is minor), it might still be deemed in breach of the ecological limitation. This would be the case if the legitimate objective was trivial (the project, for example, only created a small number of part-time jobs) or there was no legitimate objective (the project, for example, was only approved due to a corrupt deal between a politician and the relevant logging company).[73] Alternatively, the Court might view the detrimental impact of this deforestation project as significant (the project, for example, destroys a particularly valuable carbon sink) but also view the objective for the project as significant enough in itself to justify this impact (the land clearing, for example, is vital to make room for much-needed agriculture). This would lead to the conclusion that the ecological limitation has not been breached.

This outlines the basic operation of the ecological limitation constructed in terms of proportionality. In Part V, I will tease out some of the details of its operation and, in Chapter 6, explore its operation further in the context of the Carmichael mine test case.[74] In the remainder of this Part, however, I explain why I propose this construction of the ecological limitation in the first place.

B *The Reasoning behind Formulating the Ecological Limitation via Proportionality*

Alternative ways of formulating implied structural limitations exist beyond proportionality. While the construction of each limitation is unique, some general trends can be observed. An implied structural limitation, for example, could be framed as absolute. This means it defines a category of government action that is always unconstitutional with no exceptions.[75] Another way of constructing an

[73] The High Court has a generous view of the objectives that may be deemed 'legitimate' with regard to established limitations such as the political communication and interstate trade limitations. It is possible, therefore, that even this objective could be deemed 'legitimate' in the context of the ecological limitation. See discussion in: Part V(A).
[74] See discussion in: Chapter 6(V).
[75] The possibility of the High Court deriving such a limitation is small. The incremental nature of how Australian constitutional law develops alone means that one can never be certain that exceptions

implied structural limitation is to define a category of government action that is generally deemed unconstitutional with certain exceptions recognised. The *Boilermakers* limitation, for instance, defines a category of government action that should generally be considered unconstitutional – 'government action conferring judicial and non-judicial power in the one Commonwealth body'. The High Court has incrementally established several exceptions to this drawn from various parts of the Constitution, such as both Houses of Parliament's ability to deal with contempt of parliament matters drawn from section 49 of the Constitution.[76] An implied structural limitation could also be crafted similarly to the *Melbourne Corporation* limitation. This limitation shares some common ground with the political communication limitation in its basic formulation. It requires a qualitative assessment made on a case by case basis on which particular action that can be considered part of a broad category (Commonwealth laws curtailing States' autonomy) 'crosses the line' and compromises the relevant structural element (federalism). This assessment, however, is not made using proportionality as a framework and is not based on consideration of the general social benefits provided by the action in question as it is with regard to the political communication limitation. It is more narrowly based on consideration of what is the proper relationship between the Commonwealth and States as gleaned from the Constitution.[77]

With such alternatives available, why formulate the ecological limitation via proportionality? A conclusive answer cannot be provided to this question. As discussed in Chapter 3 with reference to Adrienne Stone's work, the High Court's precise formulation of mechanisms for maintaining structural elements generally invites a large degree of judicial choice.[78] Stone makes this point with regard to the political communication limitation. In the early days of the political communication

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to such a category may not be established (or a reformulation of the category may not be needed) in subsequent cases. For discussion on different ways of defining absolute limitations (in the context of constitutional rights protection) see: Barak, above n 61, 27-32.

[76] *R v Richards; Ex parte Fitzpatrick & Browne* (1954) 92 CLR 386.

[77] *Re State Public Services Federation; Ex parte Attorney-General (WA)* (1993) 178 CLR 249, 271-272; *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 225-226; James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 501-503.

[78] 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668; 'Revisited', above n 62. See discussion in: Chapter 3(VI)(C).

limitation's formulation, essentially two models were considered – proportionality or a series of standards tailored to address different categories of political communication.[79] As Stone explains, the Constitution's words provide little practical guidance for determining which of these models to adopt.[80] Making this choice is largely a value judgment depending on whether one prefers the flexibility of proportionality or the more rule-based specificity of the latter approach.[81] As Brennan J concludes with regard to this limitation, '[t]o hold that the Constitution contains such an implication is not to state any very precise criterion for determining the validity of impugned legislation.'[82] The same is true for the ecological limitation. One cannot be certain of the model for constructing this limitation that the Court might adopt.

While a conclusive answer cannot be provided for why the concept of proportionality should be drawn upon when framing the ecological limitation, I posit that it is the soundest option for its framing. The main reason for this is that the ecological limitation is a 'constitutional guarantee limitation' (a limitation protecting a constitutionally-entrenched or 'guaranteed' right or freedom of the Australian people) and the High Court generally views proportionality as the appropriate framework for such limitations. Further, the properties of proportionality are well-suited for dealing with the particular dynamics of the type of government action in question with regard to the ecological limitation – namely, government action burdening Australia's habitability. Before examining the link between constitutional guarantee limitations and proportionality, I must first explain how the ecological limitation can be understood as a constitutional guarantee limitation.

1 *The Ecological Limitation as Constitutional Guarantee Limitation*

The ecological limitation is a limitation protecting a constitutionally-entrenched guarantee. This guarantee is that the Australian people have preserved some

[79] Stone, 'Revisited', above n 62, 844.
[80] Ibid 845.
[81] Ibid 844-845.
[82] *ACTV* (1992) 177 CLR 106, 149.

standard of habitability. This is akin to the political communication, voting access and interstate trade limitations – all constitutional guarantee limitations formulated utilising the concept of proportionality. They protect a constitutionally-entrenched guarantee that the Australian people have preserved some standard of ability to communicate freely on government and political matters, vote and engage in interstate trade, respectively. Of these constitutional guarantee limitations (and all limitations), the ecological limitation is most similar to the political communication and voting access limitations. This is because they operate as both constitutional guarantee limitations and implied structural limitations. That is, they protect people's rights or freedoms *in order to* protect the Constitution's systemic structure. The political communication limitation, for example, has not been established to preserve a freedom of communication about government and political matters because of its intrinsic value for human flourishing or other such reasons that might underpin a similar freedom in other nations' constitutions.[83] It has been established, and only operates to the extent needed, to preserve the structural integrity of the Australian constitutional system. This system – its Parliament, referendum process and so forth – cannot properly function without the Australian people maintaining some standard of freedom of communication on such matters. Any protection that this limitation provides to individuals for their own personal benefit is a 'happy coincidence'.[84]

The ecological limitation operates similarly. Its establishment is not proposed because of the intrinsic value of maintaining Australia's habitability for human flourishing or other such reasons.[85] Its establishment is proposed to preserve the structural integrity of the Australian constitutional system. Any protection this limitation provides to individuals for their own personal benefit is also a 'happy coincidence'. The ecological limitation, therefore, is more similar to the political communication and voting access limitations than other implied structural limitations, such as the *Melbourne Corporation* and *Boilermakers* limitations. While they all operate to preserve the Constitution's systemic structure, the

[83] Recall discussion in Part II that few constitutional guarantees in Australia's constitution operate on such a premise.
[84] William and Hume, above n 3, 114.
[85] See discussion in: Part II.

ecological, the political communication and voting access limitations do so by preserving the rights or freedoms 'guaranteed' to the Australian people.

2 *Proportionality and Constitutional Guarantee Limitations*

As stated above, the reason that the ecological limitation's operation as a constitutional guarantee limitation is significant is because the High Court generally views proportionality as the appropriate framework for such limitations. This is evident in the Court's use of proportionality in the formulation of several constitutional guarantee limitations as already discussed – the political communication, voting access and interstate trade limitations. Jeremy Kirk notes that several judges have employed proportionality analysis in their application of other constitutional guarantee limitations in Australian constitutional law, though not always referring to it as such.[86] The tenets of proportionality, for example, were 'mentioned or implicit' in judges' application of section 116 protecting people's free exercise of religion in *Adelaide Company v Jehovah's Witnesses Inc v Commonwealth*.[87] The appropriateness of (if not requirement for) proportionality as part of constitutional guarantee limitations is also evident in statements made by several judges. In *Falzon v Minister for Immigration and Border Protection*, for example, Kiefel CJ, Bell, Keane and Edelman JJ straightforwardly assert that '[p]roportionality analysis is applied to constitutionally guaranteed freedoms.'[88] In Australian constitutional law, therefore, a link is drawn between proportionality and constitutional guarantee limitations.

The reason judges have drawn this link is rooted in proportionality's fundamental connection to constitutional guarantees (and rights and freedoms protection matters more generally) since its origins. Prussian courts initially developed and implemented proportionality to determine whether police powers were being used excessively against individuals in the absence of other sufficient means of rights and freedoms protection.[89] As Moshe Cohen-Eliya and Iddo Porat state,

[86] Kirk, 'Constitutional Guarantees', above n 62, 11-12.
[87] Ibid 11; (1943) 67 CLR 116. See discussion in: Chapter 5(II)(B); Williams and Hume, above n 3, 269.
[88] (2018) 262 CLR 333, 344. For other examples see: *Cunliffe* (1994) 182 CLR 272, 300 (Mason CJ), 356 (Dawson J). Also see: Kiefel, above n 62, 89.
[89] Cohen-Eliya and Porat, above n 67, 26, 32.

'proportionality was a vehicle by which the idea of rights was introduced into German law.'[90] Proportionality eventually became entrenched as a foundational principle in German constitutional law and spread to numerous jurisdictions across the globe for assessing the validity of government encroachments on constitutional guarantees and people's rights and freedoms in non-constitutional areas of law.[91] The correlation between the two internationally is so strong that Grant Huscroft, Bradley Miller and Grégoire Webber assert that '[t]o speak of human rights is to speak of proportionality.'[92] While proportionality is today deployed in Australia (and elsewhere) beyond the context of rights and freedoms, this is the original context for its development and remains the prominent area for its use across the globe.[93]

It is understandable why proportionality is well-suited for assessing the validity of government encroachments on people's rights and freedoms. Rights and freedoms often conflict with other objectives that governments might wish to pursue.[94] They also often conflict with each other.[95] A myriad of variables are at play when determining whether government action encroaching on a right or freedom in pursuit of some objective (including the protection of other rights or freedoms) is justifiable in any given case. Consider, for example, the freedom of communication about government and political matters. Government action might encroach on this freedom in a range of areas. It might restrain in large and small ways what journalists publish, what political candidates say in campaign advertisements, how and where activists protest and so forth.[96] This action might be taken in pursuit of a diverse range of potentially justifiable objectives – privacy, public safety and anti-corruption to name only a few instances – each with their own varying degrees of

[90] Ibid 32.
[91] Barak, above n 61, 181-210; Huscroft, Miller and Webber, 'Introduction', above n 61, 1.
[92] 'Introduction', above n 61, 1.
[93] For discussion on proportionality's use beyond rights and freedom matters see: Roshan Chaile, 'The Proportionality Principle and the Kable Doctrine: A New Test of Constitutional Invalidity' (2012) 1 *Global Journal of Comparative Law* 163, 187; Paul Craig, 'Proportionality, Rationality and Review' [2010] *New Zealand Law Review* 265; Janina Boughey, 'The Reasonableness of Proportionality in the Australian Administrative Law Context' (2015) 43 *Federal Law Review* 59; Greg Weeks and Matthew Groves, 'Editorial: The Enduring Mystery of Minister for Immigration and Citizenship v Li' (2017) 24 *Australian Journal of Administrative Law* 145.
[94] Kirk, 'Constitutional Guarantees', above n 62, 9; Cohen-Eliya and Porat, above n 67, 2.
[95] Kirk, 'Constitutional Guarantees', above n 62, 9; Cohen-Eliya and Porat, above n 67, 2.
[96] For example see: *Nationwide News* (1992) 177 CLR 1 (journalism); *ACTV* (1992) 177 CLR 106 (political campaigns); *Levy* (1997) 189 CLR 579 (protests).

significance and varying degrees of burden on this freedom.[97] A limitation protecting constitutional guarantees, therefore, must be formulated in a manner that allows a judge to take into account all of these complex variables when determining the constitutionality of the government action in question. Proportionality is a conceptual tool tailored for such a task. It provides a flexible framework for weighing all of these complex variables, determining if the encroachment on the right or freedom in question is excessive or disproportionate on a case by case basis. As Justice Susan Kiefel concludes, writing extra-judicially, if a limitation protecting constitutional guarantees is to be viewed as conditional rather than absolute, '[p]roportionality is the obvious candidate' to form part of the limitation.[98]

Thus, the High Court generally views proportionality as a vital feature of constitutional guarantee limitations. This, in itself, suggests that the ecological limitation, being such a limitation, should include proportionality. The fact that the ecological limitation is most similar to the political communication and voting access limitations in form (operating as both constitutional guarantee and implied structural limitations) strengthens this position in the interests of doctrinal consistency. This argument is further strengthened when closer examination is taken of the particular dimensions of both the ecological limitation and the concept of proportionality to assess their compatibility.

3 *Proportionality and the Ecological Limitation*

The ecological limitation is unlikely to be conceptualised as absolute. This is not to undermine the significance of Australia's habitability to the Australian constitutional system's maintenance. If Australia's habitability could be destroyed in an instance with the press of a button, there would be no constitutional (nor ethical) justification for an Australian government pressing that button. In reality, however, the threat that government action poses to Australia's habitability is more complex. Such action generally undermines Australia's habitability in a partial manner and does so to fulfil some valuable objective in the Australian public's interest. Coal-fired power stations, for example, increase greenhouse gas emissions

[97] For example see: *Monis v The Queen* (2013) 249 CLR 92 (privacy); *Levy* (1997) 189 CLR 579 (public safety); *Unions NSW v New South Wales* (2013) 252 CLR 530 (anti-corruption).
[98] Kiefel, above n 62, 89.

(that are far from single-handedly bringing about runaway climate change) in order to provide energy to the Australian community and provide jobs and other economic benefits for various members of it. Deforestation, for another example, diminishes carbon sinks, and increases greenhouse gases in the process, but does so to achieve certain objectives such as accruing resources for various areas of human activity or clearing land for agricultural use. It would be prudent, therefore, for the High Court to at least be open to the possibility that the Australian government in question might have a justifiable reason for taking such action that deserves consideration.[99] This requires the ecological limitation to be formulated in a conditional, rather than absolute, manner.[100]

Proportionality is well-suited for the task of formulating this conditional limitation for similar reasons as to why it is viewed as the 'obvious candidate', as Kiefel states, for constitutional guarantee limitations in general.[101] That is, a myriad of variables are at play when determining whether government action burdening Australia's habitability in pursuit of some objective is justifiable in any given case. The extent to which the action in question burdens Australia's habitability can vary significantly from matter to matter. The objectives being pursued by this action can also vary significantly, both in terms of their subject-matter – energy production, job creation and so forth – and the extent to which they necessitate some level of burdening of Australia's habitability. Proportionality offers a doctrinally

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[99] This view also provides some measure of deference to the legislative and executive branches. Such deference might be desirable in the face of possible concerns that the establishment of the ecological limitation necessitates the judiciary getting involved in 'political' areas regarding nature's use. See discussion in: Chapter 5(II).

[100] This aligns with the formulation of constitutional guarantee limitations in Australia and elsewhere. They are rarely formulated as absolute because, as discussed above, objectives are likely to exist that justify their encroachment (including the protection of other guarantees): Kirk, 'Constitutional Guarantees', above n 62, 51; Barak, above n 61, 27. An example of an absolute constitutional guarantee limitation is article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* prohibiting 'torture' and 'inhuman or burdening treatment or punishment': Barak 28. This limitation is absolute in the sense that '[t]he public interest, or the rights of other individuals, cannot diminish the extent of its protection': Barak 28. Even the notion that protection against torture is, or should be, absolute, however, is questionable:

> Do terrorists have an absolute constitutional right not to be tortured when their investigation may lead to many lives being saved? Do innocent hostages, kidnapped by terrorists, have an absolute constitutional right not to pay with their lives to save a larger number of people? These and many other questions await their answer, in both the legal and ethical spheres: Barak 30.

[101] Above n 62, 89.

established flexible framework for weighing all of these complex variables on a case by case basis.

Further, alternative conceptual devices are not as well-adapted as is proportionality for the ecological limitation. The *Boilermakers* limitation, for example, defines a narrow category of government action that is almost always deemed unconstitutional (government action conferring judicial and non-judicial power in the one Commonwealth body) bar a few disparate exceptions recognised by the Court.[102] While the certainty and simplicity of such a formulation may be desirable, it is not practicable for the ecological limitation. Only a broad category of government action that has the *potential* to be deemed unconstitutional (government action burdening Australia's habitability) can be identified. Further, a neat list of exceptions to this category of government action cannot be constructed (as it is with regard to the *Boilermakers* limitation) because too many variables exist when determining objectives which might justify such action. Proportionality is such a conceptual device tailored to this task.

The *Melbourne Corporation* limitation, for another example, similarly identifies a broad category of government action with the potential to be deemed unconstitutional (Commonwealth laws curtailing States' autonomy).[103] In this way, it is similar to the ecological limitation. The High Court, however, is unwilling to take into account a broad range of objectives in the public interest when determining which action in this category is unconstitutional. Instead, the *Melbourne Corporation* limitation requires judges to salvage such government action if it aligns with (what is considered to be) the proper relationship between the Commonwealth and States under the Constitution.[104] This does not suit the purposes of the ecological limitation. As stated above, if the Court was willing to establish the ecological limitation, it would likely allow a broad range of objectives in the public interest to be taken into account when considering the permissibility of the relevant government action burdening Australia's habitability. The framing of the *Melbourne Corporation* limitation, therefore is ill-suited for these purposes.

[102] See above n 78 and accompanying text.
[103] See above n 79 and accompanying text.
[104] Ibid.

Thus, proportionality appears to be the most suitable candidate of the different means of framing the nature of the limitation. In form, the ecological limitation is most akin to the political communication and voting access limitations in that they are hybrids of constitutional guarantee limitations and implied structural limitations. This suggests that the ecological limitation be similarly framed to these limitations via proportionality. This is compounded by the Court's general stance linking the use of proportionality with such constitutional guarantee limitations. In substance, proportionality is well-suited for the ecological limitation more so than the conceptual devices employed with regard to other constitutional limitations. This is due to the multiple variables that need to be taken into account when considering the burdens and benefits of the government action in question. These factors taken together indicate that the ecological limitation should employ the concept of proportionality in its construction. In the final segment of this chapter, therefore, I formulate the test for applying the ecological limitation drawing on the tenets of proportionality.

V THE FORMULATION OF THE ECOLOGICAL LIMITATION TEST

The 'ecological limitation test' is the test I propose for the purposes of applying this limitation. If it is accepted that the ecological limitation should include the use of proportionality analysis akin to its use with regard to the political communication limitation, then the political communication limitation test provides a useful blueprint for the ecological limitation test. The High Court's formulation of the political communication limitation test largely stems from *Lange v Australian Broadcasting Corporation* ('*Lange*') and *Coleman v Power* ('*Coleman*').[105] The broad category of government action with the potential for breaching the political communication limitation is *Commonwealth or State legislative or executive action*

[105] *Lange* (1997) 189 CLR 520, 567; *Coleman* (2004) 220 CLR 1.

that burdens people's freedom of communication about government and political matters. If this action is *reasonably appropriate and adapted* to serve a *legitimate objective*, then the action does not breach the political communication limitation. It will, therefore, be deemed constitutional.[106] If this action is *not reasonably appropriate and adapted* to serve a *legitimate objective*, then the action breaches the political communication limitation. It will, therefore, be deemed unconstitutional. In order to determine how the ecological limitation test may be formulated, I will go through the relevant features of the political communication limitation test for comparison. In doing so, I will also discuss how the High Court has built upon this basic formulation of the political communication limitation test since *Lange* and *Coleman*.

A *Legitimate Objective*

The High Court defines a 'legitimate objective' broadly. In the context of section 92, for example, an objective is 'legitimate' if it is not one to protect intrastate trade.[107] In the context of the political communication limitation, for another example, an objective is 'legitimate' if it is not one that undermines the structural element of representative democracy (in the context of this limitation, this is known as testing for 'compatibility').[108] Thus, as long as the government action in question does not exist solely to harm the subject protected by the limitation, it will be assumed that the government's objective is sound. This means that a wide range of benefits provided by the government action in question may be drawn upon to 'save' this action from being held to breach the limitation in question. This broad definition of a 'legitimate' objective seems to be, at least in part, out of deference

[106] The High Court notes in *Lange* (1997) 189 CLR 520 that 'there is little difference between the test of "reasonably appropriate and adapted" and the test of proportionality': 567. The High Court uses the phrases 'legitimate objective', 'legitimate object', 'legitimate end' and 'legitimate purpose' interchangeably. For the sake of consistency, I will use the phrase 'legitimate objective'.

[107] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 446; *Sportodds Systems Pty Ltd v New South Wales* (2003) 133 FCR 63, 76. In *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 ('*Castlemaine*'), for example, the *Beverage Container Act 1975* (SA) placed a commercial disadvantage on the sale of non-refillable beer bottles. The High Court accepted that the objective of this law was not to boost the intrastate trade of South Australian brewers (which did not use such bottles unlike some out-of-state competitors) but to protect the environment. It was, therefore, deemed 'legitimate'.

[108] *McCloy v New South Wales* (2015) 257 CLR 178, 194 ('*McCloy*'); *Brown v Tasmania* (2017) 261 CLR 328, 363-364 ('*Brown*').

to the political branches – if Parliament or the Executive think the objective is legitimate, it is not for a court to second-guess it.[109] This pattern in defining 'legitimate objective' suggests that in the context of the ecological limitation, an objective would be deemed 'legitimate' if it is not one that sets out to burden Australia's habitability for its own sake.

B *Reasonably Appropriate and Adapted*

In *McCloy v New South Wales* ('*McCloy*'), French CJ and Kiefel, Bell and Keane JJ elaborated on how one determines whether the government action in question is 'reasonably appropriate and adapted' to serve the relevant legitimate objective in the context of the political communication limitation. [110] They adopted a three stage test. First, one must consider *suitability*: does the law have a 'rational connection to the purpose of the provision'?[111] Second, one must consider *necessity*: is there an 'obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom'?[112] Third, one must consider *adequacy in its balance*: is there a 'balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom'?[113] If the answer to any of these questions is 'no' then the law is disproportionate or not reasonably appropriate and adapted and is, thus, in breach of the political communication limitation. This three stage test is known as

[109] Kristen Walker, 'Justice Hayne and the Implied Freedom of Political Communication' (2015) 26 *Public Law Review* 292, 296; Murray, Samuel, 'The Public Interest, Representative Government and the Legitimate Ends of Restricting Political Speech' (2017) 43 *Monash University Law Review* 1, 20; *Castlemaine* (1990) 169 CLR 436, 473. For further discussion of the role of deference in Australian constitutional law see: Chapter 5(II)(A).
[110] *McCloy* (2015) 257 CLR 178.
[111] Ibid 195.
[112] Ibid 195.
[113] Ibid 195.

'structured proportionality'.[114] French CJ and Kiefel, Bell and Keane JJ adopted this approach, inspired by how proportionality is traditionally formulated in Europe and the work of Aharon Barak.[115]

The joint judgment's structured proportionality approach has retained majority support since *McCloy*. Their colleagues in *McCloy* – Gageler, Nettle and Gordon JJ – did not adopt it.[116] Nettle J, however, changed his stance and adopted and applied structured proportionality in *Brown v Tasmania* ('*Brown*').[117] The Honourable Robert French had left the High Court at this point, so altogether this approach once again had the support of four judges – Kiefel CJ, Bell, Keane and Nettle JJ. In the recent cases of *Clubb v Edwards; Preston v Avery* ('*Clubb*') and *Comcare v Banerji*, Edelman JJ joined these judges in employing structured proportionality, giving this approach a stronger majority of five judges in support for its application with regard to the political communication limitation.[118] Thus, while structured proportionality is a relatively recent introduction into Australian constitutional law, it is one that has garnered the support of a majority of the present members of the High Court.

The general consensus, however, is that structured proportionality is merely a 'tool' for determining whether the government action in question is 'reasonably appropriate and adapted'.[119] This means that judges may opt to use structured proportionality when determining the 'reasonably appropriate and adapted' segment of the political communication limitation test. Alternatively, they may opt to determine this segment of the test in a different manner. In *Clubb*, Gordon J (one of the two judges who opted not to employ structured proportionality along with Gageler J) recognised the validity of structured proportionality as such a tool of

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[114] Watts, above n 68, 349.
[115] *McCloy* (2015) 257 CLR 178, 215-220; Barak, above n 61; Ibid 351; Caroline Henckels, 'Proportionality and the Separation of Powers in Constitutional Review: Examining the Role of Judicial Deference' (2017) 45 *Federal Law Review* 181, 184.
[116] (2015) 257 CLR 178, 235, 269, 282.
[117] (2017) 261 CLR 328, 416.
[118] *Clubb v Edwards; Preston v Avery* (2019) 93 ALJR 448, 547-553 ('*Clubb*'); *Comcare v Banerji* (2019) 93 ALJR 900, 941-945; Douek, above n 68, 5.
[119] Arisha Arif and Emily Azar, 'Clubb v Edwards; Preston v Avery: Structured proportionality – has anything changed?' <auspublaw.org/2019/05/clubb-v-edwards-preston-v-avery-structured-proportionality>; *McCloy* (2015) 257 CLR 178, 195, 211, 213, 215 (French CJ, Kiefel, Bell and Keane JJ); *Brown* (2017) 261 CLR 328, 376 (Gageler J), 417 (Nettle J), 476 (Gordon J).

analysis even if she opted not to employ it herself.[120] This means that six of the seven current members of the High Court at least accept structured proportionality as a valid tool when deciding political communication limitation matters with five opting to employ it themselves. Arisha Arif and Emily Azar, however, detect in the joint judgment of Kiefel CJ, Bell and Keane JJ in *Clubb* a 'reluctance to fragment or selectively apply the structured proportionality formula as set out in *McCloy*.'[121] Thus, while structured proportionality appears to be merely a tool judges may use in political communication limitation matters, some indication exists in doctrine that some judges view it as a more entrenched requirement when applying the political communication limitation test.

In constructing the ecological limitation test, I will do so via proportionality for the reasons discussed in Part IV. It is prudent to assume that *structured* proportionality would remain a tool judges might opt to utilise when making such a proportionality assessment in the context of an ecological limitation matter. It seems likely that several judges would opt to use this tool, however, if the ecological limitation was established. This is because a majority of judges have opted to use structured proportionality in the most recent political communication limitation cases. While these judges state that structured proportionality is not necessarily the tool to be used with regard to all areas of Australian constitutional law in which proportionality arises, the similarities between the ecological and political communication limitations discussed throughout this chapter (and particularly in Part IV) suggest that its use is appropriate with regard to the ecological limitation. For this reason, I will formulate the ecological limitation in terms of proportionality and leave open the option for judges to use the particular tool of structured proportionality at their discretion. Due to the fact that a majority of judges have embraced structured proportionality, however, I will use this particular framework

[120] *Clubb* (2019) 93 ALJR 448, 483-484 (Gageler J), 529-532 (Gordon J). Douek summarises the 'three main criticisms levelled against structured proportionality in Australia: that it is too indeterminate; that it involves judges transgressing the separation of powers; and that it is inappropriate in the unique context of the freedom': above n 68, 1. For discussion of these criticisms of structured proportionality see: Douek; Asif and Azar, above n 121; Alex Deagon, 'There and Back Again? The High Court's Decision in Clubb v Edwards; Preston v Avery [2019] HCA 11' <auspublaw.org/2019/05/there-and-back-again-the-high-courts-decision-in-clubb-v-edwards-preston-v-avery>.

[121] Above n 121.

for assessing the application of the ecological limitation test in the Carmichael mine test case discussed in Chapter 6.

C *Level and Branch of Government*

The levels and branches of government to which the ecological limitation applies are as follows. In terms of levels of government, I propose that the ecological limitation apply to both Commonwealth and State government action, similar to how the political communication limitation applies to both forms of action. This is because both of these levels of government have the potential to burden Australia's habitability, as discussed in Part III. In terms of branches of government I propose that the ecological limitation apply to legislative and executive action, as noted in Part I. This is because both forms of government power have the potential to burden Australia's habitability and it mirrors the reach of the political communication limitation. These are the levels and branches of government, therefore, that might 'need' to be restrained for the preservation of the structural integrity of the Australian constitutional system with regard to the necessity test.

Questions remain on the precise manner in which the political communication limitation applies to legislative and executive action. In *Chief of Defence Force v Gaynor* ('*Gaynor*'), for example, the Full Federal Court states:

> While there are references in the authorities to the [political communication limitation] being a restriction on executive power as well as a restriction on legislative power ... they tend to be general propositions, which have not yet been squarely confronted and teased out in a case where there was no statutory source for the impugned power.[122]

These questions would also require answering with regard to the ecological limitation test. In Chapter 6, I discuss this question of the application of the political

[122] (2017) 246 FCR 298, 314-5 (citations omitted). See discussion in: Justice Pamela Tate, 'The Federal and State Courts on Constitutional Law: The 2017 Term' (Paper presented at 2018 Constitutional Law Conference, Art Gallery of New South Wales, 23 February 2018) 3-9.

communication limitation to executive action, compared to legislative action, in further detail.[123]

Questions also remain on why the political communication limitation generally does not apply to judicial action. Stone argues that the High Court's position that the political communication limitation does not restrain judicial action (at least, judicial action regulating the common law relations between individuals such as the common law action of defamation) is flawed.[124] The High Court's reasoning seems to be based on three propositions: such judicial action correlates with 'personal rights' (and the political communication limitation is not such a right), is not conferred by the Constitution (unlike the Commonwealth's and States' legislative and executive powers) and is private in nature (unlike the Constitution which focuses on governmental power).[125] Space restrictions do not permit me to outline Stone's various arguments against these propositions. Many of her arguments, however, could be made with regard to the ecological limitation. For the sake of prudence, I will assume that the High Court would not be willing to extend the ecological limitation to judicial action as it continues not to similarly extend the political communication limitation. Thus, I will frame the ecological limitation as only extending to legislative and executive action as is done with the political communication limitation.[126]

D *The Ecological Limitation Test*

Taking into account the matters discussed in the above sections, a test can be formulated for applying the ecological limitation. I propose the following formulation of the ecological limitation test:

[123] See discussion in: Chapter 6(II).
[124] 'Rights', above n 3, 406-414.
[125] Ibid 406-414.
[126] The political communication limitation does, however, indirectly inform judicial action and the development of the common law. As the High Court explains in *Lange* (1997) 189 CLR 520, the common law must develop in harmony with constitutional values: 564, 571; Ibid 405-406. The establishment of the political communication limitation informs those values and, thereby, informs the common law's development. The ecological limitation may similarly influence judicial action and the development of the common law.

1. *Does the impugned Commonwealth or State legislative or executive action burden Australia's habitability in a manner that may be causally linked to the compromising of one or more structural elements?*

   If 'no', then the ecological limitation is not breached. If 'yes', then proceed to the next question.

2. *Is the action being taken to achieve a legitimate objective, this being an objective other than solely for the burdening of Australia's habitability?*

   If 'no', then the ecological limitation is breached. If 'yes', then proceed to the next question.

3. *Is the action reasonably appropriate and adapted for a legitimate objective?*

If 'no', then the ecological limitation is breached. If 'yes', then the ecological limitation has not been breached.

The 'tool' of structured proportionality employed in the context of the ecological limitation, if judges opted to use it, would require this third question to be answered via the following three stage test:

a. *Suitable – is there a rational connection between the action and its objective?*
b. *Necessary – is there no obvious and compelling alternative, reasonably practicable means of achieving the same objective which is less burdensome on Australia's habitability?*
c. *Adequate in its balance – is there an adequate balance between the importance of the objective served by the action and the extent of the burden on Australia's habitability?*

If the answer to all three questions is 'yes', then the ecological limitation is not breached. If the answer to any of these three questions is 'no', then the ecological limitation has been breached.

One cannot be certain that the High Court would formulate the ecological limitation test this way if it were to establish the limitation. Further, the Court is prone to continue to reformulate the tests for implied structural limitations well after their establishment. As discussed above with reference to structured proportionality introduced in *McCloy*, for example, the precise formulation of the political communication limitation continues to be questioned and changed decades after this limitation gained unanimous acceptance in *Lange*.[127] This test for the ecological limitation, however, is the product of what appears to be the most likely formulation based on contemporary Australian constitutional jurisprudence.

VI CONCLUSION

This chapter began with a hypothetical dispute framed at a level of generality – a litigant objects to government action burdening Australia's habitability. The argument for deriving the proposed ecological limitation to restrain such action is essentially that such action poses a threat to the structural integrity of the Australian constitutional system. The ecological limitation, therefore, is proposed as a form of structural implication. Such implications may only be derived if they satisfy the necessity test. This means that the proposed ecological limitation is only eligible for establishment if the government action in question may be causally linked to the compromising of one or more structural elements. Government action burdening Australia's habitability satisfies this causal link (at least, theoretically) because the

[127] The *Melbourne Corporation* limitation test, for another example, was recently reformulated in *Austin* (2003) 215 CLR 185 by Gaudron, Gummow and Hayne JJ: 258. This was subsequently endorsed by the entirety of the High Court in *Clarke v Commissioner of Taxation* (2009) 240 CLR 272: 289-290, 306-307, 312. For discussion on this reformulation see: Stellios, above n 79, 497-501; Amelia Simpson, 'State Immunity from Commonwealth Laws: Austin v Commonwealth and Dilemmas of Doctrinal Design' (2004) 32 *University of Western Australia Law Review* 44.

life-supporting capacities of the physical site of Australia are a fundamental prerequisite for the maintenance of the Australian constitutional system.

In order to refine the ecological limitation to a form in which it can be applied, I propose that the ecological limitation be formulated with reference to proportionality. This is because the ecological limitation is a constitutional guarantee limitation (particularly similar to the political communication and voting access limitations) and the High Court considers proportionality appropriate for framing such limitations. Further, proportionality is well-suited for the formulation of the ecological limitation and the particular kind of government action it is geared towards restraining – government action burdening Australia's habitability. I, therefore, formulate the ecological limitation test, employing the concept of proportionality, drawing inspiration from the construction of the political communication limitation test along similar lines.

The formulation of the ecological limitation test provides a clear sense of what the ecological limitation I am proposing looks like in its final form. It also provides something tangible to critique. In the next chapter, I consider the arguments that might be raised against the ecological limitation as formulated here.

CHAPTER 5: CRITIQUING THE ECOLOGICAL LIMITATION

I INTRODUCTION

In the previous chapter, I articulated the overarching argument for the derivation of the ecological limitation and formulated a test for its application. In this chapter, I examine two counter-arguments. The first, presented in Part II, is based on the grounds that ecological limitation matters would invite judges to engage in a substantial amount of political decision-making. Such decision-making may be deemed beyond the judiciary's skills, resources and democratic mandate and so should be avoided. The second, presented in Part III, is an intentionalist argument that the ecological limitation should not be established because it conflicts with the framers' intentions.

These arguments against establishing the ecological limitation have been gleaned from consideration of the arguments that proposed implications, and implied structural limitations specifically, attract.[1] With regard to the first argument, I am assisted by consideration of scholarship on the concept of justiciability.[2] The term 'justiciability' has various meanings but here broadly signifies when 'an issue is … appropriate or fit for judicial determination'.[3] This appropriateness or fitness is generally determined based on ensuring the judiciary is not resolving issues

[1] Literature regarding the derivation of implications in Australian constitutional law discussed in Chapter 1 has been drawn upon for these purposes with attention paid to the ways in which the ecological limitation differs from the implications in question. See discussion in: Chapter 1(II)(A).
[2] Chris Finn, 'The Justiciability of Administrative Decisions: A Redundant Concept' (2002) 30 *Federal Law Review* 239; Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353; Andrew Hanna, 'Nationhood Power and Judicial Review: A Bridge Too Far' (2015) 39 *University of Western Australia Law Review* 327; Jeff King, 'Institutional Approaches to Judicial Restraint' (2008) 28 *Oxford Journal of Legal Studies* 409; Jeff King, *Judging Social Rights* (Cambridge University Press, 2012); Geoffrey Lindell, 'The Justiciability of Political Questions: Recent Developments' in HP Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Law Book Company, 1992); Sir Anthony Mason, 'The High Court as Gatekeeper' (2000) 24 *Melbourne University Law Review* 784.
[3] Mason, 'Gatekeeper', above n 2, 788.

'properly assignable to the political process'.[4] The second argument is informed by the scholarship on intentionalism in Australian constitutional law that was introduced in Chapter 2.[5]

II THE 'BRANCHES OF POWER' ARGUMENT

An argument against the establishment of the ecological limitation could be made on the grounds that ecological limitation matters invite judges to engage in an unacceptable amount of political decision-making. By 'political decision-making', I refer to the making of decisions on complex issues that require policy considerations and value judgments as part of the broader adjudication of a legal question.[6] The third question of the ecological limitation test, in particular, invites a substantial amount of such decision-making.[7] This question requires judges to determine if the relevant government action burdening Australia's habitability is reasonably appropriate and adapted to serve its legitimate objective. Consider, for example, government approval of a deforestation project. Judges would need to assess this project's economic impacts for the relevant businesses and broader community, ecological impacts brought about by destruction of a carbon sink and weigh them against each other to determine that the action is proportionate. This requires judges to engage in policy considerations and value judgments regarding economic policy, environmental ethics and more.

One reason judges engaging in such political decision-making may be cause for concern is that they purportedly do not possess the skills or resources for such decision-making.[8] The legislative and executive branches ('political branches'), in

[4] Hanna, above n 2, 332.
[5] See discussion in: Chapter 2(III).
[6] Describing decision-making as 'political' could have a range of other meanings. For discussion see: Finn, above n 2, 242-251; Jeremy Kirk, 'Rights, Review and Reasons for Restraint' (2000) 23 *Sydney Law Review* 19, 28-30.
[7] See discussion in: Chapter 4(V)(D).
[8] Caroline Henckels, 'Proportionality and the Separation of Powers in Constitutional Review: Examining the Role of Judicial Deference' (2017) 45 *Federal Law Review* 181, 194-195; Kirk, 'Rights', above n 6, 24-28; Rosalind Dixon, 'The Functional Constitution: Re-Reading the 2014 High Court Constitutional Term' (2015) 43 *Federal Law Review* 455, 470.

contrast, are ostensibly designed for such decision-making. The politicians and public servants that populate these branches have the skills and resources to make decisions on complex issues that require such value-based assessments through their access to government data, experts on staff, contact with the community and so forth. Establishing the ecological limitation would invite judges to engage in political decision-making for which they are not equipped and, therefore, should be avoided.

Another reason judges engaging in political decision-making may be cause for concern is that it may be deemed anti-democratic.[9] Judges are not democratically-elected nor accountable to the people in any direct sense.[10] The judiciary claiming that the Constitution enables it to quash legislative and executive action burdening Australia's habitability effectively takes those matters out of the Australian people's, and their elected representatives', hands. Several judges and scholars have raised this issue in response to the proposal of other constitutional implications.[11] As Michael Coper phrases this argument with regard to the political communication limitation, '[i]s it not … fundamentally undemocratic for [the Court] to overturn the wishes of a democratically elected body whose very purpose in life is to make the country's laws?' With regard to the ecological limitation, the claim that results is that the political decision-making involved in prospective ecological limitation matters is best left to the political branches which have the requisite democratic mandate.

One may argue, therefore, that the ecological limitation represents a threat to the structural integrity of the Australian constitutional system in itself by impairing the proper roles of the judiciary and political branches. This presents a conundrum.

[9] Kirk, 'Rights', above n 6, 30-40.
[10] High Court judges are appointed by the Governor-General in Council and retain their position until the retiring age of 70: Constitution, s 72(i), (iii). They can only be removed in exceptional circumstances due to incapacity or proved misbehaviour: s 72(ii).
[11] For examples of judges see: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 186 (Dawson J) ('*ACTV*'); *McGinty v Western Australia* (1996) 186 CLR 140, 250 (McHugh J); *Kruger v Commonwealth* (1997) 190 CLR 1, 156 (Gummow J). For examples of scholars see: Michael Coper, 'The High Court and Free Speech: Visions of Democracy or Delusions of Grandeur' (1994) 16 *Sydney Law Review* 185, 190-191; James Allan, 'Implied Rights and Federalism: Inventing Intentions While Ignoring Them' (2009) 34 *University of Western Australia Law Review* 228, 233; Nicholas Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1994) 18 *University of Queensland Law Journal* 249, 268-269.

While maintaining Australia's habitability is 'necessary' to protect the structural integrity of the Australian constitutional system, maintaining the proper roles of the judiciary and political branches is also 'necessary' to protect this structural integrity. As James Stellios states, sometimes 'necessity clashe[s] with necessity'.[12] To resolve this conundrum, one may argue that the ecological limitation should not be established. Political means (such as parliamentary scrutiny, public debate and so forth) may be relied upon to restrain offensive government action burdening Australia's habitability. It may be a loss not to have this additional (legal) means of restraining such constitution-threatening government action but the roles of the branches of power must be preserved. Employing the ecological limitation runs too high a risk of impairing one feature 'necessary' to the Constitution's structure in order to protect another.[13]

In order to assess the cogency of this argument, I will first consider the roles that the concepts of justiciability and judicial deference may play in helping quell these concerns regarding the derivation of the ecological limitation. I will then examine whether this limitation takes judges beyond their skills and resources and whether they possess the democratic mandate to adjudicate ecological limitation matters.

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[12] James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 3. Stellios made this point with regard to the High Court's position on the implied immunity of instrumentalities in *Attorney-General (NSW) v Collector of Customs* (1908) 5 CLR 81 ('*Steel Rails Case*') (the necessities in conflict in that case, however, differed from the ones being discussed here). For discussion on the complex array of propositions housed within the Constitution that must be weighed when interpreting the Constitution (and how the need to resolve these tensions might themselves give rise to the derivation of constitutional implications, in contrast to the argument here) see: Jeremy Kirk, 'Constitutional Implications I: Nature, Legitimacy, Classification, Examples' (2000) 24 *Melbourne University Law Review* 645, 660-661.

[13] Thus, the argument is not that political means for restraining government action burdening Australia's habitability should reflexively be prioritised over legal ones based on a sense that the Constitution is singularly founded on the principles of political, rather than legal, constitutionalism. Such an argument is unlikely to succeed. As the High Court states in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 in the process of explaining its support for the political communication limitation's establishment, the 'Constitution displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature': 564. This is evident from the existence of express limitations within the Constitution as well as the implied ones that the Court has confirmed form part of the document. If political means were to be prioritised to deal with undesirable government action, this would mean that none of the implied (structural) limitations would have been established. In short, the Constitution is a hybrid of both political and legal constitutionalism: Lisa Burton Crawford and Jeffrey Goldsworthy, 'Constitutionalism' in Cheryl Saunders and Adrienne Stone, *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 357, 362. The 'branches of power' argument posed in this Part is that the specific category of undesirable government action in question – action burdening Australia's habitability – is a type best left to the political branches to resolve for the reasons mentioned above.

A *Justiciability and Deference*

The matters that might be presented to the judiciary with regard to the ecological limitation (or any limitation) are not monolithic. Some ecological limitation matters may take judges beyond their skills, resources or democratic mandate more than others. This suggests that the High Court does not need to dismiss the ecological limitation in its entirety on these grounds. Options are available to deal with these issues on a case by case basis. One option lies in judges' discretion to deem an individual ecological limitation matter non-justiciable. That is, judges may decide not to hear a matter because they consider it inherently unsuitable for a court to determine.[14] While judges have left unclear the precise factors that lead to a matter being declared non-justiciable, a belief that the judiciary does not possess the skills, resources or democratic mandate to determine a specific matter are accepted, if not fundamental, reasons for such a finding.[15] While it was not a constitutional law matter but an administrative law one, *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* ('*Peko-Wallsend*') offers an example of governmental (mis)use of nature ostensibly requiring too much political decision-making to be appropriate for judicial determination.[16] Bowen CJ held that a Cabinet decision on the World Heritage listing of Stage II of Kakadu National Park was non-justiciable in large part because it

> involved complex policy questions relating to the environment, the rights of Aboriginals, mining and the impact on Australia's economic position of allowing or not allowing mining as well as matters affecting private interests such as those of the respondents.[17]

[14] See discussion in: Part I.
[15] *Thomas v Mowbray* (2007) 244 CLR 307, 354 ('*Thomas*'); Hanna, above n 2, 357-358; Mason, 'Gatekeeper', above n 2, 787-788; Judith Bannister, Gabrielle Appleby and Anna Olijnyk, *Government Accountability: Australian Administrative Law* (Cambridge University Press, 2015) 394-395.
[16] (1987) 15 FCR 274.
[17] Ibid 278-279.

Thus, if a specific ecological limitation matter raises such concerns, judges may deem the matter non-justiciable and decline to hear it as they did with regard to this case on Kakadu National Park.

Another option available to judges is to pay deference to the relevant political branch's position where particular issues arise during an ecological limitation matter that take them beyond their skills, resources or democratic mandate.[18] Judicial deference is the concept of judges giving weight to the views of the government when a matter presents uncertainty.[19] This uncertainty may be normative (uncertainty pertaining to value judgments) or empirical (uncertainty pertaining to factual matters).[20] The term 'deference' does not refer to a strict principle of interpretation. It only signifies a general stance that judges may take, whether they do so in a consistent principled manner, an ad hoc manner or otherwise.[21] While some judges use the term 'deference' to describe this concept, the concept is sometimes framed in different language, such as adhering to the 'boundaries' of separation of powers or giving 'respect' or 'weight' to governments' conclusions.[22]

The concept of deference has been given little in-depth analysis in Australia.[23] Judges and scholars have not paid substantial attention to when, and to what degree,

[18] Henckels, above n 8, 194-195; Jeremy Kirk, 'Constitutional Guarantees, Characterization and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 55-56; Dan Meagher, 'The Brennan Conception of the Implied Freedom: Theory, Proportionality and Deference' (2011) 30 *Queensland Law Journal* 119, 125.
[19] Henckels, above n 8, 182.
[20] Ibid, 182, 192 citing Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers trans, Oxford University Press, 2010) 388-425 [trans of: *Theorie der Grundrechte* (first published 1985)].
[21] Jeff King, 'Institutional Approaches to Judicial Restraint' (2008) 28 *Oxford Journal of Legal Studies* 409, 410.
[22] Henckels, above n 8, 189-192; Sir Anthony Mason, 'The Use of Proportionality in Australian Constitutional Law' (2016) 27 *Public Law Review* 109, 120. For example see: *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 158 ('deference'); *McCloy v New South Wales* (2015) 257 CLR 178, 220 ('*McCloy*') ('boundaries'); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 263 ('respect'); *Registrar of Trade Marks v Muller* (1980) 144 CLR 37, 40 ('weight').
[23] Justice Kenneth Hayne, 'Deference - An Australian Perspective' [2011] *Public Law* 75, 75; Murray Wesson, 'Crafting a Concept of Deference for the Implied Freedom of Political Communication' (2016) 27 *Public Law Review* 101, 101, 104. In jurisdictions where deference has been given more consideration, there remains significant debate and disagreement as to how it should operate: Kirk, 'Constitutional Guarantees', above n 18, 56; Meagher, above n 18, 129-132; Aileen Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 *Law Quarterly Review* 222, 222; Wesson 101.

deference should be granted to government in constitutional judgments. While some judges have embraced the concept of deference, others have criticised it, often viewing it as a dereliction of judicial duties.[24] Nevertheless, differing levels of deference are present across a range of judgments and it is sometimes suffused in the formulation of specific areas of Australian constitutional law.[25] As discussed in Chapter 4, for an example of the latter, deference is paid to the political branches in the High Court's broad definition of a 'legitimate objective' with regard to the political communication limitation and other limitations.[26] This is based, at least in part, on the view that if Parliament or the Executive contend that the objective served by a specific government action is legitimate, it is not for a court to question it.[27]

Deference has the potential to play a particularly important role tempering the operation of proportionality, beyond its role informing the Court's understanding of 'legitimate' objectives.[28] Proportionality analysis, as discussed in Chapter 3 and further below, inherently invites judges to make value-based decisions regarding the appropriateness of particular government action.[29] As Caroline Henckels states, '[p]roportionality and deference exist in a symbiotic relationship' – the extent to which proportionality allows the judiciary to make value judgements or policy considerations that override the political branches' own is mitigated by the deference given to their position where suitable throughout the decision-making process.[30] Murray Wesson asserts that the High Court does not have a principled

[24] For examples of judges criticising the concept see: *McCloy* (2015) 257 CLR 178, 220 (French CJ, Kiefel, Bell and Keane JJ); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 262-263 (Kirby J); Hayne, above n 23.
[25] Kirk, 'Constitutional Guarantees', above n 18, 59.
[26] See discussion in: Chapter 4(V)(A).
[27] Kristen Walker, 'Justice Hayne and the Implied Freedom of Political Communication' (2015) 26 *Public Law Review* 292, 296; Samuel Murray, 'The Public Interest, Representative Government and the Legitimate Ends of Restricting Political Speech' (2017) 43 *Monash University Law Review* 1, 20; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 473 ('*Castlemaine*').
[28] Henckels, above n 8, 197; Wesson, 'Crafting', above n 23, 101; Gertrude Lübbe-Wolff, 'The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court' (2014) 34 *Human Rights Law Journal* 12, 16; Thomas Poole, 'The Reformation of English Administrative Law' (2009) 68 *Cambridge Law Journal* 142, 146; *McCloy* (2015) 257 CLR 178, 216 (French CJ, Kiefel, Bell and Keane JJ).
[29] See discussion in: Chapter 3(VI)(C). Also see: Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, 702-704; *McCloy* (2015) 257 CLR 178, 216 (French CJ, Kiefel, Bell and Keane JJ).
[30] Above n 8, 197. Also see: Poole, above n 28, 146.

approach to the use of deference in proportionality analysis in political communication limitation matters.[31] It appears to determine the appropriate use of deference in such matters on a case by case basis.[32] In the proportionality analysis employed in ecological limitation matters, judicial deference can operate similarly. It can be employed to enable the ecological limitation to be applied in a cautious manner responsive to any deficiencies that arise with regard to judges' skills, resources or democratic mandate.

Thus, such deficiencies can be dealt with on a case by case basis using justiciability and deference if needed. This weakens the argument that the ecological limitation should be dismissed in its entirety due to these concerns. This argument is further weakened on a closer inspection of the purported burden that the ecological limitation places on the judiciary in terms of its capacity and democratic underpinnings. The fact that the precise burden depends on the given case means that this inspection can only be conducted at a level of generality at this juncture.[33] What follows, therefore, is a general assessment of the skills and resources that would typically be employed by judges in an ecological limitation matter to determine the appropriateness of them engaging in such matters. I will then make an assessment of judges' democratic mandate for adjudicating such matters.

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[31] Wesson, 'Crafting', above n 23, 105. Also see: Murray Wesson, 'Unions NSW v New South Wales [No 2]: Unresolved Issues for the Implied Freedom of Political Communication' (2019) 23 *Media and Arts Law Review* 93.

[32] Wesson, 'Crafting', above n 23, 105. Some suggestions exist in recent political communication limitation judgments that deference is wholly prohibited in the proportionality analysis in such cases. In *Unions NSW v New South Wales* (2019) 93 ALJR 166 ('*Unions NSW [No 2]*'), for example, Kiefel CJ, Bell and Keane JJ state that 'deference would seem not to be appropriate given this Court's role in relation to the freedom [of communication about government and political matters]': 178. Also see: *McCloy* (2015) 257 CLR 178, 220 ((French CJ, Kiefel, Bell and Keane JJ). This interpretation of these judgments, however, is contradicted by other judicial statements that indicate the ad hoc use of deference in such analysis (as well as being contradicted by the entrenchment of deference in the framing of 'legitimate objectives' in the process of proportionality analysis discussed above and in Chapter 4(V)(A)): *McCloy*, 219 (French CJ, Kiefel, Bell and Keane JJ); *Tajjour v New South Wales* (2014) 254 CLR 508, 550 (French CJ). Wesson suggests that the above statement in *Unions NSW [No 2]* might be directed at a more extreme kind of deference – 'submissive deference' (which requires judges to submit to the political branches' decisions) as opposed to 'deference as respect' (which requires judges to pay due attention to the political branches' reasons for their decision): 'Unresolved Issues', above n 31, 102. Also see: Wesson, 'Crafting', 105-106.

[33] I will return to these concerns regarding judges' skills, resources and democratic mandate where relevant in discussion of a specific case – the Carmichael mine test case – in Chapter 6. See in particular: Chapter 6(III)(B) and (V).

B *Skills and Resources*

In order to assess whether judges have the skills and resources for applying the ecological limitation, consideration must be given to the tasks that the judiciary is expected to undertake at the different stages of the ecological limitation test.[34] The first question in this test requires judges to determine if the relevant government action burdens Australia's habitability in a manner that may be causally linked to compromising one or more structural elements. Judges are generally well-versed in assessing questions of causation.[35] This particular question, while complex, does not appear to take judges beyond their skills and resources. As will be discussed in more detail in Chapter 6, a few links in the chain of causation would need to be established to satisfy this initial question of the test with regard to climate change.[36]

First, does the relevant government action lead to an increase in greenhouse gas emissions? Establishing this link might be straight-forward in some instances. Government approval of a coal-powered plant, for example, clearly leads to an increase in greenhouse gas emissions. Government approval of a coal mine, in contrast, might not be so readily accepted as causally linked to an increase in emissions (other than those directly related to its construction and operation). As discussed in Chapter 4, this is because alternative sources of coal might be employed, and an equal amount of emissions produced, if the coal mine in question is not approved.[37] Judges are generally accepted as having the skills and resources to address such causation issues in climate litigation cases.[38] They are also generally accepted as having the capacity to address equivalent causation issues outside of the field of climate litigation – namely, questions of whether a causal link can be

[34] For the formulation of this test see: Chapter 4(V)(D).
[35] HLA Hart and Tony Honoré, *Causation in the Law* (Oxford University Press, 1985).
[36] See discussion in: Chapter 6(III).
[37] See discussion in: Chapter 4(III)(B). Also see discussion in: Chapter 6(III)(B)(3); Nicole Rogers, 'Making Climate Science Matter in the Courtroom' (2017) 34 *Environmental and Planning Law Journal* 475, 478; Justine Bell-James and Sean Ryan, 'Climate Change Litigation in Queensland: A Case Study in Incrementalism' (2016) 33 *Environmental and Planning Law Journal* 515, 524; Kane Bennett, 'Australian Climate Change Litigation: Assessing the Impact of Carbon Emissions' (2016) 33 *Environmental and Planning Law Journal* 538, 543.
[38] For example see: *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* (2006) 232 ALR 510. See discussion in: Jacqueline Peel, 'Issues in Climate Change Litigation' (2011) 1 *Carbon and Climate Law Review* 15, 21-22.

established if the same harm is likely to happen regardless of the relevant party's actions.[39] Examining whether this first link in the causal chain is established, therefore, is demonstrably within the judiciary's skills and resources.

Second, does an increase in greenhouse gas emissions contribute to bringing about runaway climate change? This is also within the judiciary's skills and resources (if a party was to even question the existence of this scientifically well-accepted causal link). In Australian constitutional law and other areas of law, judges are often required to make predictions of future events.[40] Doing so on scientific grounds is generally well-suited to the reason-based judicial process.[41] As Hayne J notes in *Thomas v Mowbray*, drawing on expert evidence to predict the future is an established part of the judiciary's role:

> When courts are required to predict the future … the prediction will usually be assisted by, and determined having regard to, expert evidence of a kind that the competing parties to the litigation can be expected to adduce if the point in issue is challenged.[42]

Hayne J makes this point in the context of considering whether judges have the skills and resources to predict a specific kind of future event and its cause: the likelihood of an individual committing (or assisting in committing) an act of terrorism for the sake of determining whether a control order should be made with regard to them. The majority concluded that the judiciary has the requisite skills and resources.[43] This is despite Justice Hayne's objection, in dissent, that such an assessment relies too much on '[i]ntelligence information, gathered by government agencies' that cannot be readily accessed by the court or all parties.[44] Such a hindrance is not present for the scientific evidence that would be required if the

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[39] For example see: *Kuwait Airways Corporation v Iraqi Airways Co [Nos 4 & 5]* (discussed in: Chapter 6(III)(B)(3)).
[40] *Thomas* (2007) 233 CLR 307, 334, 477. Indeed, United States constitutional law scholar Adrian Vermeule argues that the entire project of 'constitutional rulemaking is best understood as a means to regulate and manage political risks' relating to potential future occurrences: *The Constitution of Risk* (Cambridge University Press, 2014) 1.
[41] Kirk, 'Rights', above n 6, 28.
[42] *Thomas* (2007) 233 CLR 307, 477.
[43] *Thomas* (2007) 233 CLR 307, 334 (Gleeson CJ), 351 (Gummow and Crennan JJ), 508 (Callinan J), 526 (Heydon J).
[44] *Thomas* (2007) 233 CLR 307, 477. Also see: 417 (Kirby J, dissenting).

connection between an increase in greenhouse gas emissions and the generation of runaway climate change is questioned in an ecological limitation matter.

Third, does helping bring about runaway climate change compromise one or more structural elements? This also requires a prediction to be made of the future. This prediction is based partially on an assessment of climate science and partially on an assessment of when the structural integrity of the Australian constitutional system can be considered to be compromised. As will be discussed in Chapter 6, a substantial amount of uncertainty is involved in making this determination.[45] This is due to the lack of precision in knowing what Australian society, let alone its constitutional system, will look like if runaway climate change is triggered.[46] With regard to judges' skills and resources, however, the judiciary has just as much capacity to discern the future of what the structural integrity of the Australian constitutional system might look like in such an event as the political branches. Neither the judiciary nor the political branches can claim to have more particular insights on what such a climate impacted future might hold for the Australian constitutional system.

Indeed, the judiciary might be better equipped to make this assessment in some respects. The primary aim of the ecological limitation remains fundamentally judicial – protecting the Australian constitutional system from actions of the political branches that may impair it. The judiciary has a better claim to impartiality to assess the potential damage done to the Australian constitutional system by the political branches' actions than these political branches themselves. Further, the judiciary is the institution established to resist partisan self-interest and focus on long-term considerations.[47] These are attributes critical to understanding climate change and assessing its potential ramifications. In contrast, political branches populated by politicians have institutional weaknesses – partisanship, short-sightedness, bureaucratic tendencies and influence from vested interests profiting from exploitation of natural resources – that have the potential to mire their ability

[45] See discussion in: Chapter 6(III)(B)(5).
[46] Ibid.
[47] Kirk, 'Rights', above n 6, 28-29.

to objectively assess the threat runaway climate change might pose to the Australian constitutional system.[48]

This is not merely a theoretical point. These institutional weaknesses help explain, in practice, why the Australian government and governments worldwide have collectively failed to do their share to combat climate change over the last three decades.[49] Magistrate Judge Coffin found this reasoning compelling in his determination that a United States District Court matter, on whether the United States constitution includes implied protections to ensure the nation's ecological stability for future generations in the face of climate change, may proceed to trial.[50] He states:

> The intractability of the debates before Congress and state legislatures and the alleged valuing of short term economic interest despite the cost to human life, necessitates a need for the courts to evaluate the constitutional parameters of the action or inaction taken by the government.[51]

Thus, the judiciary is institutionally well-placed to determine runaway climate change's potential impact on the Australian constitutional system in ways that the political branches is not. Overall, it seems sufficiently equipped to answer the first question of the ecological limitation test.

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[48] See discussion in: Michael M'Gonigle and Louise Takeda, 'The Liberal Limits of Environmental Law: A Green Legal Critique' (2013) 30 *Pace Environmental Law Review* 1005; Mary Christina Wood, 'Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part 1): Ecological Realism and the Need for a Paradigm Shift' (2009) 39 *Environmental Law* 43, 54-61.

[49] Governments from 154 nations including Australia officially declared their commitment to reduce greenhouse gas emissions to avoid 'dangerous' levels of climate change in 1992 at the United Nations Conference on Environment and Development Earth Summit in Rio de Janeiro ('Rio Earth Summit'): *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) art 2. More than 25 years later, many observers fear that 'dangerous' climate change has already commenced or that little time remains for it to be averted. For example see: Johan Rockström et al, 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity' (2009) 14(2) *Ecology and Society* <ecologyandsociety.org/vol14/iss2/art32>; Will Steffen et al, 'Planetary Boundaries: Guiding Human Development on a Changing Planet' (2015) 347 *Science* 1259855-1. Eileen Crist, 'Beyond the Climate Crisis: A Critique of Climate Change Discourse' (2007) 141 *Telos* 29, 31-33. Also see discussion in: Chapter 1(I)(A).

[50] *Kelsey Cascade Rose Juliana v The United States of America*, 217 F Supp 3d 1224 (D Or, 2016) ('Order and Findings & Recommendation', 18 April 2016).

[51] Ibid 8.

The second question of this test requires analysis of the legitimacy of the objective served by the government action at hand. This analysis does not conflict with the judiciary's skills and resources. As noted above, the High Court defines a 'legitimate objective' in a deferential manner with regard to other implied structural limitations and, as discussed in Chapter 4, I have followed suit in relation to the ecological limitation.[52] Namely, an objective would be deemed 'legitimate' if it is not one that sets out to burden Australia's habitability for its own sake. As noted above, the broad definition of 'legitimate objective' that is common in the jurisprudence on the relevant limitations seems, at least in part, driven by an acknowledgement that the political branches should determine the legitimacy of the objective of the action in question.[53] This generous conceptualisation of what makes an objective 'legitimate' appears specifically designed to ensure judges stay within their skills and resources (if not democratic mandate).[54]

In the third question of the ecological limitation test, judges must determine if the government action is reasonably appropriate and adapted to serve that legitimate objective. This essentially means that judges must assess the (detrimental) impact of the relevant government action on the Australian constitutional system, the (beneficial) impact of this action to achieve its legitimate objective and weigh these impacts against each other to determine if a proper balance has been struck.[55] These impacts would likely be disparate and complex. Government approval of a deforestation project, to recall the example above, might entail comparing the (long-term but less easily predictable) ecological damage to the Australian constitutional system via its contribution to worsening climate change with the (more immediate and ascertainable) economic benefits of this government action for particular workers and businesses. Value judgments and policy considerations would be required when determining the extent of a relevant government action's impacts individually – the economic impact on one side and the ecological impact on the

[52] See discussion in: Part II(A) and Chapter 4(V)(A).
[53] Ibid.
[54] Ibid.
[55] For discussion on the way in which 'balancing' is inherent to the concept of proportionality (beyond it being demarcated as its own specific step in the process of applying a specific form of proportionality, 'structured proportionality') see: Chapter 4, n 62.

other.[56] Weighing these distinct impacts against each other would require further value judgments and policy considerations. As the (albeit, administrative law) judgment in *Peko-Wallsend* suggests, such complex, merit-based decision-making regarding natural resources management might be viewed as beyond judges' purview. Thus, the third question of the ecological limitation test requires judges to engage in a substantial amount of political decision-making. This is where the argument that the ecological limitation poses a challenge to the judiciary's skills and resources is strongest.

The problem with this argument is that it can be made, and has been made, against the use of proportionality generally.[57] In *Cunliffe v Commonwealth*, for example, Dawson J warns that proportionality 'invites the court to have regard to the merits of the law – to matters of justice, fairness, morality and propriety – which are matters for the legislature and not for the court.'[58] The essential task at hand in the third question of the ecological limitation test is at the crux of proportionality analysis in Australian constitutional law more broadly – weighing the differing

[56] The judiciary seem to have the requisite skills and resources for assessing the extent of these impacts individually. As stated above with regard to the first question of the ecological limitation test, the judiciary appears to have the skills and resources to assess the detrimental impact of the relevant government action on the structural integrity of the Australian constitutional system via this action's contribution to bringing about runaway climate change. In terms of the legitimate objective of this government action, this would typically be economic in character – the economic gains from the ecological degradation – but could also include other objectives, such as the energy produced by this degradation to obtain and burn fossil fuels. Generally speaking, the judiciary also ostensibly has the skills and resources to assess the economic impacts of particular business ventures or other projects related to natural resource use or otherwise. Calculating the economic impacts of a government or commercial project on individuals and the broader community is a task judges have to regularly undertake in a wide range of areas of law including Australian constitutional law. In Australian constitutional law, for example, s 92 often requires judges to determine the present and potential future economic impacts of particular projects on interstate trade. For instance see: *Bath v Alston Holdings* (1988) 165 CLR 411; *Castlemaine* (1990) 169 CLR 436. In contract law and tort law, for examples outside of Australian constitutional law, judges often must determine the present and potential future economic impacts of particular projects when assessing the possibility of contract breaches, the amounts to be paid in damages and so forth. For example see: *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64; *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377.

[57] For example see: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (Dawson J); *Leask v Commonwealth* (1996) 187 CLR 579,616 (Toohey J). See discussion in: HP Lee, 'Proportionality in Australian Constitutional Adjudication' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 126, 127; JJ Doyle, 'Constitutional Law: "At the Eye of the Storm"' (1993) 23 *University of Western Australia Law Review* 15, 26-27; Gabrielle Appleby, 'Proportionality and Federalism: Can Australia Learn from the European Community, the US and Canada?' (2007) 26 *University of Tasmania Law Review* 1, 3.

[58] Ibid, 357 (citations omitted).

impacts of a single government action against each other to determine that action's constitutionality.[59] These impacts, like those involved in ecological limitation matters, are often disparate and complex. The act of assessing the extent of these impacts individually as well as weighing these impacts against each other, therefore, often involves a significant degree of values and policy-based analysis. As discussed in Chapter 3 with regard to the political communication limitation, for example, the judiciary is engaging in a myriad of value judgments and policy consideration when weighing the impacts of government action on the Australian people's freedom of communication about government and political matters against its impacts on entirely different societal objectives to determine its constitutionality.[60] Despite concerns such as those expressed by Dawson J, proportionality has an established place in contemporary Australian constitutional law. The judiciary ostensibly has the skills and resources to make such complicated assessments.

Does the third question of the ecological limitation test require judges to draw upon skills and resources materially distinct from, or beyond, those that they must draw upon when undertaking proportionality analysis in other areas of Australian constitutional law? This query cannot be answered definitively. The impacts of the government action being assessed and weighed against each other in an ecological limitation matter differ from those of the government action in matters pertaining to other areas of Australian constitutional law involving proportionality analysis. Nevertheless, it is difficult to see how the former impacts are more disparate, complex or otherwise more challenging to assess and weigh than those impacts that arise with respect to the latter.

Consider, for example, the case of *Adelaide Company v Jehovah's Witnesses Inc v Commonwealth*.[61] This matter centred on a declaration by the Governor-General that an organisation of Jehovah's Witnesses was a body 'prejudicial to the defence of the Commonwealth' under the *National Security (Subversive Associations)*

[59] See discussion in: Chapter 4(IV).
[60] See discussion in: Chapter 3(VI).
[61] (1943) 67 CLR 116.

Regulations 1940 (Cth).[62] This was due to the organisation's anti-war stance based on its members' religious beliefs during World War II. In order to determine the constitutionality of these regulations under section 116, the Court was required to weigh the (detrimental) impact of these regulations on peoples' free exercise of religion against its (beneficial) impact on the entirely different societal objective of aiding the war effort.[63] In other words, judges were required to compare the profoundly difficult to quantify impacts of a single government action on people's spiritual lives against those to combat the existential threat posed by a large-scale war. Judges are evidently accepted as possessing the skills and resources for the political decision-making involved in such cases. This suggests that the considerations involved in the third and final question of the ecological limitation test, as disparate and complex as they may be, are within judges' capabilities.

On this overarching assessment of the ecological limitation, the judiciary seems to possess the skills and resources required for its application. In the first question of the ecological limitation test, judges are required to engage in a causal analysis involving predictions of future events based primarily on scientific evidence. Such reason-based analysis is generally well-suited for the judiciary. In the second question, judges are required to determine whether the objective served by the relevant government action is 'legitimate'. This assessment of 'legitimacy' is already framed in a deferential matter that does not pose a challenge to judges' capabilities. In the third question, judges are required to engage in substantial amounts of political decision-making when conducting proportionality analysis. This analysis does not appear to require judges to employ skills and resources materially different from those employed in other areas of Australian constitutional law similarly requiring substantial amounts of political decision-making when conducting proportionality analysis. Overall, the judiciary appears to be equipped to hear ecological limitation matters – and can rely on the mechanisms of justiciability and deference where they are not. In the final segment of this Part, I

[62] Reg 3.
[63] *Adelaide Company Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 131-132, 155. For discussion on the relationship between proportionality analysis and the free exercise of religion limb of s 116 see: Chapter 4(IV)(B)(2). The High Court concluded in this case that s 116 had not been breached but the relevant regulations were ultimately deemed unconstitutional as they were beyond the scope of the defence power: Constitution, s 51(vi).

consider the other concern related to the 'branches of power' argument regarding the democratic underpinnings of the judiciary.

C *Democratic Mandate*

The 'democratic mandate' concern, as noted above, rests on the view that deriving the ecological limitation might effectively take matters regarding the burdening of Australia's habitability out of the hands of the elected members of Parliament and the people. The strength of this argument on its own, however, is questionable. If one accepts that the Constitution has legitimacy and that the judiciary is the appropriate institution to interpret and apply it, then this anti-democratic objection seems to rest on how clearly or not the implication in question derives from the Constitution.[64] If the implication flows from the Constitution, then the judiciary has the right to enforce it. On this count, the anti-democratic argument does not appear to have substantive content on its own that needs to be addressed. Instead, it adds weight to the already pressing need for judges to ensure their reasons for establishing any constitutional implication are sound.

Further, the focus of the ecological limitation is likely to be future generations. The notion that protecting the Australian constitutional system from legislative or executive action burdening Australia's habitability can be left to orthodox democratic means loses potency when one considers that the likely victims of such burdens are yet to exist or too young to engage in political activities such as voting. Justice Stephen Gageler argues extra-judicially that courts should play a more assertive role holding political institutions to account in Australian constitutional law where their accountability to the Australian people 'is inherently weak or endangered'.[65] This is the case here, considering the interconnected constitutional and ecological needs of *future* Australians who cannot practicably engage in the political processes of today.

[64] Kirk, 'Constitutional Implications I', above n 12, 652-653; Kirk, 'Rights', above n 6, 32-34.
[65] Justice Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32 *Australian Bar Review* 138, 152.

On this count, the ecological limitation seems to be in a stronger position than the *Melbourne Corporation* and political communication limitations. Individuals concerned about their freedom of communication and States concerned about their autonomy have more access to orthodox political means of protecting their interests (thereby ostensibly making it less necessary for the courts to adjudicate upon). These individuals have capacity as voters and these States have capacity as relatively well-resourced institutional powers to combat such respective government encroachments of their constitutional protections.[66] The likely victims of government action burdening Australia's habitability, however, are yet to be born, form part of Australia's franchise or engage in politics. The needs of future Australians cannot be disregarded in Australian constitutional law. As discussed in Chapter 4, consideration of their needs is vital to one's interpretation of the Constitution.[67] As Erin Daly and James May state, constitutions are 'quintessentially, intergenerational compacts'.[68] While organisations may form in ad hoc ways to protect these future generations' political interests, they are not assured as solid a systemic safeguard in the political system for the encroachment of their constitutional protections. The 'anti-democratic' argument was ultimately not strong enough to thwart the establishment of the *Melbourne Corporation* and political communication limitations. It appears less strong with regard to the ecological limitation.

In this Part, I have examined the argument that establishing the ecological limitation is incompatible with the judiciary's and political branches' constitutional roles. Overall, the ecological limitation generally does not seem to place more of a burden on the judiciary's skills, resources or democratic mandate than other implied (or express) limitations. Indeed, the ecological limitation may be on firmer ground on some of these points than other limitations. Further, where specific ecological matters raise issues regarding judges' skills, resources or democratic mandate, the

[66] For a similar argument comparing the political avenues available to the States and individuals see: Kirk, 'Rights', above n 6, 24.
[67] See discussion in: Chapter 4(III)(B).
[68] Erin Daly and James May, 'Comparative Environmental Constitutionalism' (2015) 6 *Jindal Global Law Review* 9, 25; Richard Hiskes, *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice* (Cambridge University Press, 2009) 126-133.

safeguards of justiciability and deference may be employed. This, in itself, weakens the argument that the ecological limitation should not be derived when such issues can be dealt with on a case by case basis. The ecological limitation, therefore, seems to be as resistant to the 'branches of power' argument as other implied limitations, if not more so. If this argument did not prevent the establishment of these limitations, the Court's commitment to doctrinal consistency suggests that it also should not prevent the establishment of the ecological limitation.

III THE 'INTENTIONALIST' ARGUMENT

One may argue that the ecological limitation should not be established because this would contradict the framers' intentions. In this part, I consider the possible arguments made on these terms. It must be acknowledged, however, that the framers' intentions do not necessarily require consideration when determining the doctrinal merits of a constitutional implication. The High Court's focus when considering the derivation of constitutional implications is the Constitution's text and structure. Its focus when deriving structural implications specifically is reasoning based on *logical* inferences and the Australian constitutional system's *practical* requirements as suggested by the necessity test.[69] The extent to which such reasoning leads to results that align with the framers' intentions is not strictly relevant.[70]

As discussed in Chapters 2, however, different judges employ different interpretive methods.[71] Their views regarding the use of the framers' intentions in constitutional interpretation are not uniform. Various judges have taken into account the framers'

[69] *ACTV* (1992) 177 CLR 106, 135. See discussion in: Chapters 2(V)(B) and 3(VI)(C).
[70] Jeffrey Goldsworthy, 'Constitutional Implications Revisited - The Implied Rights Cases: Twenty Years On' (2011) 30 *University of Queensland Law Journal* 9, 19. For discussion on the distinction between reasoning based on logical and practical inferences and reasoning based on consideration of the framers' intentions with regard to the derivation of constitutional implications see: Stephen Donaghue, 'The Clamour of Silent Constitutional Principles' (1996) 24 *Federal Law Review* 133; Jeffrey Goldsworthy, 'Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue' (1997) 23 *Monash University Law Review* 362.
[71] See discussion in: Chapter 2(III)(B).

intentions when considering the derivation of implications.[72] For the sake of completeness, I will consider the intentionalist arguments that could be made with regard to the ecological limitation. In doing so, I will avoid rehearsing the more fundamental arguments made for and against intentionalism, such as the benefits and detriments of historical understandings of the Constitution and epistemological difficulties determining a collective group's 'intentions'.[73] Instead, I will assess the merits of the intentionalist arguments below through the lens of High Court doctrine.[74]

One may argue that the framers intended for political means to be (or, more acutely, took for granted that political means would be) relied upon to quell legislative or

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[72] In *ACTV* (1992) 177 CLR 106, for example, Dawson J asserts that the framers 'preferred to place their trust in Parliament' with regard to preserving certain rights and interests in society so as to argue against the establishment of the political communication limitation (at least in its broader form endorsed by his peers): 186. In *Leeth v Commonwealth* (1992) 174 CLR 455, for another example, Deane and Toohey JJ proposed that the Constitution includes an implied guarantee of equality (broadly speaking, a constitutional guarantee of equal treatment for all people of Australia under the law). This is, in part, premised on their view that 'the general approach of the framers … was to incorporate underlying doctrines or principles': 484. Including such guarantees explicitly was 'unnecessary' in the words of various participants in the Convention Debates due to their fundamentality as part of such doctrines or principles: 484 quoting *Official Report of the National Australasian Convention Debates*, Melbourne, 8 February 1898, 667, 687, 688.

[73] With regard to the epistemological difficulties regarding the framers' intentions, note the observations of the majority in *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*Work Choices Case*'):

> To pursue the identification of what is said to be the framers' intention, much more often than not, is to pursue a mirage. It is a mirage because the inquiry assumes that it is both possible and useful to attempt to work out a single collective view about what now is a disputed question of power, but then was not present to the minds of those who contributed to the debates: 97 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

For further discussion on the fundamental arguments for and against intentionalism in the Australian constitutional law context see for example: Greg Craven, 'Original Intent and the Australian Constitution – Coming Soon to a Court Near You?' (1990) 1 *Public Law Review* 166; Helen Irving, 'Constitutional Interpretation, the High Court, and the Discipline of History' (2013) 41 *Federal Law Review* 95; Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1. Also see discussion in: Chapter 2(III)(A).

[74] In this spirit, I will focus on the intention of the framers who drafted the Constitution, as opposed to the Australian people of the 1890s who approved the Constitution at referenda or the Imperial Parliament who enacted the Constitution. The High Court has never made clear whose intentions are relevant from these three possibilities when adopting an intentionalist approach: Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323, 325-326, 342-343; Donaghue, above n 70, 151-153. Jeffrey Goldsworthy argues that 'choosing between those who drafted and debated the Constitution, and the voters who approved it' is usually unnecessary 'because our evidence of the original intention applies equally to both: for example, evidence concerning the meaning of words in 1900, or beliefs and values which were widely shared at the time': Goldsworthy, 'Originalism in Constitutional Interpretation', above n 73, 26. The High Court most frequently refers to the framers' intentions, however, so I will focus my attention on their intentions for present purposes: Kirk 325.

executive action burdening Australia's habitability.[75] While this intention may be difficult to demonstrate, the best evidence for its existence may be made on *expressio unius* grounds.[76] The fact that the framers placed various limitations in the Constitution but not one akin to an ecological limitation suggests that they did not intend for such a judiciary-enforced limitation on government power to be available. The ecological limitation, therefore, should not be established for it conflicts with this intention. This argument, however, could be made with regard to any implied limitation. The High Court has demonstrably been willing to establish such limitations despite the possibility of such an *expressio unius* argument against it. The *expressio unius* argument is on stronger ground where 'numerous and detailed' express limitations exist (making any left out a noticeable absence) or an express limitation exists similar to the implied one being proposed (suggesting that the framers turned their mind to the subject-matter in question and chose to place restraints on some facets of it but not others).[77] Neither is the case here.

Further, the harm the ecological limitation seeks to prevent was virtually beyond the framers' imaginations at the time of the Constitution's conception. Existential threats to Australia's habitability such as climate change simply did not exist nor was environmental science developed enough to raise the possibility in people's minds in any sufficient detail.[78] The notion that the political branches may be the ones playing a significant role contributing to bringing about such threats was likely even further from their minds. Thus, if the framers did harbour any intentions regarding how government action burdening Australia's habitability would be dealt with in the constitutional system they were developing, it was based on outdated science and vastly different circumstances. The High Court is generally unwilling to take into account the framers' intentions where they are based on antiquated

[75] This intention would likely take the form of an 'implicit assumption': Jeffrey Goldsworthy, 'Implications in Language, Law and the Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 150, 154. This is where the founders may not have actually considered a particular meaning but simply taken it for granted.
[76] Kirk, 'Constitutional Implications II: Doctrines of Equality and Democracy' (2001) 25 *Melbourne University Law Review* 24, 30. *Expressio unius* is a principle of statutory construction asserting 'that the express mention of a matter militates against implications arising from elsewhere in the document relating to that type of matter': 30.
[77] Ibid 30.
[78] Jeremy Caradonna, *Sustainability: A History* (Oxford University Press, 2014) 87-91; James Crawford, 'The Constitution' in Tim Bonyhady (ed), *Environmental Protection and Legal Change* (Federation Press, 1992) 1, 2.

knowledge and circumstances.[79] Such intentions are seemingly only taken into account in instances where they have some particular utility. In *Cole v Whitfield*, for example, the High Court was willing to consider the framers' intentions when drafting section 92 to help interpret this section, despite how bound these intentions were in the particular economic landscape of the late nineteenth century.[80] The High Court was not taking the framers' intentions into account to interpret the section to mean whatever the framers' intended.[81] It was merely using these intentions to gain a better sense of what influenced the particular wording chosen for the confusingly phrased section. With regard to the ecological limitation, the framers' intentions do not provide such useful or unique insights.

The fact that the harm the ecological limitation seeks to prevent was virtually beyond the framers' imaginations places this implied limitation in a stronger position than others. The framers, for example, were aware that the political branches may act in a censorial manner. They were also aware that the Commonwealth, once established, might encroach upon the States' autonomy. Despite these harms being known to the framers (and them seemingly opting not to place limitations in the Constitution to thwart them), the High Court still established the political communication and *Melbourne Corporation* limitations. The basic awareness of this harm the ecological limitation seeks to prevent, however, was lacking. Any intention the framers had on this point would seem to be of lesser utility in challenging the ecological limitation as it would with regard to these other limitations.

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[79] The framers, for example, likely assumed that treaties would play a minor role in Australian political life. They were likely unaware of how their significance would grow substantially over the twentieth century. In *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case'*), however, Mason J asserts that such 'mere expectations held in 1900' are irrelevant in interpreting the external affairs power and what laws the Commonwealth may pass based on treaties it has signed under this power: 127. Another example is the definition of 'race' and 'aboriginal race' [sic] under the race power: s 51(xxvi). In 1901, these terms' meaning was rooted in concepts of biology and racial hierarchy: Justin Malbon, 'The Race Power under the Australian Constitution: Altered Meanings' (1999) 21 *Sydney Law Review* 80. In the *Tasmanian Dam Case*, however, Brennan and Deane JJ interpreted these terms emphasising social characteristics (such as how one self-identifies and shared religion and culture) free from pseudo-scientific rankings of 'inferior' and 'superior' species of humans: 244, 274; Malbon 109.

[80] (1988) 165 CLR 360.

[81] Ibid 385.

A different intentionalist argument could be made that the ecological limitation should not be established because the framers did not intend it. Jeffrey Goldsworthy argues that 'the Constitution can plausibly be said to include an implication *only* if there is evidence that the founders had the requisite intention'.[82] This is not the High Court's position, however, as Goldsworthy accepts.[83] One could venture an intentionalist argument in support of the ecological limitation on these terms, however, along the lines of Justice Windeyer's argument in support of the *Melbourne Corporation* limitation. In *Victoria v Commonwealth* ('*Payroll Tax Case*'), Windeyer J frames the *Melbourne Corporation* limitation as grounded in 'tacit' or 'underlying assumptions'.[84] That is, it was implicitly assumed that the States would retain some standard of autonomy.[85] The *Melbourne Corporation* limitation functions to restrain the Commonwealth from curtailing the States' autonomy and ensure that these assumptions are honoured. One could similarly argue that it was implicitly assumed that the physical site of Australia would retain some standard of habitability. The ecological limitation functions to restrain the Commonwealth and States from burdening Australia's habitability and ensure that *these* assumptions are honoured. This intentionalist argument in support of the ecological limitation, however, is open to challenge. The fact that the framers assumed some 'thing' fundamental to the Australian constitutional system would be retained (if the existence of this assumption could, indeed, be proven) does not necessarily lead to the conclusion that the judiciary should be the body impliedly empowered to protect it.[86]

Overall, the framers' intentions do not appear to be particularly valuable in assessing the viability of establishing the ecological limitation (at least, within the

[82] Goldsworthy, 'Reply', above n 70, 362 (emphasis added).
[83] Goldsworthy, 'Constitutional Implications Revisited', above n 70, 19.
[84] (1971) 122 CLR 353, 393, 403.
[85] Justice Windeyer's phrasing is problematic. Windeyer J writes of the 'underlying assumptions of the Constitution' which might suggest that the Constitution itself is assuming or intending something: Ibid 403. It cannot. Only a cognisant being can assume or intend something – a document can only relay their assumptions or intentions: Kirk, 'Evolutionary Originalism', above n 74, 325. It is possible that Justice Windeyer's assertion that the Constitution assumes 'X' is, in fact, an assertion that 'X' may be gleaned from the Constitution in a manner unrelated to the framers' intentions. One cannot, however, be certain of this. For discussion on this phenomenon of judges referring to the *Constitution's* intention see: 325.
[86] For discussion on the discretion involved in claiming judicial avenues for preserving attributes of structural elements is 'necessary' (in terms of the necessity test) see: Chapter 3(VI)(C).

doctrinal framework of the text and structure approach and necessity test). The *expressio unius* argument is no more effective against the ecological limitation as it is against other implied limitations that have been established. It might be less so, considering the fact that the harm the ecological limitation seeks to prevent was effectively unknown to the framers, unlike the harms that other implied limitations were established to tackle. The framers' outdated views and circumstances may be worth considering in some instances, but this is not the case with regard to the ecological limitation. Finally, any suggestion that deriving the ecological limitation requires the framers to have intended such a possibility cannot be squared with the High Court's doctrinal approach to establishing constitutional implications. An argument for the ecological limitation's establishment can be made on these terms, with some precedent to support it, but it would be open to challenge.

IV CONCLUSION

This chapter has examined two arguments that may be raised against the establishment of the ecological limitation. The 'branches of power' argument asserts that deriving the ecological limitation is a threat to the structural integrity of the Australian constitutional system in itself. This is because it invites the judiciary to act beyond its skills, resources and democratic mandate, in contradiction with the vision of separation of powers underpinning the Constitution. Out of 'necessity', political means should be relied upon to quell ecological threats to the structural integrity of the Australian constitutional system. The analysis I have undertaken in this chapter, however, has shown weaknesses inherent in this argument. The ecological limitation does not appear to take judges beyond their capabilities or democratic mandate any more than other implied (structural) limitations. Indeed, the ecological limitation seems less in conflict with judges' capabilities and democratic mandate than these other limitations in some respects. Further, any concerns regarding the way in which a specific ecological limitation matter takes judges beyond their skills, resources or democratic mandate can be dealt with on a case by case basis via the use of judicial deference to the political branch's position on certain issues or a finding that the specific matter is non-justiciable.

The ‘intentionalist’ argument posits that the ecological limitation should not be established because it is incompatible with the framers’ intentions. One could make such an argument based on the maxim of *expressio unius* – the fact that the framers placed various limitations in the Constitution but not something akin to the ecological limitation suggests that they did not intend for such a judiciary-enforced limitation on government power to be available. Like the ‘branches of power’ argument, however, this argument seems to apply just as readily to other implied limitations that the High Court has established. The fact that the harm that the ecological limitation seeks to prevent was virtually beyond the framers’ imaginations weakens this argument further. An alternative argument on intentionalist grounds – that one must show evidence that the ecological limitation was, in some way, intended by the framers – is at odds with the High Court’s doctrinal approach to establishing constitutional implications (but, nevertheless, might be satisfied with regard to the ecological limitation).

Overall, the analysis in this chapter suggests that there is a substantial basis to argue that the ecological limitation could meet these counter-arguments raised against it. In the next chapter, I offer a more detailed picture of the operation of this proposed implication through exploration of a hypothetical ecological limitation matter.

CHAPTER 6: THE CARMICHAEL MINE

I INTRODUCTION

In this chapter, I examine a hypothetical ecological limitation matter based on a real occurrence. This 'test case' centres on whether government approval of the Carmichael mine breaches the ecological limitation, as formulated in Chapter 4. The Carmichael mine is a proposed coal mine in Queensland being pursued by Adani Mining Pty Ltd ('Adani'). The Queensland and Commonwealth government approvals granted to Adani allow for a coal mine to be built that would be the biggest in Australia and one of the biggest in the world, expected to produce 2.3 billion tonnes of coal over its 60 year lifetime.[1] In terms of carbon emissions, the annual emissions of the Carmichael mine would be 79 million tonnes of carbon equivalent which, to give one a sense of its scale, roughly equate to those of Austria.[2]

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[1] Cameron Amos and Tom Swann, 'Carmichael in Context: Quantifying Australia's Threat to Climate Action' (Australia Institute, 2015) i; *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48, [2] ('*Adani Mining*'). For discussion on the Queensland and Commonwealth government approvals see: Part II.

As at the time of writing, the precise size of the planned mine is a matter of contention. In November 2018, Adani announced that it would pursue a smaller mine that would produce 27.5 million tonnes of coal per year at peak capacity (as opposed to 60 million tonnes per year as it initially announced in 2010 and the above figures are based on): Michael Slezak, 'Adani Says a Scaled-Down Version of its Carmichael Coal Mine will go Ahead; Environmentalists Express Scepticism', *Australian Broadcasting Corporation*, 29 November 2018 <abc.net.au/news/2018-11-29/adani-carmichael-coal-mine-go-ahead-plans-to-self-fund/10567848>; Samantha Hepburn, 'Adani's New Mini Version of its Mega Mine Still Faces Some Big Hurdles', *The Conversation*, 3 December 2018 <theconversation.com/adanis-new-mini-version-of-its-mega-mine-still-faces-some-big-hurdles-108038>; Amos and Swann i. Adani, however, has refused to commit to the size of the mine 'and is still pursuing final approvals based on plans for' the larger-scale mine as originally planned: Ben Smee, 'Adani Refuses to Commit to Size of "Scaled-Down" Carmichael Coalmine' <theguardian.com/environment/2019/may/07/adani-refuses-to-commit-to-size-of-scaled-down-carmichael-coalmine>. For the purposes of this chapter, I will base my analysis on the larger-scale mine. This is not only because this is the scale of the mine that might still be constructed. It is also because the subject of this test case is the Queensland government approval and this is the scale of the mine that forms the basis of this approval: Part II.

[2] Amos and Swann, above n 1, i.

This mine has been the subject of numerous political and legal challenges. Nationwide political campaigns have been waged in objection to the mine's potential environmental, economic and other impacts.[3] The mine has also been the subject of numerous court cases, though none have been argued on constitutional grounds. They have primarily been statutory challenges in areas including endangered species protection,[4] native title,[5] economic viability[6] and conservation of the Great Barrier Reef.[7] The climate repercussions of the Carmichael mine were examined most prominently in the Land Court of Queensland decision of *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* ('*Adani Mining*').[8] Despite these legal and political challenges, the Carmichael mine is still planned to proceed.

The primary aim of this test case is to give the reader a detailed understanding of how the ecological limitation might apply to a concrete set of facts.[9] It operates on the presupposition that the ecological limitation is established (and the formulation of its test from Chapter 4 is accepted) in order to avoid rehearsing the discussion in preceding chapters on the arguments for and against deriving the limitation.[10] Nevertheless, this test case sheds light on issues pertaining to the derivation of this proposed implication. This includes a nuanced examination of how government

[3] The main banner under which these campaigns have been waged is '#StopAdani' representing 'thousands of individuals and community groups across Australia' in opposition to the Carmichael mine: #StopAdani, <stopadani.com/about>.
[4] In this Federal Court matter brought by the Mackay Conservation Group in 2015, no judgment was delivered but a statement was issued that the parties agreed that the Commonwealth Environment Minister had failed to consider advice on two listed threatened species, the Ornamental Snake and Yakka Skink, contrary to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s139(2): Federal Court of Australia, 'Statement re NSD33/2015 Mackay Conservation Group v Minister for Environment' (Media Release, 19 August 2015).
[5] *Adani Mining Pty Ltd v Adrian Burragubba, Patrick Malone and Irene White on behalf of the Wangan and Jagalingou People* [2015] NNTTA 16; *Burragubba v State of Queensland* (2016) 151 ALD 471; *Burragubba v Minister for Natural Resources and Mines* (2016) 222 LGERA 13; *Burragubba v Minister for Natural Resources and Mines* (2017) 225 LGERA 265; *Burragubba v Queensland* (2017) 346 ALR 414; *Kemppi v Adani Mining Pty Ltd (No 4)* (2018) 360 ALR 697.
[6] *Adani Mining* [2015] QLC 48, [458]-[575].
[7] *Australian Conservation Foundation Inc v Minister for the Environment* (2016) 251 FCR 308; *Australian Conservation Foundation Inc v Minister for the Environment and Energy* (2017) 251 FCR 359.
[8] [2015] QLC 48, [420]-[457].
[9] For an example of this device of a test case being used in other climate litigation literature see: Shi-Ling Hsu, 'A Realistic Evaluation of Climate Change Litigation through the Lens of a Hypothetical Lawsuit' (2008) 79 *University of Colorado Law Review* 701.
[10] For discussion on the formulation of the ecological limitation test see: Chapter 4(V)(D).

action can be viewed as burdening Australia's habitability and how it may be causally linked to the compromising of structural elements. This also includes a more detailed exploration of the political decision-making involved for judges in an ecological limitation matter, which was discussed in the context of the 'branches of power' argument against establishing the limitation in Chapter 5.[11]

While this test case offers an examination of what applying the ecological limitation might look like in practice, a degree of hypothesising is unavoidable. I can only predict the arguments that would be raised by the parties in such a matter and how the court might respond to them. I do so by considering how similar issues as those in this test case have been dealt with in Australian and non-Australian climate litigation cases (with particular attention given to *Adani Mining*) and implied structural limitation cases. Another source of artifice is the evidence that might be required in court to lay the factual basis for the arguments raised. I do not attempt to replicate evidence in the form of affidavits or oral evidence from climate and economic experts on the mine's climate and economic impacts here.

Further, the parties cannot be certain of what evidence may be required or favoured by the court in this matter. While this is often an obstacle for litigants in other areas of law, it is particularly pertinent with regard to climate litigation and Australian constitutional law cases. As Nicole Rogers observes, in climate litigation cases, judges sometimes appear to rank conflicting expert evidence on climate science in an arbitrary manner.[12] In Australian constitutional law cases, the High Court is not bound by traditional rules of evidence (and has not developed a coherent body of rules of its own in the alternative) when informing itself of facts requiring establishment in order to determine constitutional issues ('constitutional facts').[13]

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[11] See discussion in: Chapter 5(II).

[12] 'Making Climate Science Matter in the Courtroom' (2017) 34 *Environmental and Planning Law Journal* 475, 479.

[13] Susan Kenny, 'Constitutional Fact Ascertainment (With Reference to the Practice of the Supreme Court of the United States and the High Court of Australia)' (1990) 1 *Public Law Review* 134, 135, 162; Gabrielle Appleby, 'Functionalism in Constitutional Interpretation: Factual and Participatory Challenges: Commentary on Dixon' (2015) 43 *Federal Law Review* 493, 496. For example see: *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280, 291-292 (Dixon CJ). For discussion see: Kenny; Appleby; Dyson Heydon, 'Constitutional Facts' in *Samuel Griffith Society Proceedings: Volume 23* (2011) 85; Justice Stephen Gageler, 'Fact and Law' (2009) 11 *The Newcastle Law Review* 1; Patrick Brazil, 'The Ascertainment of Facts in Australian Constitutional

As Brennan J states in *Gerhardy v Brown*, the parties may aid the Court in ascertaining constitutional facts 'but it is free also to inform itself from other sources.'[14] This adds a dimension of uncertainty when predicting the evidence that the court would be willing to accept and utilise in this test case. While this uncertainty cannot be wholly overcome in the discussion that follows, I rely primarily on materials that would generally be considered appropriate by the court for the purposes of this matter: climate and economic expert evidence accrued in the case of *Adani Mining*, discussion and research from climate experts and government documents on the Carmichael mine's stated economic benefits. I will discuss the ways in which disagreement on the facts (and evidence provided to support them) may impact judges' findings at relevant junctures in this chapter.

Finally, I presume that the litigant bringing this test case has standing. This is not always assured in environmental protection matters, where one often does not have a private right or interest to the site one is seeking to protect.[15] One must have a 'special interest' in these matters to gain standing.[16] While courts have generally been willing to recognise a broader pool of litigants having such an 'interest' in recent decades (and a diverse pool of litigants have managed to secure standing in the various cases brought against the Carmichael mine, from environmental groups to Wangan and Jagalingou traditional owners), this may still be a hurdle for a litigant in this matter.[17] In this chapter, I will refer to the party (or parties) instigating this test case as the 'plaintiff' and the party (or parties) responding as the 'defendant'.[18]

Cases' (1970) 4 *Federal Law Review* 65; Rosalind Dixon, 'The Functional Constitution: Re-Reading the 2014 High Court Constitutional Term' (2015) 43 *Federal Law Review* 455.

[14] (1985) 159 CLR 70, 142.

[15] Michael Barker, 'Standing to Sue in Public Interest Environmental Litigation: From ACF v Commonwealth to Tasmanian Conservation Trust v Minister for Resources' (1996) 13 *Environmental Planning and Law Journal* 186.

[16] *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493.

[17] Ross Abbs et al 'Australia' in Richard Lord et al (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2012) 67, 73; Roger Douglas, 'Uses of Standing Rules 1980-2006' (2006) 14 *Australian Journal of Administrative Law* 22, 36-37.

[18] As discussed in Part II, the focus of this test case will be Queensland government approval of the Carmichael mine. The defendant, therefore, is likely to be the Queensland Minister for Natural Resources, Mines and Energy.

The structure of this chapter generally follows the structure of the ecological limitation test. In Part II, I identify the particular government action that will serve as the subject of this test case. In Part III, I examine Question 1 of the ecological limitation test as it applies to the Carmichael mine. This entails drawing a causal link between the Carmichael mine's approval and the compromising of one or more structural elements. In Part IV, I examine Question 2 as it applies to the Carmichael mine. This entails defining the legitimate objective that the approval of the Carmichael mine serves. In Part V, I examine Question 3 as it applies to the Carmichael mine. This entails consideration of whether the Carmichael mine's approval is reasonably appropriate and adapted to achieve this legitimate objective, to which I employ the structured proportionality approach.[19] In Part VI, I conclude this chapter with a summation of the plaintiff's potential for success in this matter and discussion of the ways in which this test case sheds light on issues related to the derivation of the ecological limitation.

II GOVERNMENT ACTION

What is the 'legislative or executive action' that is the subject of this test case? Adani requires various Queensland and Commonwealth executive approvals to build this mine. The main approvals required for large mines in Queensland are a mining lease under the *Mineral Resources Act 1989* (Qld), environmental authority under the *Environmental Protection Act 1994* (Qld) and approval under the *Environment Protection and Biodiversity Conservation Act 1994* (Cth).[20] Each of these have been granted to Adani with regard to the Carmichael mine.[21] Some more

[19] See discussion in: Chapter 4(V)(B).
[20] Environmental Law Australia, *Carmichael Coal Mine Cases in the Land Court & Supreme Court of Qld* <envlaw.com.au/carmichael-coal-mine-case>.
[21] The Queensland government granted three mining leases required for the Carmichael mine – 70441 (Carmichael), 70505 (Carmichael East) and 70506 (Carmichael North) – on 3 April 2016: Anthony Lynham (Minister for Natural Resources and Mines), *Statement of Reasons – Statement of Reasons for the Decision to Approve Mining Leases under Section 271A of the Mineral Resources Act 1989 (MRA)* <envlaw.com.au/wp-content/uploads/carmichael54.pdf>. The Queensland government issued final environmental authority for the Carmichael mine on 2 February 2016: Kate Bennink (Department of Environment and Heritage Protection), *Statement of Reasons – Decision about an Application for a Site-Specific Environmental Authority under the Environmental Protection Act 1994* <envlaw.com.au/wp-content/uploads/carmichael52.pdf>. The Commonwealth government issued approval required for the Carmichael mine on 14 October 2015: Greg Hunt

particular executive approvals required for construction to commence (such as the associated water licence under the *Water Act 2000* (Qld) for Adani to access groundwater required for the mine's operation) have also been granted.[22]

The three mining leases – 70441 (Carmichael), 70505 (Carmichael East) and 70506 (Carmichael North) – granted by the Queensland Minister for Natural Resources and Mines (now referred to as the 'Minister for Natural Resources, Mines and Energy') made under section 271A of the *Mineral Resources Act 1989* (Qld) are the main executive action authorising the Carmichael mine. For the sake of convenience, I will focus the discussion in this chapter on these three mining leases. In court, however, the plaintiff could also raise the possibility of these various other Queensland and Commonwealth executive approvals for the mine breaching the ecological limitation on similar grounds discussed in this chapter.

Should the legislative action (namely, section 271A) or executive action (namely, the mining lease approvals) be the subject of this test case? Precedent suggests that the answer is, effectively, the executive action.[23] The High Court asserts that one examine an executive discretionary decision's compatibility with a constitutional limitation, rather than the legislative provision it is made under, where this

(Minister for the Environment), *Approval – Carmichael Coal Mine and Rail Infrastructure Project, Queensland (EPBC 2010/5736)* <epbcnotices.environment.gov.au/_entity/annotation/0b3953c8-e472-e511-a947-005056ba00a8/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?t=1511734567016>.

[22] The water licence was issued on 29 March 2017: Darren Moor (Department of Natural Resources and Mines), *Associated Water Licence – Water Act 2000* <smh.com.au/cqstatic/gvdane/adaniawl.PDF>. Also see the substantial powers of the Coordinator-General to facilitate the planning and development of infrastructure projects in Queensland under the *State Development and Public Works Organisation Act 1971* (Qld).

[23] *Wotton v Queensland* (2012) 246 CLR 1, 9–10 ('*Wotton*'); *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 613–4 ('*Miller*'); *Chief of the Defence Force v Gaynor* (2017) 246 FCR 298, 315-317; Justice Pamela Tate, 'The Federal and State Courts on Constitutional Law: The 2017 Term' (Paper presented at 2018 Constitutional Law Conference, Art Gallery of New South Wales, 23 February 2018) 6-9; James Stellios, 'Marbury v Madison: Constitutional Limitations and Statutory Discretions' (2016) 42 *Australian Bar Review* 324. The precedent in this area has been applied with regard to a range of constitutional limitations including the political communication limitation, the interstate trade limitation under s 92 and limitations related to Chapter III powers: Stellios 348. It is also likely to apply, therefore, to the ecological limitation. Note, this issue of the operation of constitutional limitations with regard to legislative versus executive action was raised in the recent decision of *Comcare v Banerji* (2019) 93 ALJR 900 ('*Comcare*') in the context of the political communication limitation. The court generally adhered to the approach outlined in *Wotton* and *Miller*: Kieran Pender, '"A powerful chill"? Comcare v Banerji [2019] HCA 23 and the Political Expression of Public Servants' <auspublaw.org/2019/08/a-powerful-chill-comcare-v-banerji-2019-hca-23>; See in particular: *Comcare*, 924-925 (Gageler J), 945-96 (Edelman J).

provision takes a certain form.[24] That form is a provision with such broad application and no clear textual references to the subject-matter of constitutional limitations that whether it breaches the constitutional limitation or not will only become apparent based on *how* it is applied by the executive officer or body in question.[25] Section 271A is such a provision. This section is written in general terms, essentially stating that the Minister may grant or reject a mining lease application after considering certain criteria and obtaining certain consent from the land owner and Governor in Council. Such mining leases are not restricted to coal. They may be granted under this section for an array of mining ventures, such as gold and silver mining. Thus, its use in approving the Carmichael mine may breach the ecological limitation. Its use in approving other mines that are not fossil fuel related (or otherwise place a significant burden on Australia's habitability) would not.

The High Court asserts that such provisions must be understood as confined by the Constitution (as all parts of legislation are) and, thus, also confined by the particular constitutional limitation in question.[26] This has a flow-on effect to the executive discretionary decisions made under the provision. That is, the executive action must respect the confines of the provision that enables it. This provision's dimensions are defined by the Constitution, including the constitutional limitation in question.[27] This effectively means that the executive action, itself, must respect the constitutional limitation in question. As stated in *Wotton v Queensland*, the executive discretionary power 'must be exercised in accordance with any applicable law, including the Constitution itself'.[28] Thus, this test case essentially requires an

[24] *Wotton* (2012) 246 CLR 1, 14; Stellios, above n 23, 335-340.
[25] *Wotton* (2012) 246 CLR 1, 14; Stellios, above n 23, 335-340. If deficiencies in administrative law mean that the High Court cannot satisfactorily determine such an executive action's compatibility with the constitutional limitation in question via this area of law, the court has flagged the possibility of opting to determine the legislative provision's compatibility with the limitation via constitutional law instead: Stellios 327-328; *Miller* (1986) 161 CLR 556, 614; *Hughes and Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127. This is unlikely. Due to developments in administrative law in recent decades, the High Court now generally accepts that effective administrative law review is available for the task: Stellios 328; *Miller* (1986) 161 CLR 556, 614; *Buck v Bavone* (1976) 135 CLR 110, 118-119, 131.
[26] Stellios, above n 23, 337-338; *Wotton* (2012) 246 CLR 1, 14.
[27] Ibid.
[28] *Wotton* (2012) 246 CLR 1, 9.

examination of whether the executive action approving these mining leases abides by the ecological limitation.

III QUESTION 1 – THE CARMICHAEL MINE AND THE CONSTITUTION'S STRUCTURE

The first question of the ecological limitation test that must be answered is whether Queensland government approval of the Carmichael mine burdens Australia's habitability in a manner that may be causally linked to the compromising of one or more structural elements of the Constitution. If so, we proceed to Question 2. If not, the ecological limitation has not been breached. This Part begins with an outline of the basic argument for how the greenhouse gas emissions from the Carmichael mine may be causally linked to the compromising of one or more structural elements, via its significant contribution to triggering runaway climate change. I will then interrogate this argument based on the objections it might raise. This interrogation will help add detail to the argument in order to more capably assess whether Question 1 may be satisfied.

A *The Plaintiff's Argument*

1 *Two Degrees and the Carmichael Mine*

Runaway climate change is a phenomenon predicted to occur if greenhouse gas emissions into the atmosphere surpass a certain level.[29] Once this level is surpassed, global temperature effectively rises of its own volition and a myriad of changes in the Earth's climate system detrimental to humankind are generated.[30] The broadly held view among climate scientists and policy leaders is that the risk of the climate 'running away' from human control substantially increases once global temperature reaches two degrees Celsius above pre-industrial levels ('two degrees').[31] Reducing

[29] Haydn Washington and John Cook, *Climate Change Denial: Heads in the Sand* (Earthscan, 2011) 30-31.
[30] Ibid 30-31.
[31] Kevin Anderson and Alice Bows, 'Reframing the Climate Change Challenge in Light of Post-2000 Emission Trends' (2008) 366 *Philosophical Transactions of the Royal Society* 3863, 3863. For

greenhouse gas emissions so as not to bring the global temperature beyond two degrees, therefore, is imperative.

The greenhouse gas emissions from the Carmichael mine would significantly contribute to breaching two degrees and potentially invite this burden on Australia's habitability. To understand the threat the Carmichael mine poses, one must first understand the concept of the carbon budget.[32] The carbon budget represents the maximum amount of carbon from human sources that can be emitted before the planet reaches two degrees.[33] If formulated for a 50% chance of remaining under two degrees, the carbon budget sits at 1,112 gigatonnes (gt) of carbon.[34] This means only 38% of global fossil fuel reserves may be burned if the world is to stay within the globe's carbon budget.[35] For Australia specifically, this ostensibly requires approximately 90% of its coal reserves to remain in the ground and not be burnt.[36] This has critical ramifications for the Carmichael mine. Will Steffen, a climate expert from the Climate Council of Australia, concludes based on these findings that '[t]ackling climate change effectively means that existing coal mines [in Australia] will need to be retired before they are exploited fully and new mines [such as the Carmichael mine] cannot be built'.[37] Thus, government approval of the Carmichael mine contributes to bringing about two degrees and its detrimental impacts.

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discussion on the emergence of this broadly held view see: Christopher Shaw, *The Two Degrees Dangerous Limit for Climate Change: Public Understanding and Decision Making* (Routledge, 2015).

[32] Will Steffen, 'Unburnable Carbon: Why We Need to Leave Fossil Fuels in the Ground' (Climate Council of Australia, 2015) iii.

[33] Ibid 12-15.

[34] Ibid 14.

[35] Ibid 19-20. The total amount of fossil fuels in reserve (that is, the amount of coal, oil and gas that 'are economically and technologically viable to exploit now': 18) would amount to the release of 2,900 gt of carbon if all burned: 19. If we were to consider all resources (that is, the total number of fossil fuels known to exist, whether it is viable to access them or not) burned, that would release 11,000 gt of carbon. Of this amount, only 10% could be burned to stay within the globe's carbon budget: 19. For further discussion see: Christophe McGlade and Paul Ekins, 'The Geographical Distribution of Fossil Fuels Unused When Limiting Global Warming to 2°C' (2015) 517 *Nature* 187.

[36] Steffen, 'Unburnable Carbon', above n 32, 27. This calculation of Australia's portion of the carbon budget, drawn largely from McGlade and Ekins' analysis, is based primarily on the physical reality of where remaining fossil fuel reserves are geographically located across the globe: above n 35. Value judgments are still involved in making this calculation, however, with regard to economic and technological factors: above n 35; Steffen 27-29.

[37] Will Steffen, 'Galilee Basin - Unburnable Coal' (Climate Council of Australia, 2015) 4.

2 *Two Degrees to Four Degrees*

Many predictions of what breaching two degrees and triggering runaway climate change will look like for humankind are framed in terms of four degrees Celsius above pre-industrial levels ('four degrees'). This is not because four degrees is where rises in global temperature are expected to stop if two degrees is breached. Haydn Washington and John Cook, for example, state that global temperature may only stabilise some six to ten degrees higher than today if runaway climate change is triggered.[38] Four degrees is regularly used to frame what the planet might look like if runaway climate change is triggered because this seems to be where the planet is heading in the nearer-term future. Patrick Brown and Ken Caldeira suggest that there is a 93% chance of exceeding four degrees by 2100 if emissions proceed in a business-as-usual manner.[39] While breaching two degrees might lead to a global temperature more severe than four degrees in the long-term (and, as discussed in Chapter 4 and Part III, such a long-term preservation of the Australian constitutional system is important in Australian constitutional law), I will focus on what four degrees means for Australia's habitability for the sake of prudence.[40]

Four degrees is predicted to result in a significant burdening of Australia's habitability. To begin, four degrees is predicted to degrade the physical site of Australia in various ways. It is predicted to lead to profound adverse changes to landscapes, breakdowns of a range of ecosystems and an increase in extreme weather events such as droughts, floods and bushfires in Australia.[41] This amounts

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[38] Above n 29, 30. For other examples see: World Bank, 'Turn down the Heat: Why a 4°C Warmer World Must Be Avoided' (World Bank, 2012) xiii; International Energy Agency, 'World Energy Outlook 2011: Executive Summary' (International Energy Agency, 2011) 2.

[39] 'Greater Future Global Warming Inferred from Earth's Recent Energy Budget' (2017) 552 *Nature* 45; Carnegie Institution for Science, 'More-Severe Climate Model Predictions Could be the Most Accurate' (Media Release, 6 December 2017). Also see: George Marshall, *Don't Even Think About It: Why Our Brains Are Wired to Ignore Climate Change* (Bloomsbury, 2014) 239-240.

[40] See discussion in: Part III(B)(1) and Chapter 4(III)(B).

[41] Lesley Hughes, 'Changes to Australian Terrestrial Biodiversity' in Peter Christoff (ed), *Four Degrees of Global Warming: Australia in a Hot World* (Routledge, 2014) 63; Ove Hough-Guldberg et al, 'Australia's Marine Resources in a Warn, Acid Ocean' in Peter Christoff (ed), *Four Degrees of Global Warming: Australia in a Hot World* (Routledge, 2014) 84; Will Steffen and David Griggs, 'Compounding Crises: Climate Change in a Complex World' in Peter Christoff (ed), *Four Degrees of Global Warming: Australia in a Hot World* (Routledge, 2014) 121; Karl Braganza et al, 'Changes in Extreme Weather' in Peter Christoff (ed), *Four Degrees of Global Warming: Australia in a Hot World* (Routledge, 2014) 33; Ben Saul et al, *Climate Change and Australia: Warming to the Global Challenge* (Federation Press, 2012) 35-54.

to a burdening of the basic ecological conditions for humans to survive and thrive within this physical site: significant strain on domestic food and water sources;[42] widespread physical and mental health hazards;[43] and coastal areas, where 85% of the Australian population live, under a variety of threats from rising sea levels.[44] This is compounded by climate impacts outside of Australia's borders generated by four degrees. Climate change threatens food security globally, placing Australian society's ability to rely on trade for its own food security (as domestic agricultural capacities diminish under climate change) at substantial risk.[45] Further, climate change fuels security threats for Australian society as severe climate impacts may lead to wide-ranging conflicts, some predicted to be particularly severe in the Asia Pacific Region.[46] Peter Christoff concludes that the high level of social, economic and ecological global integration 'will ensure that even if wealthy states such as Australia are able to engage in a relatively high level of investment in domestic adaptation, their global interdependency will lead to additional and probably unpredictable difficulties for which it is hard to plan and to adjust.'[47] Thus, four degrees is predicted to lead to a worsening of humans' ability to survive and thrive within the physical site of Australia by placing significant overlapping pressures on human life within and without Australia's borders. That is to say, in the specific terms of the constitutional language adopted in the present inquiry, it is predicted to lead to a burdening of Australia's habitability.

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[42] Lesley Hughes et al, 'Feeding a Hungry Nation: Climate Change, Food and Farming' (Climate Council, 2015); Will Steffen et al, 'Deluge and Drought: Australia's Water Security in a Changing Climate' (Climate Council, 2018); Mark Howden et al, 'Agriculture in an Even More Sunburnt Country' in Peter Christoff (ed), *Four Degrees of Global Warming: Australia in a Hot World* (Routledge, 2014) 101; Ben Saul et al, above n 41, 44-46.

[43] Australian Academy of Science, 'Climate Change Challenges to Health: Risks and Opportunities' (Australian Academy of Science, 2015); Anthony McMichael, 'Health Impacts in Australia in a Four Degree World' in Peter Christoff (ed), *Four Degrees of Global Warming: Australia in a Hot World* (Routledge, 2014) 155; Saul et al, above n 41, 48-49.

[44] Department of Climate Change, 'Climate Change Risks to Australia's Coasts: A First Pass National Assessment' (Commonwealth of Australia, 2009) 6; Will Steffen et al, 'Counting the Costs: Climate Change and Coastal Flooding' (Climate Council, 2014).

[45] Ross Garnaut, 'Compounding Social and Economic Impacts: the Limits to Adaptation' in Peter Christoff (ed), *Four Degrees of Global Warming: Australia in a Hot World* (Routledge, 2014) 142, 144-145. Note Jared Diamond's examination of the importance of trade in warding off collapse for many societies historically: *Collapse: How Societies Choose to Fail or Succeed* (Viking Penguin, 2005) 11.

[46] Peter Christoff and Robyn Eckersley, 'No Island is an Island: Security in a Four Degree World' in Peter Christoff (ed), *Four Degrees of Global Warming: Australia in a Hot World* (Routledge, 2014) 190; Saul, above n 41, 191-226.

[47] Peter Christoff, 'Introduction: Four Degrees or More?' in Peter Christoff (ed), *Four Degrees of Global Warming: Australia in a Hot World* (Routledge, 2014).

3 *Four Degrees to the Compromising of One or More Structural Elements*

No literature exists on whether such a burdening of Australia's habitability by four degrees can be causally linked to the compromising of one or more structural elements. The problems this presents for the plaintiff's argument are addressed below.[48] Literature on what four degrees will look like for human societies within and without Australia generally, however, suggest that the structural integrity of the Australian constitutional system is in significant danger at four degrees. Ross Garnaut, the economics professor and author of 'The Garnaut Climate Change Review: Final Report Review' commissioned by Commonwealth, State and Territory governments in 2008, states:

> [W]hen we compare the most likely physical and biophysical effects of 4°C warming … including shocks of magnitudes that have in the past turned out to be unmanageable for modern human social, economic and political systems … planning for adaptation to a Four Degree World *within established state structures* seems an indulgence of fantasy.[49]

Climate expert Kevin Anderson asserts that a 'widespread view' among climate experts is that four degrees is 'incompatible with any reasonable characterisation of an organised, equitable and civilised global community' and many believe it is beyond what 'we can reasonably adapt to.'[50] The World Bank states that 'given that uncertainty remains about the full nature and scale of impacts, there is also no certainty that adaptation to a 4°C world is possible'.[51] Climate scientist John Schellnhuber more bluntly stated at a 2013 conference in Australia that 'the difference between two and four degrees is human civilisation'.[52] With such severe

[48] See discussion in: Part III(B)(5).
[49] Above n 45, 142; 'The Garnaut Climate Change Review: Final Report Review' (Cambridge University Press, 2008) (emphasis added).
[50] 'Climate Change Going beyond Dangerous - Brutal Numbers and Tenuous Hope' (2012) 3 *Development Dialogue* 16, 29.
[51] World Bank, 'Turn down the Heat: Why a 4°C Warmer World Must Be Avoided' (World Bank, 2012) xviii.
[52] Marshall, above n 39, 241.

devastation predicted to be occasioned by four degrees, it seems plausible to argue that one or more structural elements will be compromised at four degrees.

In summary, the plaintiff can make the following argument that a causal link exists between government approval of the Carmichael mine and the compromising of one or more structural elements. Government approval of the mine authorises large amounts of coal to be burned. This burning contributes to global temperature breaching two degrees. Breaching two degrees is predicted to substantially increase the risk of triggering runaway climate change. If triggered, global temperature will climb effectively of its own volition and generate progressively worsening conditions for Australia's habitability and, thereby, generate progressively worsening conditions for maintaining the structural integrity of the Australian constitutional system. In this manner, government approval of the Carmichael mine may be causally linked to the compromising of one or more structural elements.

The discussion thus far only draws a causal link between the Carmichael mine's approval and the compromising of the Constitution's structural foundations in broad strokes. To assist in teasing this connection out, one must confront five objections that the defendant may raise. First, the defendant may argue that the causal link may not be drawn if the damage to one or more structural elements only eventuates in the 'distant future'. Second, the defendant may argue that the very concept of 'triggering' runaway climate change is flawed because there *is* no singular or precise point at which one can conclude runaway climate change is likely to emerge. Third, the coal mine may be considered too removed from the release of greenhouse gases in the atmosphere because (apart from the emissions caused primarily by the machinery required to unearth the coal) the emissions resulting from the coal only occur at the point where it is burned, not unearthed. Fourth, the Carmichael mine only represents a fraction of the carbon budget so its contribution to triggering runaway climate change is not substantial enough to be causally linked to any climate impacts, let alone the compromising of one or more structural elements. While the first four of these objections focus on the first link in the requisite causal chain (the causal link between the mine and breaching two

degrees) the final objection focuses on the final link in this chain (the causal link between breaching two degrees and compromising one or more structural elements). This final objection is that there is not enough certainty that one or more structural elements will be compromised if two degrees is breached. Each of these objections will be considered separately.

B *Objections*

1 *Temporality*

The defendant may argue that the ecological limitation could not be considered breached if the level of (in)habitability caused only eventuates in the 'distant future'. This argument is unlikely to succeed. First, despite some common misperceptions, the severe climate impacts scientists have been warning about for decades are not expected in some distant future. As noted above, Brown and Caldeira assert that there is a high probability global temperature will reach four degrees by 2100, while others suggest it may be as early as the 2050s.[53]

Second, as discussed in Chapter 4, such an argument dismissive of the requirements of future generations of Australians is inconsistent with Australian constitutional law.[54] Karen Schultz states that the High Court has adopted the stance that 'anticipating future generations' existence is integral to constitutions'.[55] Isaac J, for example, asserts that the Constitution was not created 'for a single occasion, but for the continued life and progress of the community'.[56] If the High Court is to interpret the Constitution with the needs of future generations in mind then it would be remiss of the Court to be unwilling to take into account what may be the biggest threat to

[53] Above n 39; Carnegie Institution for Science, above n 39; Mark New et al, 'Four Degrees and beyond: The Potential for a Global Temperature Increase of Four Degrees and Its Implications' (2010) 369 *Philosophical Transactions of the Royal Society of London A: Mathematical, Physical and Engineering Sciences* 6, 13; Marshall, above n 39, 241-242.
[54] See discussion in: Chapter 4(III)(B).
[55] Karen Schultz, 'Future Citizens or Intergenerational Aliens?: Limits of Australian Constitutional Citizenship' (2012) 21 *Griffith Law Review* 36, 38. For further discussion on the connection between constitutions and the future generations they serve see: Richard Hiskes, *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice* (Cambridge University Press, 2009) 126-133.
[56] *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393, 413.

the structural integrity, if not existence, of the Australian constitutional system for those future generations – climate change.

Ultimately, one must acknowledge the temporal reality of how climate change operates. The 2010s have been referred to as the 'critical decade' for climate action because the climate-related decisions made now by governments and others have disproportionate impact on the future.[57] Simply put, a delay between cause and effect is expected. Many of the devastating effects of placing greenhouse gases in the atmosphere now may not be seen or felt by the casual observer for decades or centuries but they will nevertheless have effect, and those effects are predicted to be largely irreversible, uncontrollable and profoundly detrimental. These decisions made now 'lock in' a version of the future predicted to be inhospitable to humankind. Thus, if one wants to secure the Constitution's operations in 2100, for example, one does not have the luxury of waiting to do so in 2100. If one wants to ensure the Constitution's operation for decades and centuries to come the work to do so substantially needs to be done now. That is the physical reality that Australian governments and courts must work within if the Australian constitutional system is to be preserved.

2 *Two Degrees as Runaway Climate Change's 'Trigger'*

The very concept of 'triggering' runaway climate change might be viewed as flawed. This is because there is no singular or precise point at which one can conclude runaway climate change is likely to emerge.[58] The Earth's climate system is too complex for there to be a single moment when the climate 'runs away' from human control. Runaway climate change is the result of a myriad of phenomena operating in their own distinct but interconnected ways. There is no single 'trigger' but rather a complex web of 'triggers'. The greenhouse gases trapped in Siberian permafrost, for example, may be released at a certain temperature (or spectrum of temperatures), while the melting of the Greenland ice sheet may gain momentum at another and the exhaustion of the Amazon rainforest's ability to store carbon at another still, and so on. Further, each of these phenomena differ in their

[57] Will Steffen and Lesley Hughes, 'The Critical Decade 2013: Climate Change Science, Risks and Responses' (Climate Commission, 2013).
[58] David Victor and Charles Kennel, 'Ditch the 2 °C Warming Goal' (2014) 514 *Nature* 30.

destructiveness, reversibility, temporality and more. How can one claim two degrees (or any particular temperature or marker of change) neatly captures when runaway climate change emerges as a threat?

While it cannot be denied that climate change does not lend itself to simple targets or thresholds, there is a danger here of being too relativist. To start with, one could never do justice to the complexity of the threat climate change presents even if one set a different, more complicated target or multi-pronged set of targets.[59] One must accept that a measure of simplification is unavoidable. Climate scientist Richard Betts makes a similar point when comparing two degrees to a legal speed limit:

> The level of danger at any particular speed depends on many factors… It would be too complicated and unworkable to set individual speed limits for individual circumstances taking into account all these factors, so clear and simple general speed limits are set using judgement and experience to try to get an overall balance between advantages and disadvantages of higher speeds for the community of road users as a whole.[60]

Further, the courtroom is a forum familiar with this reality. The law requires factually complex matters to be regulated routinely. It requires objective standards and criteria to be set where the subject-matter at hand may not lend itself to such simplifications, from setting speed limits, as Betts suggests, to determining what defines an unfit parent in family law and what is reasonably appropriate and adapted government activity for defending the nation in constitutional law.[61] While certain subject-matter may present difficulties so extreme that politicians conclude it is inappropriate for regulation, or judges conclude it is inappropriate for adjudication, this is relatively infrequent, particularly if there is a substantial imperative for the law to intervene.[62] Indeed, the formulation of the *Melbourne Corporation* limitation

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[59] Ibid; Bill Hare et al, 'Rebuttal of "Ditch the 2 °C Warming Goal!" By David G. Victor and Charles F. Kennel, Nature, Published 1 October 2014' (Climate Analytics, 2014) 11-12, 18-19.

[60] Quoted in Carbon Brief Staff, 'Two Degrees: The History of Climate Change's Speed Limit' *Carbon Brief*, 8 December 2014 <carbonbrief.org/two-degrees-the-history-of-climate-changes-speed-limit>. For other examples of two degrees being compared to a speed limit see: Shaw, above n 31, 24, 74, 76.

[61] The Constitution, s 51(vi); for example see: *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 593.

[62] See discussion in: Chapter 5(II)(A).

and its precise application in specific cases has been notoriously difficult for the High Court, but the imperative for finding such an implication – the protection of the Constitution's federal nature – could not be ignored.[63] Thus, one can recognise that there is a level of imprecision in framing two degrees as a threshold demarcating when runaway climate change emerges as a threat. This, in itself, does not invalidate its use as such a marker for current purposes.

Why, then, is two degrees an appropriate marker for runaway climate change and the flow-on effects this may have on Australia's habitability? The primary reason is that two degrees represents the *upper limit* of when this risk of runaway climate change is predicted to eventuate. It is a target that encompasses when many, it not all, of the most significant of these multiple 'triggers' are expected to emerge.[64] The Advisory Group on Greenhouse Gases (created by the World Meteorological Organization, International Council of Scientific Unions, United Nations Environment Programme), for example, reported in 1990 that two degrees indicates 'an upper limit beyond which the risks of grave damage to ecosystems, and of non-linear responses, are expected to increase rapidly.'[65] As far as I can determine, no reputable climate expert suggests that the climate target be placed higher than two degrees but many argue that it be placed lower. Climate scientist James Hansen, for example, states that '[t]he two degree scenario cannot be recommended as a responsible target, as it almost surely takes us well into the realm of dangerous anthropogenic interference with the climate system'.[66] The Stockholm Resilience Centre, for another example, asserts that the 'planetary boundary' which marks where the risk of triggering runaway climate change substantially increases has already been crossed and current global temperature is approximately one degree.[67] In explaining why the planetary boundary is not set at two degrees, Johan

[63] Jeremy Kirk, 'Constitutional Implications I: Nature, Legitimacy, Classification, Examples' (2000) 24 *Melbourne University Law Review* 645, 655.
[64] Hare et al, above n 59, 11-12.
[65] Frank Rijsberman and Rob Swart (eds), 'Targets and Indicators of Climatic Change' (Stockholm Environment Institute, 1990) quoted in Bert Metz et al, 'Climate Change 2007: Mitigation of Climate Change - Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change' (Cambridge University Press, 2007) 99.
[66] James Hansen, 'A Slippery Slope: How Much Global Warming Constitutes "Dangerous Anthropogenic Interference"? An Editorial Essay' (2005) 68 *Climate Change* 269, 277.
[67] Johan Rockström et al, 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity' (2009) 14(2) *Ecology and Society* <ecologyandsociety.org/vol14/iss2/art32>.

Rockström et al explain 'that significant risks of deleterious climate impacts for society and the environment have to be faced even if the 2°C line can be held'.[68]

By selecting the uppermost limit of when the risk of runaway climate change is expected to eventuate, it is difficult to argue that such a trigger has been selected that is too generous to the plaintiff. It is already a standard many (if not most) climate scientists would argue is too generous to the defendant. If the defendant was to suggest a more generous trigger than two degrees, they would find it difficult to garner support from many (if any) climate experts. Further, two degrees is the uppermost limit entrenched in the *Paris Agreement*.[69] This is the target with which Australian governments have signalled their commitment. Two degrees still holds a sense of legitimacy on the international stage – and for Australian governments – as representing when the risk of triggering runaway climate change substantially increases.[70]

3 *Burning versus Unearthing Coal*

The defendant may argue that the responsibility for the greenhouse gas emissions released from the Carmichael mine's coal rests with the entity that burns it (that is, the corporations or nations that ultimately purchase the coal) rather than unearths it (that is, Adani or Australia). This is because such emissions will occur regardless of whether the mine is built. The entity wishing to burn this coal can source coal from another, possibly 'dirtier', source.[71] Government approval of the unearthing of coal in the Carmichael mine, therefore, cannot be causally linked with any damage the burning of this coal may have on Australia's habitability (or constitutional system). Following this reasoning, the only greenhouse gas emissions attributable to the Carmichael mine are the ones from the mine's construction and operation. This is known as the 'market substitution' argument in climate litigation

[68] Ibid.
[69] *Paris Agreement,* opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016) art 2. This target is coupled with the more ambitious target of 'pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels': art 2.
[70] For discussion on how consensus has grown historically around a two degree target on the international stage see: Shaw, above n 31.
[71] Rogers, above n 12, 478.

scholarship.[72] This argument was accepted in *Adani Mining*.[73] MacDonald P held that 'there will be no increase of greenhouse gas emissions if the Carmichael mine is approved … because alternative supply will be sourced elsewhere to meet global demand if the mine is not approved.'[74]

The plaintiff may argue in the alternative that the causal link does exist. The Queensland government is allowing large amounts of coal in its possession to be placed on ships and taken out of its jurisdiction, knowing it is to be burned and knowing that this burning is predicted to help bring forth runaway climate change. Whether an Australian government burns the coal itself or takes action that ensures other parties perform this potentially Constitution-damaging task may be seen as immaterial. A causal link, therefore, can be drawn between government approval for the unearthing and selling of this coal and the climate impacts resulting from its burning.

While the 'market substitution' argument has had some success in climate litigation, so too has this alternative.[75] Pain J from the New South Wales Land and Environment Court, for example, accepted a similar line of reasoning in *Gray v Minister for Planning* when determining whether greenhouse gas emissions from the coal burned from a proposed mine in New South Wales must be taken into account when conducting the statutorily required assessment of the mine's environmental impacts.[76] Pain J held that a 'sufficient proximate link' exists 'between the mining of a very substantial reserve of thermal coal in NSW, the only purpose of which is for use as fuel in power stations' and detrimental climate

[72] Ibid 478; Justine Bell-James and Sean Ryan, 'Climate Change Litigation in Queensland: A Case Study in Incrementalism' (2016) 33 *Environmental and Planning Law Journal* 515, 524; Kane Bennett, 'Australian Climate Change Litigation: Assessing the Impact of Carbon Emissions' (2016) 33 *Environmental and Planning Law Journal* 538, 543. A more fundamental causation argument could be proposed that any particular damage done by climate change cannot be shown to be causally linked to the particular greenhouse gases emitted from a particular coal mine. This argument, however, does not appear to have had much success in recent Australian climate litigation: Bell-James and Ryan, 532. Indeed, Adani opted to concede that such a causal link exists in *Adani Mining*: [429]. Also see: *Xstrata Coal Queensland Pty Ltd v Friends of the Earth – Brisbane Co-Op Ltd* [2012] QLC 13, [567] ('*Xstrata*').
[73] [2015] QLC 48.
[74] *Adani Mining* [2015] QLC 48, [449].
[75] Justice Brian Preston, 'Mapping Climate Change Litigation' (2018) 92 *Australian Law Journal* 774, 784; Rogers, above n 12, 477-479.
[76] [2006] NSWLEC 720. For discussion see: Anna Rose, '*Gray v Minister for Planning*: Rising Tide of Climate Change Litigation in Australia' (2007) 29(4) *Sydney Law Review* 725.

impacts on the New South Wales environment. Preston CJ from the same court, for a more recent example, appeared to view the 'market substitution' argument as fundamentally flawed in *Gloucester Resources Limited v Minister for Planning* ('*Gloucester*') for reasons discussed below.[77] This resulted in him upholding the New South Wales government's rejection of a proposed Rocky Hill coal mine due, in part, to its increase in greenhouse gases 'at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in' such emissions.[78]

One cannot conclusively determine which of these arguments the court in this test case would accept. The climate litigation literature surveying the relevant case law suggests that judges are divided on this question.[79] Some, such as MacDonald P, see no causal link. Others, such as Pain J and Preston CJ, confirm a causal link. Further, Jacqueline Peel concludes that judges have been 'uniformly vague' on their reasoning for determining whether such a causal link exists.[80] There is some evidence that courts are becoming slightly more lenient in drawing this causal link in recent cases, but this is little to draw conclusions from.[81]

While the judicial position appears equivocal, strong arguments have been advanced to counter the 'market substitution' position. As Justine Bell-James and Sean Ryan state, the premise of the defendant's 'market substitution' argument is essentially that 'if we don't do it, someone else will'.[82] This line of reasoning is at

[77] [2019] NSWLEC 7, [534]-[535]. For discussion see: Lesley Hughes, 'The Rocky Hill decision: a watershed for climate change action?' (2019) 37 *Journal of Energy & Natural Resources Law* 341; Environmental Law Australia, 'Gloucester Resources ("Rocky Hill") case' <envlaw.com.au/gloucester-resources-case>.
[78] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [699] ('*Gloucester*').
[79] Preston, 'Mapping', above n 75, 784; Rogers, above n 12, 477-479; Jacqueline Peel, 'Issues in Climate Change Litigation' (2011) 1 *Carbon and Climate Law Review* 15, 21-22.
[80] Above n 79, 22. Also see: Rose, above n 76, 731-733; 223-232; Erica Kassman, 'How Local Courts Address Global Problems: The Case of Climate Change' (2013) 24 *Duke Journal of Comparative and International Law* 201, 223-232; Lesley McAllister, 'Litigating Climate Change at the Coal Mine' in William Burns and Hari Osofsky (eds), *Adjudicating Climate Change: State, National, and International Approaches* (Cambridge University Press, 2009) 48, 68-70.
[81] This shift has been observed in the Land Court of Queensland (which Nicole Rogers calls 'far more recalcitrant' on this causation argument than New South Wales): Bell-James and Ryan, above n 72, 532-533; Rogers, above n 12, 478.
[82] Bell-James and Ryan, above n 72, 532.

odds with traditional common law conceptions of causation.[83] In *Kuwait Airways Corporation v Iraqi Airways Co [Nos 4 & 5]*, for example, Iraqi Airways argued that someone else was likely to commit the tort of conversion (by taking Kuwait Airway planes in the wake of Iraq's attempted annexation of Kuwait) if it had not.[84] The House of Lords held that this 'is no reason for diminishing the defendant's liability and responsibility'.[85] The line of reasoning adopted in the 'market substitution' argument is also at odds with traditional approaches to assessing harm under environmental protection legislation.[86] As Kane Bennett explains,

> an approval for a supermarket or a housing development (markets which are also price inelastic and demand-driven), would never be assessed on the basis that there is no net impact from the development as the supermarket or housing estate would be built elsewhere to satisfy existing demand for food or housing.[87]

The 'market substitution' argument effectively blames 'the market' for the harm done, allowing any individual in that market to be free of responsibility.[88]

The 'market substitution' argument might also be considered deficient because it relies on assumptions that may be inaccurate. It is not inevitable that another actor or actors will step in to provide the massive amount of coal that the Carmichael mine is expected to produce over 60 years when pressure is mounting for societies to transition off fossil fuels well before then. Preston CJ similarly concluded in *Gloucester* that there is 'no certainty that there will be market substitution by new coking coal mines in India or Indonesia or any other country supplying the coal' if the Rocky Hill mine in question is rejected.[89] These other nations might follow 'Australia's lead to refuse a new coal mine.'[90]

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[83] Bennett, above n 72, 544-548; *Joyner v Weeks* [1891] 2 QB 31; *Graham v The Markets Hotel Pty Ltd* (1943) 67 CLR 567; *Kuwait Airways Corporation v Iraqi Airways Co [Nos 4 & 5]* [2002] 2 AC 883.
[84] [2002] 2 AC 883.
[85] Ibid [82].
[86] Bennett, above n 72, 547; Bell-James and Ryan, above n 72, 535.
[87] Above n 72, 547.
[88] Bennett, above n 72, 546. Preston CJ seems to endorse this reasoning in *Gloucester* [2019] NSWLEC 7: [545].
[89] *Gloucester* [2019] NSWLEC 7, [538].
[90] Ibid [539].

Further, approving a coal mine as large as the Carmichael mine is likely to have a range of flow-on effects in the energy sector.[91] Pouring large amounts of relatively cheap coal in the market has the potential to decrease overall coal prices, thereby encouraging more coal mining, coal-fired power plants and coal-related infrastructure globally.[92] This ultimately makes the continued use of coal into the future more economically advantageous and a transition to renewable energy less economically advantageous.[93] The Carmichael mine, therefore, does seem to be causally linked to an increase in greenhouse gas emissions, unlike Macdonald P and the logic of the 'market substitution' argument suggests.[94] The United States Court of Appeals for the Tenth Circuit took this view in *WildEarth Guardians and Sierra Club v United States Bureau of Land Management* ('*WildEarth*') – a view that Preston CJ endorsed in *Gloucester* in his discussion of the United States case.[95] The Bureau of Land Management argued in *WildEarth* that failure to grant mining leases for four coal mines in Wyoming would not result in decreased carbon emissions because the coal could be sourced elsewhere.[96] The court considered this argument 'arbitrary and capricious' and 'irrational'.[97] Briscoe J explained that '[t]his long logical leap presumes that either the reduced supply will have no impact on price, or that any increase in price will not make other forms of energy more attractive and decrease coal's share of the energy mix, even slightly.'[98]

For these reasons, the plaintiff's argument on this point seems sounder overall. If the plaintiff cannot satisfy the court of this causal link, they may still be able to draw a causal link between the greenhouse gas emissions directly from the mine's construction and operation and a burden on Australia's habitability caused by such contributions to breaching the carbon budget. Such emissions are substantial. The annual carbon emissions from the mine's operation alone equate to double those of

[91] Ibid 549. Richard Denniss, 'Individual Expert Report for Computable General Equilibrium Modelling and Cost Benefit Analysis' (Submission in *Adani Mining* [2015] QLC 48) 19; Richard Denniss and Jerome Fahrer, 'Joint Expert Report to the Land Court of Queensland Adani Mining Pty Ltd v Land Services of Coast & Country & Anor' (Submission in *Adani Mining* [2015] QLC 48) 3-4, 21-22.
[92] Bennett, above n 72, 549.
[93] Ibid 549.
[94] Ibid 549; Denniss, above n 91, 19.
[95] 870 F 3d 1222 (10th Cir, 2017); *Gloucester* [2019] NSWLEC 7, [542]-[544].
[96] *WildEarth*, 870 F 3d 1222 (10th Cir, 2017).
[97] Ibid 1233, 1236.
[98] Ibid 1229.

Tokyo to give one a sense of scale.[99] One could also argue that the greenhouse gas emissions expected to increase due to the Carmichael mine's influence on the energy sector should also be included in this tally of emissions attributable to the mine (though the estimated increase would be difficult to calculate). While these emissions may be substantial, ultimately they are far less than those produced from the burning of the Carmichael mine's coal. This would not only impact this stage of inquiry in the ecological limitation test's application, but weaken the potency of the plaintiff's argument at the proportionality, particularly the balancing, stage in Question 3.

4 *A Fraction of the Carbon Budget*

In *Adani Mining*, expert opinion agreed that the greenhouse gas emissions from the Carmichael mine would equal approximately 0.53%-0.56% of the carbon budget that remains after 2015 if formulated for a 66% chance of avoiding two degrees.[100] The defendant may argue that these emissions make up too small a fraction of the carbon budget to be causally linked to societal or environmental damage wrought by breaching two degrees (including the compromising of one or more structural elements). The relevant causal link to satisfy Question 1, therefore, cannot be established.

This argument runs into significant problems. The plaintiff may argue that even 0.53-0.56% of a contribution to something expected to be as profoundly destructive to humankind as breaching two degrees should be considered a substantial contribution. Smith PA makes a similar point in *Hancock Coal Pty Ltd v Kelly and Department of Environment and Heritage Protection (No 4)*.[101] The mining company in question argued that the Alpha coal mine's emissions were 'negligible' because they amounted to 0.16% of global greenhouse gas emissions.[102] Smith PA countered that

[99] Amos and Swann, above n 1, i.
[100] [2015] QLC 48, [434]; Chris Taylor and Malte Meinshausen, 'Joint Report to the Land Court of Queensland on "Climate Change – Emissions"' (Submission in *Adani Mining* [2015] QLC 48) 8-9.
[101] [2014] QLC 12.
[102] Ibid [44].

> a percentage of 0.16 equates to a ratio of 1 as to 625. In my view, particularly considering the possible local, State and global consequences which may flow from increased GHG emissions, a factor of 1 as to 625 is both real and of concern. It cannot be dismissed as negligible.[103]

The plaintiff's argument is compounded when one considers the exceptional enormity in scale of this single fossil fuel venture. Chris Taylor and Malte Meinshausen state that '[t]he cumulative emissions related to [the Carmichael] mine … are amongst the highest in the world for any individual project and – to the knowledge of the authors – the highest in the Southern Hemisphere.'[104] This is compounded further still, when one considers that much of the carbon budget is already 'locked in' by fossil fuel projects in Australia and elsewhere and are much further in development than the Carmichael mine. While the size of the contribution of the Carmichael mine to bringing about two degrees is a value judgment, it seems a strong argument can be made that its size is substantial.

Further, judges and parties in recent Australian climate litigation cases tend to accept that a causal link can be drawn between a particular fossil fuel venture (namely, a coal mine or coal-fired power station) and the detrimental impacts of climate change despite the former only ever being a small contributing factor to bringing about such impacts.[105] This includes parties supporting the fossil fuel venture in question.[106] Indeed, Adani opted to concede that such a causal link exists in *Adani Mining*, relying instead on the 'market substitution' argument.[107] In other words, Adani did not dispute that a causal link may be drawn between the Carmichael mine and the impacts of climate change. It instead argued that such climate impacts will occur regardless. The general position of judges and parties against this particular causal link argument based on the size of a particular fossil fuel venture's contribution to climate change in Australian climate litigation and *Adani Mining* specifically, suggests it might not gain traction with regard to this test case.

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[103] Ibid [209]
[104] Above n 100, 10.
[105] Preston, 'Mapping', above n 75, 784; Bell-James and Ryan, above n 72, 532.
[106] For example see: *Xstrata* [2012] QLC 13, [567].
[107] [429]; Bell-James and Ryan, above n 72, 532. Also see: Ibid [567].

In terms of implied structural limitations, a causal link between a particular government action and a structural element's degradation is not necessarily based on the *size* of this degradation. For the purposes of the voting access limitation, for example, the High Court held that a causal link exists between government action disqualifying prisoners serving any length sentence from voting in federal elections (as opposed to those serving sentences of three or more years) and the compromising of the structural element of representative democracy.[108] To take another example, for the purposes of the *Melbourne Corporation* limitation, the High Court held that a causal link exists between a superannuation tax on State judges and the compromising of the structural element of federalism.[109] These seem to be relatively small incursions on these structural elements – *causally linked* to these structural elements' degradation but certainly not capable of significantly upending them. As discussed in Chapter 4, the High Court is sensitive to how the integrity of the Constitution's structure may be diminished in a 'death by a thousand cuts' fashion.[110]

This feature of implied structural limitations is particularly pronounced with regard to implied structural limitations formulated to incorporate the concept of proportionality. For the purposes of the political communication limitation, for example, a government action's burden on people's freedom of communication abut government and political matters may be small in impact but still breach the limitation if this action has no legitimate objective or this objective does not justify this (minor) burden.[111] Alternatively, a government action burdening this freedom may be *huge* in impact but still not breach the political communication limitation if the legitimate objective is significant enough to justify such a burden. The ecological limitation operates similarly. The size of the burden attributable to the Carmichael mine will be important to consider at the proportionality, and particularly balancing, stage (as will be seen in Part V) but is not necessarily determinative at this stage.

[108] *Roach v Electoral Commissioner* (2007) 233 CLR 162.
[109] *Austin* v *Commonwealth* (2003) 215 CLR 185.
[110] See discussion in: Chapter 4(II).
[111] See discussion in: Chapter 4(IV)(A).

Overall, the defendant's argument appears weak. It is based on a value judgment of the significance of the greenhouse gas emissions from the mine that could easily be disputed; it is an argument that does not seem favoured by judges and parties in Australian climate litigation; and is not necessarily relevant for demonstrating a causal link at this stage of the ecological limitation test.

5 *Uncertainty*

The discussion thus far with regard to the above four objections largely centres on the first link in the causation chain in question: whether government approval of the Carmichael mine can be causally linked to breaching two degrees. A final objection may be made based on the final link in this causation chain: whether breaching two degrees can be causally linked to compromising one or more structural elements. The defendant may argue that there is not sufficient certainty that such a causal link can be drawn. It may be drawn between breaching two degrees and certain environmental impacts (such as increases in droughts) and to flow-on societal impacts (such as greater challenges to food and water security) described at a level of generality. It is more difficult to draw a causal link between breaching two degrees and these environmental and societal impacts equating to the compromising of one or more structural elements specifically. There is simply too much unknown about what Australia will look like post-two degrees to draw such a causal link with precision.

This objection holds some weight. The plaintiff would likely struggle to show what breaching two degrees might look like in Australia for the stability of structural elements in precise detail. No literature exists on what will happen to structural elements post-two degrees. The only literature on how ecological factors might impact the integrity of structural elements more broadly is Adam Webster's work on transboundary rivers.[112] As discussed in Chapter 1, Webster examines the importance of access to water in these rivers by the relevant States in order to

[112] Adam Webster, 'Sharing Water from Transboundary Rivers: Limits on State Power' (2016) 44 *Federal Law Review* 25; Adam Webster, *Defining Rights, Powers and Limits in Transboundary River Disputes: A Legal Analysis of the River Murray* (PhD thesis, University of Adelaide, 2014) 246-275.

preserve the structural element of federalism.[113] Based on this analysis, an argument could be put forth that the drying up of transboundary rivers under climate change might place significant strains on this structural element. It could hurt States' abilities to function in basic ways with some areas being rendered virtually uninhabitable and lead to breakdowns in State relations regarding disputes over shared water sources.[114] If this test case was to occur in reality, the lack of additional literature could be partially remedied by climate experts or political scientists being sought to give their views on the specific question of what might happen to Australia's legal and political system if two degrees is breached. Their ability to do so is stifled, however, without literature on this question and by the inescapable fact that the medium to long-term future of the Australian constitutional system in a post-two degree world is simply too hard to predict with precision.

(a) Certainty in Australian Constitutional Law

The crucial question is what level of precision is expected when making such a factual determination in Australian constitutional law. Under the ecological limitation, it is a constitutional fact whether breaching two degrees may be deemed causally linked to the compromising of one or more structural elements.[115] As discussed in Part I, the High Court has been unclear on the means by which constitutional facts can be established before it, and the standard of proof it expects.[116] This lack of clarity extends to drawing requisite factual causal links in Australian constitutional law. Causation is a concept that remains under-theorised in this area of law, especially in comparison to other areas of law, most notably tort and criminal law.

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[113] See discussion in: Chapter 1(II)(B).

[114] Webster's focus is on the States' activity in response to transboundary river water shortages, not specifically on how climate change might be a contributor to such water shortages in the first place. As he notes: 'Whether the frequency and severity of such droughts [as the 'millennium drought' roughly spanning from 2000 to 2010] are a product of climate change is an important scientific question, but one which is beyond the scope of this thesis': Webster, *Defining*, above n 112, 6.

[115] It is a constitutional fact assuming, as we are for the purposes of this chapter, that the ecological limitation is considered part of Australian constitutional law in the first place.

[116] For discussion on the difficulties of determining the proper standard of proof with regard to the application of an implied structural limitation (namely, the political communication limitation) see: Arthur Glass, 'Australian Capital Television and the Application of Constitutional Rights' (1995) 17 *Sydney Law Review* 29.

Nevertheless, a sense of what level of precision is doctrinally expected when drawing such a causal link can be gained by a closer examination of constitutional case law. To start with, the development of Australian constitutional law would be at a standstill if judges only acted upon events that are certain rather than predicted. As discussed in Chapter 5, judges are often required to make predictions of future events in Australian constitutional law (as well as other areas of law).[117] Further, as discussed above, the fact that the High Court deems it necessary to consider the needs of future generations when interpreting the Constitution suggests that some measure of uncertainty is expected.[118] No one knows the future with certainty but to be able to consider future generations' needs requires one to make predictions about potential risks.

With regard to implied structural limitations (of which the ecological limitation is an example) specifically, a significant level of imprecision is unavoidable in their application. Implied structural limitations are implied limitations on government action compromising one or more structural elements.[119] Thus, while every implied structural limitation is formulated differently, each is premised on a causal link being drawn between the government action in question and the compromising of the relevant structural element or elements. A significant level of imprecision is generally unavoidable when drawing this causal link because, as discussed in Chapter 3, structural elements are, themselves, abstract concepts with contested meanings.[120] A significant level of imprecision is also unavoidable because the act of 'compromising' a structural element does not mean its destruction in an obvious and totalising way.[121] It means the qualitative weakening of this element, now or in the future, carried out in a partial manner.[122] In other words, applying implied structural limitations requires one to determine whether the piecemeal qualitative weakening of an abstract concept has occurred or will occur. This cannot be done with much precision.

[117] See discussion in: Chapter 5(II)(B).
[118] See discussion in: Part III(B)(1).
[119] See discussion in: Chapters 3(VII) and 4(II).
[120] See discussion in: Chapter 3(VI).
[121] See discussion in: Chapter 4(II).
[122] Ibid.

Consider, for example, the political communication limitation. The High Court has deemed a range of government actions in breach of this limitation, such as a Commonwealth law restricting types of political advertising or Tasmanian law restricting where one may protest.[123] The assertion that such government action has done, or will do, partial but tangible damage to the operation of representative democracy in the Australian constitutional system, however, is, to a substantial degree, speculative. With regard to the ecological limitation, this suggests that at least some generosity exists in the level of precision required to define the government action burdening Australia's habitability that is causally linked to compromising one or more structural elements.

(b) The Plaintiff's Argument

If it is accepted that the High Court is willing to draw the requisite causal link with some generosity, there appears to be a compelling argument available to the plaintiff. Two degrees effectively means the forfeiting of control over the standard of habitability enjoyed in Australia. That is, two degrees is the upper limit before it is expected that humans may be rendered powerless to stop the Earth's climate system 'running away' or shifting from their control irreversibly. A causal link could plausibly be drawn on this basis alone. Namely, the argument could be made that the eternal forfeiting of control over something vital to the maintenance of all structural elements is causally linked to the compromising of these structural elements.[124]

This argument is compounded when one considers that once this control is forfeited, this climate system is expected to change in ways that progressively worsen Australia's habitability. At what point one or more structural elements are compromised does not necessarily need to be answered. All that one needs to consider is whether it is likely that this progressive worsening of Australia's habitability will stop of its own volition before one or more structural elements are compromised. Recall from the discussion above, that adaptation to four degrees in

[123] *ACTV* (1992) 177 CLR 106 (political advertising); *Brown v Tasmania* (2017) 261 CLR 328 (protest).
[124] For discussion on Australia's habitability being vital to the maintenance of all structural elements see: Chapter 4(III)(A).

Australia 'within established state structures seems an indulgence of fantasy' according to Garnaut.[125] If Washington and Cook are correct, the global temperature might not stabilise until six to ten degrees.[126] It appears unlikely that the progressive worsening of Australia's habitability will stop of its own volition before one or more structural elements are compromised, if not destroyed.

When faced with factual uncertainty, some judges may be inclined to pay deference to the government's version of the facts.[127] As discussed in Chapter 5, discerning how deference operates in Australian constitutional law is difficult due to the lack of in-depth analysis given to it by Australian judges and scholars.[128] Nevertheless, it is clear that deference's application is context-specific.[129] It depends on the matter, and the type and extent of uncertainty, in question. Deference is typically considered the appropriate route to deal with factual uncertainties where judges are held not to have the skills, resources or democratic mandate for determining which view of the facts to accept.[130] How do these justifications for deference correspond to the specific factual uncertainty here regarding whether a causal link can be drawn between breaching two degrees and compromising one or more structural elements?

With regard to judges' skills and resources, as discussed in Chapter 5, the judiciary has just as much capacity to discern the future of what the structural integrity of the Australian constitutional system might look like post-two degrees as the political branches.[131] Neither the judiciary nor the political branches can claim to have more particular insights on what such a climate impacted future might hold for the Australian constitutional system. As discussed above, one must work within the realities of climate change.[132] One must make decisions now to prevent irreversible harm to the Australian constitutional system in the future. While no one knows with precision what this future might look like, enough is known to predict that it will

[125] See discussion in: Part III(A)(3).
[126] See discussion in: Part III(A)(2).
[127] See discussion in: Chapter 5(II)(A).
[128] Ibid.
[129] Caroline Henckels, 'Proportionality and the Separation of Powers in Constitutional Review: Examining the Role of Judicial Deference' (2017) 45 *Federal Law Review* 181, 192. See discussion in: Chapter 5(II)(A).
[130] See discussion in: Chapter 5(II)(A).
[131] See discussion in: Chapter 5(II)(B).
[132] See discussion in: Part III(B)(1).

present immense challenges for the Australian constitutional system. The judiciary can, at least, claim that it is capable of assessing the potential damage done to this constitutional system by the Queensland government's approval of this mine in an impartial manner, more so than this government itself.[133]

With regard to the democratic mandate of the different branches of power, this raises similar issues to those discussed in Chapter 5.[134] The plaintiff is well-placed to argue that the court has democratic approval to apply the implied and express limitations contained in the Constitution (this includes the ecological limitation which, for the purposes of this chapter, is presupposed to be established).[135] It, therefore, has democratic approval to determine factual matters that arise in the application of the ecological limitation. As Justice Kenneth Hayne states in his critique of the concept of deference: '[o]nce a task is validly committed to the courts they must perform that task.'[136] In terms of democratic accountability, the central issue here is future generations of Australians and their ability to inherit a stable constitutional system. While members of the political branches may argue to have a stronger democratic mandate because they are accountable to present generation Australians, they are not accountable to future generations who are yet to vote or be born.[137] Overall, the arguments for deference are not particularly strong as a justification for the court to side with the defendant's, rather than plaintiff's, view of whether this causal link can be established.

The precautionary principle in environmental law might be of service on this question of the level of deference (if any) that should be owed to the government's position. This principle holds that judges should not let a 'lack of full scientific certainty' about a threat of 'serious or irreversible environmental damage' sway them from taking measures to prevent this damage.[138] In *Rainbow Shores P/L v Gympie Regional Council*, for instance, the Queensland Planning and Environment Court refused approval of a seaside resort development because of predicted, not

[133] See discussion in: Chapter 5(II)(B).
[134] See discussion in: Chapter 5(II)(C).
[135] Ibid.
[136] 'Deference - An Australian Perspective' [2011] *Public Law* 75, 82.
[137] See discussion in: Chapter 5(II)(C).
[138] *Intergovernmental Agreement on the Environment 1992*, 3.5.1; Douglas Fisher, *Australian Environmental Law: Norms, Principles and Rules* (Thomson Reuters, 2nd ed, 2010) 353.

certain, sea level rises and storm surges brought about by climate change.[139] This principle suggests that scientific uncertainty should not lead to deference to those seeking to take environmental risks (such as the defendant in this test case), but to those wanting to avoid them (such as the plaintiff). It is unclear whether the High Court would incorporate the general tenets of the precautionary principle into any Australian constitutional jurisprudence in this field.[140] This is a principle that originated in Germany in the 1970s, gained recognition in international law and has been incorporated into Australian environmental law in recent decades.[141] If the ecological foundations of the Australian constitutional system are taken into consideration in Australian constitutional law as the ecological limitation presupposes, a consideration of such fundamental principles of environmental law may be appropriate.

Thus, with regard to Question 1 of the ecological limitation test, various objections can be raised against the argument that a causal link exists between government approval of the Carmichael mine and the compromising of one or more structural elements. Generally speaking, the plaintiff's argument appears capable of withstanding these objections. This is based primarily on consideration of the workings of Australian constitutional law and how similar issues have been dealt with in climate litigation.

The objection likely to hold the most weight is this final one, which asserts that there is insufficient factual certainty that government approval of the Carmichael mine can be causally linked to compromising one or more structural elements. The inability to draw a specific picture of climate impacts in the medium to long-term future has been a common obstacle for climate litigants.[142] As Peel notes, however, 'a number of courts and tribunals in climate law cases have not demanded rigorous step-by-step proof of causal chains between greenhouse emissions and particular

[139] [2013] QPEC 26; Justice Brian Preston, 'The Judicial Development of the Precautionary Principle' (2018) 35 *Environmental and Planning Law Journal* 123, 141.
[140] For discussion of how the precautionary principle may operate in the context of (United States) constitutional law see: Adrian Vermeule, 'Precautionary Principles in Constitutional Law' (2012) 4 *Journal of Legal Analysis* 181.
[141] Fisher, above n 138, 353; Preston, 'Judicial Development', above n 139, 126-127.
[142] Peel, above n 79, 18-21.

climate change impacts in order to uphold claims.'[143] Whether the court in this test case would follow suit in this regard – or, otherwise, side with the plaintiff's argument for the reasons outlined above – is difficult to discern. Thus, the plaintiff seems reasonably well-placed to satisfy Question 1, despite this (and other) objections, but such a conclusion cannot be made with complete confidence. Assuming the plaintiff satisfies Question 1, I will proceed to Question 2.

IV QUESTION 2 – LEGITIMATE OBJECTIVE OF THE CARMICHAEL MINE

Question 2 of the ecological limitation test requires consideration of whether a legitimate objective exists for the government action in question. The objective of government approval of the Carmichael mine is primarily economic. The Coordinator-General of Queensland lists the project's particular benefits:

- *Employment opportunities*: Jobs will be created in construction, operation and other indirect activities, including those for Aboriginal and Torres Strait Islander people beyond traditional agriculture industry roles.[144] Overall, the Coordinator-General estimates that the mine will create 2,475 construction jobs and 3,920 operational jobs.[145]
- *Revenue raising*: Queensland and Commonwealth governments will raise 'significant' funds from taxes and royalties.[146]
- *Infrastructure improvements*: These include 'new rail infrastructure for transporting coal, road upgrades and the possible facilitation of additional power and water supplies to the region'.[147]

[143] Ibid 19.
[144] Coordinator-General, 'Carmichael Coal Mine and Rail Project: Coordinator-General's Evaluation Report on the Environmental Impact Statement' (Department of State Development, Infrastructure and Planning, May 2014) 14.
[145] Ibid 14.
[146] Ibid 14.
[147] Ibid 14.

- *Other local and regional economic opportunities*: These include '[c]ontracting and supply opportunities for local and regional individuals and businesses'.[148]
- *Overall economic benefits*: The mine at full capacity of 60 million tonnes of coal per annum is estimated to contribute $2.97 billion annually to the Queensland economy and $929.6 million annually to the Mackay Region's Gross Regional Product.[149]

These estimates are contentious (and subject to change since the Coordinator-General's report). This was perhaps most notably on display in *Adani Mining* where economists procured by Adani and those in opposition to the mining company disagreed over the economic particulars of the Carmichael mine.[150] There was dispute, for example, over the amount of revenue that may be predicted to be raised from royalties due in large part to the fact that this amount is tethered to unknown future coal prices.[151] The economist procured by Adani, Jerome Fahrer, for another example, concluded that the mine is more likely to create 1,464 jobs in Australia overall.[152] This is a lower figure than the 2,475 construction jobs and 3,920 operational jobs stated above. Nevertheless, the Coordinator-General's analysis gives an overall sense of the purported objective of the government in approving the Carmichael mine.

These pursuits would be considered 'legitimate' for the purposes of the ecological limitation test. This is because a low bar is set for defining legitimacy in contemporary Australian constitutional law.[153] With regard to the ecological limitation test, as long as the objective for the Carmichael mine is not solely to burden Australia's habitability then it will be deemed legitimate.[154]

[148] Ibid 14.
[149] Ibid x.
[150] [2015] QLC 48.
[151] Ibid [518]-[525].
[152] Ibid [585].
[153] See discussion in: Chapter 4(V)(A).
[154] Ibid.

V QUESTION 3 – THE PROPORTIONALITY TEST

The plaintiff must demonstrate that the Carmichael mine's approval is reasonably appropriate and adapted for a legitimate objective to satisfy Question 3 of the ecological limitation test. For reasons discussed in Chapter 4, I will employ a 'structured proportionality' approach to this inquiry, involving consideration of suitability, necessity and adequacy in balance.[155] Each of these stages will be examined separately.

A *Suitability*

In order to satisfy the 'suitability' stage, one must ask whether there is a rational connection between the Carmichael mine's approval and its objective to benefit the economy. While the plaintiff may argue that such a connection cannot be made because of the mine's lack of economic bona fides (which will be explored in more detail at the 'necessity' and 'balance' stage below), this is unlikely to be successful. The suitability stage of proportionality testing essentially demands that there be a logical link between the government's action (in this case, the approval of a coal mine) and its objective (the economic benefits discussed above) without the court examining its effectiveness in-depth or engaging in quality control.[156] The defendant could capably demonstrate this. That is, even if the Carmichael mine is not a particularly effective means of achieving the proposed economic benefits, it is difficult to dispute that there is a rational connection between coal mining and creating employment, raising revenue and so forth. At the very least, some of these economic benefits are almost assured. It will almost definitely provide employment and economic opportunities for those in the local and regional area and contribute

[155] See discussion in: Chapter 4(V)(B).
[156] *McCloy* (2015) 257 CLR 178, 217; Jeremy Kirk, 'Constitutional Guarantees, Characterization and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 5-6; Mark Watts, 'Reasonably Appropriate and Adapted: Assessing Proportionality and the Spectrum of Scrutiny in McCloy v New South Wales' (2016) 35 *University of Queensland Law Journal* 349, 350.

some taxes and royalties to Queensland and Commonwealth governments at least in the short-term. The Carmichael mine's approval would likely pass this stage.

B *Necessity*

In order to satisfy the 'necessity' stage, one must ask whether there is an obvious and compelling alternative, reasonably practicable means of achieving the same objective (namely, the economic benefits discussed in Part IV) which is less burdensome on Australia's habitability (and, by extension, its constitutional system). This means that it is not enough for an alternative to exist that is less burdensome on Australia's habitability.[157] The alternative must also be as capable (if not more so) of fulfilling the objective 'quantitatively, qualitatively, and probability-wise'.[158]

1 *The Plaintiff's Argument*

The plaintiff may argue that such alternatives exist. In order to assess the desirability of alternatives, however, closer scrutiny is required of the particular economic bona fides of the Carmichael mine to which these alternatives will be compared. These economic bona fides appear to be lacking for a range of reasons with regard to this particular proposed mine. First, there is a substantial risk that the mine will become a stranded asset.[159] This is due to significant market shifts: most notably, renewable energy costs are falling, China's coal-use is decreasing and India's energy self-sufficiency is being pursued 'aggressive[ly]' meaning it is reducing its overall coal imports.[160]

Second, the mine carries with it economic costs that may overwhelm its benefits. The mine's contributions to climate change means that it is contributing to the

[157] *Tajjour v New South Wales* (2014) 254 CLR 508, 571-572; *McCloy* (2015) 257 CLR 178, 217.
[158] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 324.
[159] Will Steffen et al, 'Risky Business: Health, Climate and Economic Risks of the Carmichael Coalmine' (Climate Council of Australia, 2017) 15-17.
[160] Ibid III, 17. China is the world's largest consumer of coal: 10. India is the intended primary recipient of the coal from the Carmichael mine: 17.

various economic detriments linked to climate change.[161] Particular economic detriments of note, which fall upon the local and regional area intended to economically benefit from the mine, are those related to the tourism and agriculture industry. With regard to the tourism industry, over $1 billion in tourism expenditure per year (which supports approximately 10,000 tourism jobs in regional Queensland) is expected to be lost if coral bleaching (driven in large part by warming oceans from climate change) persists.[162] With regard to the agriculture industry, climate change disturbs crop productivity in a myriad of ways, such as reductions in seasonal rainfall and increases in extreme heats.[163] Further, the Carmichael mine is expected to place other strains on the agriculture industry, such as a loss of grazing land and water access.[164]

Third, coal mining harms the health of workers and community members, causing problems such as lung cancer and bronchitis from its pollution, as well as broader health concerns from the climate change to which the mine contributes.[165] Such health hazards come with an economic cost to both the public and private sector.[166]

Fourth, Commonwealth and Queensland government funds are proposed to assist with the construction of the Carmichael mine and related infrastructure. This includes $1 billion in infrastructure subsidies with more being proposed by members of the current Coalition government.[167] Not only may this investment of

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[161] Nicholas Stern, 'Stern Review: The Economics of Climate Change' (Government of the United Kingdom, 2006).
[162] Steffen et al, 'Risky', above n 159, 21; Tom Swann and Rod Campbell, 'Great Barrier Bleached: Coral Bleaching, the Great Barrier Reef and Potential Impacts on Tourism' (Australia Institute, June 2016) 4-5.
[163] Steffen et al, 'Risky', above n 159, 19; Lesley Hughes et al, 'On the Frontline: Climate Change & Rural Communities' (Climate Council of Australia, 2016).
[164] Steffen et al, 'Risky', above n 159, 19-20; Sonya Duus, 'Coal Contestations: Learning from a Long, Broad View' (2013) 22 *Rural Society* 96, 102.
[165] Steffen et al, 'Risky', above n 159, 22-27.
[166] Ibid 22-27.
[167] Richard Denniss, 'The Carmichael Coalmine is as Much About Symbols and Interests as it is About Jobs and Money', *The Monthly*, May 2018 <themonthly.com.au/issue/2018/may/1525096800/richard-denniss/why-adani-won-t-die>; Energy & Resource Insights, 'Queensland Government Still Considering Subsidising Adani' (Energy & Resource Insights, 2018). Substantial government funds may also be required for rehabilitation of the mining site. For discussion on the contentious issue of the extent to which Adani will meet the costs of rehabilitation see: Lock the Gate, 'Adani Carmichael Mine: Baseline Closure Cost and Financial Assurance Estimation' (Lock the Gate, May 2017); Sarah Elks, 'Adani Deposits $25m as Security for Mine Rehabilitation Costs', *The Australian*, 29 January 2020

public funds lead to the economic detriments discussed above, it is an allocation of funds that could be used on other initiatives with more assured or impressive economic benefits.

Fifth, seventeen major banks worldwide (including Australia's four major banks) have refused funding for the Carmichael mine due to its poor economic viability and environmental impact.[168] The Queensland Treasury itself has significant fears about Adani's capacity to carry out the Carmichael mine project, according to documents procured via freedom of information laws.[169] Several economic experts have examined the economic case for the Carmichael mine and deemed it lacking.[170] Economist John Quiggin, for example, concludes that '[i]n all probability, neither the jobs nor the revenue will ever materialise. Rather, the whole project will turn into a sink, into which public money is poured for no return.'[171] Denniss, for another example, asserts that 'every objective analysis of the project suggested the mine … would not be viable.'[172] Indeed, Adani itself temporarily froze its investments in the Carmichael mine project in 2016 due to concerns regarding global coal prices.[173] It seems that many of those who have been involved or examined the economic credentials of the Carmichael mine have raised serious

<https://www.theaustralian.com.au/nation/politics/adani-deposits-25m-as-security-for-mine-rehabilitation-costs/news-story/df7da77013f3b773dc1f451aac8b62c5>.

[168] Steffen et al, 'Risky', above n 159, III, 3. Indeed, several major banks, such as JP Morgan Chase and HSBC, have implemented a general ban on directly financing new coal mines: 16; BankTrack et al, 'Still Coughing Up For Coal: Big Banks After The Paris Agreement' (BankTrack, Friends of the Earth France, Market Forces, Rainforest Action Network, urgewald, November 2016) 6-7.

[169] Lisa Cox, 'Adani's Carmichael Mine Is Unbankable Says Queensland Treasury', *Sydney Morning Herald*, 30 June 2015 <smh.com.au/business/mining-and-resources/adanis-carmichael-mine-is-unbankable-says-queensland-treasury-20150630-gi1l37.html>.

[170] For example see: John Quiggin, 'The Economic (Non)Viability of the Adani Galilee Basin Project' (Australia Institute, July 2017); Tim Buckley and Tom Sanzillo, 'Remote Prospects: A Financial Analysis of Adani's Coal Gamble in Australia's Galilee Basin' (The Institute for Energy Economics and Financial Analysis, November 2013); Tim Buckley, 'Briefing Note: Adani: Remote Prospects' (Institute for Energy Economics and Financial Analysis, September 2015); Rod Campbell, 'Carmichael Coal Mine and Rail Project Supplementary Environmental Impact Statement Submission' (Australia Institute, December 2013).

[171] John Quiggin, 'Jobs Bonanza? The Adani Project Is More like a Railway to Nowhere', *The Guardian*, 18 October 2017 <theguardian.com/commentisfree/2017/oct/18/jobs-bonanza-the-adani-project-is-more-like-a-railway-to-nowhere>; Quiggin, above n 170.

[172] Stephanie Smail, 'Massive Carmichael Coal Mine in Queensland Not Viable, Job Claims Overblown, Economist Says', *Australian Broadcasting Corporation*, 4 April 2016 <abc.net.au/news/2016-04-04/massive-new-coal-mine-galilee-basin-not-economically-feasible/7297710>.

[173] Joshua Robertson, 'Adani Freezes Investment in Carmichael Mine until World Coal Price Recovers', *The Guardian*, 4 February 2016 <theguardian.com/environment/2016/feb/04/adani-freezes-investment-in-carmichael-mine-until-world-coal-price-recovers>.

questions about those credentials. On these grounds, the plaintiff may argue that the economic credentials of the Carmichael mine are lacking.

If the court was open to accepting the evidence on the actual economic contribution of the Carmichael mine, the availability of obvious and compelling alternatives might not be difficult to demonstrate. The economic benefits the government seeks may be attained in the constitutionally-required manner if the resources allocated by government for the Carmichael mine were utilised elsewhere. That is, by simply *not* allowing the Carmichael mine, this would be less burdensome on Australia's habitability as well as free up vast amounts of land and water to be utilised by the agriculture industry; take away a source of danger to the Great Barrier Reef and, thus, to the tourism industry; take away the health hazards that hurt public and private economies; take away a substantial contributor to climate change and the economic detriments that follow; and free up large sums of government funds which could be used on a myriad of projects in a range of industries to better serve their economic goals and more.

With regard to the latter, for example, Tom Swann and Mark Ogge and John Cole argue that big mining projects in Queensland have failed to produce the regional economic and employment benefits promised.[174] A better alternative for government industry assistance funding may be to focus on small businesses (small and medium businesses make up over 99% of all Queensland businesses) as well as fostering industries with better prospects of growth and long-term sustainable employment in the future in fields as diverse as biotechnology, communications and digital manufacturing.[175] Such initiatives may be broadly in line, at least in some respects, with existing Queensland and Commonwealth government initiatives as well as with Productivity Commission recommendations.[176] For

[174] Tom Swann and Mark Ogge, 'The Mining Construction Boom and Regional Jobs in Queensland' (Australia Institute, September 2016); John Cole, 'Why Big Projects like the Adani Coal Mine Won't Transform Regional Queensland', *The Conversation*, 13 November 2017 <theconversation.com/why-big-projects-like-the-adani-coal-mine-wont-transform-regional-queensland-86622>. Also note Rod Campbell's analysis that 'regular exaggerat[ions]' of the significance of coal mining to Queensland's economy by the State government has skewed perceptions of the economic reality: 'The Mouse That Roars: Coal in the Queensland Economy' (Australia Institute, October 2014).
[175] Swann and Ogge, above n 174, 5; Cole, above n 174.
[176] Cole, above n 174.

another alternative for better use of government resources, one study by the climate advocacy group 350.org suggests that renewable energy is a better investment in terms of creating employment in Queensland than the Carmichael mine.[177] The Commonwealth government's investment of $71 million in a wind farm and seven solar farms in Queensland is expected to deliver 2,218 jobs.[178] The Commonwealth government's investment of $1 billion in the Carmichael mine (though, as discussed above, this may not be all that they ultimately invest) is expected to deliver 1,464 jobs.[179] This means that the Commonwealth government's investment in the mine costs 21 times more per job created than its investment in the Queensland renewable energy sector.[180]

The plaintiff may argue, therefore, that clear alternatives exist that satisfy the 'necessity' stage of this test. Simply not allowing the Carmichael mine and using the vast resources allocated for it (primarily land, water and finances) to benefit other industries would seem an 'obvious and compelling alternative, reasonably practicable means of achieving the same objective which is less burdensome on Australia's habitability'.

2 *The Defendant's Argument*

The defendant will unlikely be able to argue that the Carmichael mine is not as burdensome on Australian habitability as the alternatives the plaintiff may suggest. They may be able to argue that the Carmichael mine's approval overrides any proposed alternatives by the plaintiff in achieving its economic objectives (thereby meaning that the defendant passes the 'necessity' stage). This might ultimately depend on how the economic expert evidence procured by each party compares. Something akin to such a comparison occurred in *Adani Mining*.[181] In this matter, both the applicant (Adani) and respondents (Land Services of Coast and Country Inc and Conservation Action Trust) procured economists to defend their economic

[177] Joshua Robertson, 'Carmichael Mine Jobs Need "21 Times the Subsidies" of Renewables, Says Lobby Group', *The Guardian*, 8 February 2017 <theguardian.com/environment/2017/feb/08/carmichael-mine-jobs-need-212-times-the-subsidies-of-renewables-says-study>.
[178] Ibid.
[179] Ibid.
[180] Ibid.
[181] [2015] QLC 48.

case for and against the Carmichael mine, respectively.[182] While Adani was successful in this matter, the legal context and question in front of the court differed to that in contention here.[183] With regard to the ecological limitation, one cannot determine based on this which party's economic position may be more compelling to the court in this test case with regard to the 'necessity' stage of proportionality testing.

The defendant, however, may implore the court to pay deference to the Queensland government's position. This is because the necessity test here is essentially asking judges to name alternative economic policies involving a web of economic interests at the local, state, national and international level. This raises both normative and empirical uncertainties.[184] This is why some judges have suggested that the employment of deference be incorporated in the 'necessity' stage specifically.[185] As discussed in Chapter 5 and reiterated in Part III, it is difficult to assess the cogency of such an argument because there remains a lack of clarity on how deference operates in Australian constitutional law.[186] It may be open to the plaintiff, therefore, to argue that no deference be paid to the government's ostensible position claiming the Carmichael mine's superiority over other alternatives. If some measure of deference is to be considered, however, it will be

[182] Ibid [458]-[575].
[183] In this matter, the Land Court of Queensland was considering whether to recommend to the relevant minister that Adani's mining lease be granted based on whether Adani 'has the necessary financial and technical capabilities to carry on mining operations' and whether 'there will be an acceptable level of development and utilisation of the mineral resources' in the relevant area: *Mineral Resources Act 1989* (Qld), ss 269(4)(c), (f).
[184] See discussion in: Chapter 5(II)(A). With regard to normative uncertainties in this specific matter, for example, value judgments will need to be made on how certain interests (such as those of local and regional workers and community members) are weighed. With regard to empirical uncertainties, for example, one must estimate the future price of coal during the mine's projected six decade lifespan which cannot be factually known conclusively in the present.
[185] There has been some suggestion on the bench for a measure of deference to be granted at the 'necessity' stage of proportionality testing: Henckels, above n 129, 184-185. In *Murphy v Electoral Commissioner*, for example, Gordon J asserts that the 'necessity' stage should not be applied 'as rigidly as *McCloy* would suggest' because it 'would create too great a risk of the judicial branch intruding on the legislative function conferred on the Parliament by the *Constitution*': (2016) 90 ALJR 1027, 1080. Gordon J questions judges' capabilities in this endeavour: 'the judiciary is not equipped to make definitive judgments about whether there are obvious, compelling and practical alternatives to particular provisions that are part of an entire legislative scheme': 1080 (emphasis omitted).
[186] See discussion in: Part III(B)(5)(b) and Chapter 5(II)(A).

based on the relevant justifications for deference with regard to government's skills, resources and democratic mandate.[187]

(a) Skills and Resources

The defendant may argue that the Queensland government's position on how best to achieve the relevant economic objectives deserves deference for they have the skills and resources to make such economic determinations.[188] Namely, these governments have the capacity to spend the time, money and effort required to consult with various affected parties and experts in a way that the courts do not. They also have the institutional knowledge on how one should weigh the economic interests from the local to international level in question that the courts do not.

The plaintiff may counter this argument. There is no evidence that the Queensland government has in fact considered the specific question at hand – whether plausible alternatives exist to the Carmichael mine for fulfilling the relevant economic objectives which are less burdensome on Australia's habitability. Further, it is not self-evident that their decision to approve the Carmichael mine is based on any knowledge gleaned from their ostensibly superior skills and resources. Governments make decisions for all sorts of reasons. Some of these reasons lead to decisions being made that are unrelated or in stark contradiction to internal expert advice or whatever other sources of information have been accrued.[189] Thus, the question of whether the Carmichael mine trumps other alternatives may ultimately still depend on the expert evidence both parties put forward.[190]

This is assuming that the High Court expects such evidence that the government considered alternatives, or relied on its ostensibly superior skills and resources, to make the decision to approve the mine. The recent application of the structured proportionality approach in *Unions NSW v New South Wales* (‘*Unions NSW [No*

[187] See discussion in: Chapter 5(II)(A).
[188] See discussion in: Chapter 5(II)(A).
[189] Jeff King, *Judging Social Rights* (Cambridge University Press, 2012) 235-248.
[190] The plaintiff's argument does not negate the possibility for deference to play a role in determining this question of alternatives. The court may still pay deference when particular disparities in the competing economic evidence arise on matters of normative or empirical uncertainty. For instance, the court may deem it appropriate to defer to the government's (presumably more optimistic) projections of future coal prices over other experts' projections.

2]') supports this assumption.[191] In this case, the plaintiffs, a collection of trade union bodies, claimed that a legislative cap on the amount that trade unions and other third-party campaigners can spend on electoral campaigning breached the political communication limitation.[192] The judges applying a structured proportionality approach held that the necessity stage of this approach required the defendant, New South Wales, to justify implementing this cap rather than possible alternative means of fulfilling its objective (that would be less burdensome on people's freedom of communication about government and political matters).[193] Kiefel CJ, Bell and Keane JJ, in particular, rejected the notion that deference automatically be paid to the defendant's assessment of the merits of this cap in comparison with possible alternatives.[194]

Further, with regard to the Carmichael mine case at hand, if the reason the court is giving deference to the Queensland government's position is a belief in their superior capacity to make such determinations, it logically follows that they not just assume such capacity was employed.[195] It may even be argued to be reckless or an abdication of the judiciary's responsibilities to so blindly pay deference without such evidence, in line with such criticisms of the concept of deference expressed by some observers.[196] The need for such evidence may be heightened by the fact that there is plentiful expert economic evidence that would refute government claims that the Carmichael mine represents an adequate (let alone superior) solution to fulfil the relevant economic objectives.[197] Given this reasoning, and the recent case law on deference pertaining to the necessity stage of the structured proportionality

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[191] (2019) 93 ALJR 166.
[192] Ibid; *Electoral Funding Act 2018* (NSW), ss 29(10). The matter also involved consideration of whether a related provision, which prohibited relevant third-party campaigners from acting with others to circumvent this cap, breached the limitation: s 35.
[193] *Unions NSW v New South Wales* (2019) 93 ALJR 166, 177-178 (Kiefel CJ, Bell and Keane JJ); 191-192 (Nettle J) ('*Unions NSW [No 2]*'). For discussion on the difficulty pinpointing the 'legitimate objective' of the provision in question for the judges in this case (which can broadly be understood as an objective to ensure the integrity of the political process is preserved) see: Murray Wesson, 'Unions NSW v New South Wales [No 2]: Unresolved Issues for the Implied Freedom of Political Communication' (2019) 23 *Media and Arts Law Review* 93, 96-99.
[194] *Unions NSW No 2* (2019) 93 ALJR 166, 177-178. For discussion on the kind of deference that these judges appear to be rejecting see: Chapter 5, n 32.
[195] Henckels, above n 129, 195; Tom Hickman, 'The Substance and Structure of Proportionality' [2008] *Public Law* 694, 698.
[196] See discussion in: Part III(B)(5)(b).
[197] See discussion in: Part V(B)(1).

approach, the plaintiff might be well-placed to refute this challenge based on the judiciary's skills and resources.

(b) Democratic Mandate

The defendant may argue that the Queensland government's position deserves deference because of their superior democratic mandate compared to the judiciary. In terms of democratic approval, the defendant may argue that the Queensland government has the approval of the public who elected it to make such economic decisions, unlike the court. The plaintiff may rebut this along similar lines to those discussed above.[198] The court has democratic approval to apply the ecological limitation (as it forms part of the Constitution, as is presupposed in this chapter) and this includes engaging in the necessity stage of the structured proportionality approach as part of the ecological limitation test.[199]

In terms of democratic accountability, the defendant may argue that the Queensland government is more easily and directly held accountable by the public whose economic interests are primarily those in question. The plaintiff may challenge this argument on similar grounds to those made above regarding government capacity. Namely, it is not self-evident that the Queensland government utilised this institutional advantage when determining how approval of the Carmichael mine compares to other alternatives to fulfil the same objectives (if such a determination has been made at all). Further, this question of democratic accountability is complicated (and its weight diminished) if one considers whose interests are to a large degree at stake in this instance: future generations. These members of the public do not have the ability to hold the Queensland government accountable, as discussed above.[200] On these grounds, the plaintiff may be able to neutralise the 'democratic mandate' justification.

[198] See discussion in: Part III(B)(5)(b).
[199] Ibid.
[200] Ibid.

The plaintiff has a reasonably good argument that it can satisfy the necessity stage of proportionality testing. Namely, they appear well-placed to establish that sufficient alternatives exist to approving the Carmichael mine in order to fulfil the relevant economic objectives, such as creating job opportunities in Queensland and raising revenue, which do not take such a toll on Australia's habitability. While the defendant is unlikely to be able to claim that the Carmichael mine takes less of a toll on this habitability than these alternatives, they may nevertheless still defend the Carmichael mine's economic virtues. The defendant might bolster their argument by claiming that deference should be paid to the Queensland government's position. Several current members of the High Court, however, appear resistant to offering such deference.[201]

C *Balance*

In order to satisfy the 'balance' stage, one must ask whether there is an adequate balance between the importance of the objective in question and the extent of the burden on Australia's habitability (and, by extension, its constitutional system) to achieve this objective. As Kiefel CJ, Bell and Keane JJ state in *Clubb v Edwards; Preston v Avery* with regard to the political communication limitation, the question is not whether the government action 'strikes some ideal balance between competing considerations.' [202] It is whether this action 'can be seen to be irrational in its lack of balance in the pursuit of its object.' [203] With regard to the matter at hand, therefore, the court must consider the importance of the Carmichael mine's economic benefits, the extent of the burden the Carmichael mine places on the Australian constitutional system with its contribution to global temperatures breaching two degrees and conduct a comparison of the two. If the balance struck is considered irrational then the defendant will fail this stage of the structured proportionality assessment.

[201] See discussion in: Part V(B)(2).
[202] (2019) 93 ALJR 448, 470.
[203] Ibid 470.

One cannot determine how the economic benefits and ecological burdens in question compare for the sake of the 'balance' stage with certainty. The 'balance' stage inherently involves value judgments of how competing interests weigh against each other (as the joint judgment in *McCloy v New South Wales* explicitly admit in the context of the political communication limitation) and so a substantial measure of judicial choice is unavoidable.[204] One can, however, hone in on what may be the key areas of contention in making this determination. This is the focus of this section.

The extent of the economic benefits and ecological burdens are interconnected. Generally speaking, the mine reaps greater economic rewards the more coal unearthed and sold to be burned. The more coal unearthed and sold to be burned, however, the greater ecological hazards the Australian constitutional system faces. If the mine ends up an economic failure (for example, during or soon after completion the mine becomes a stranded asset), then the ecological damage done is less likely to be great. If the mine ends up being as successful as its advocates assert (that is, it brings in a large amount of revenue and provides various economic opportunities locally, regionally and nationally over a 60 year lifespan) the ecological damage is more likely to be great. Simply put, how successful the mine is economically, determines how dangerous the mine is ecologically.

For the sake of comparing these intertwined benefits and burdens, I will focus on the scenario where the mine is as successful as its advocates purport – and the consequential impacts this brings to the Australian constitutional system. This is because this vision of an economically successful mine is the basis of the government's approval. It would be nonsensical for the defendant (presumably the Queensland government) to take the position that the mine will not reap the economic benefits claimed. For the sake of caution, however, I will still consider how certain arguments may be impacted if alternative futures are considered where appropriate.

[204] *McCloy* (2015) 257 CLR 178, 195. See discussion in: Chapter 5(II)(B).

Fundamentally, the 'balance' stage demands consideration of whether the benefits of the Carmichael mine are worth the burdens to the Australian constitutional system. The fundamental character of these benefits and burdens must be understood. While the relevant benefits of the Carmichael mine are economic, the relevant burdens take the form of damage done to human life and health in Australia so great that it ultimately threatens the operation of the Australian constitutional system. Are the mine's economic benefits significant enough to justify these dangers?

The European Court of Justice has taken the general stance that environmental interests where human life and health are at stake should trump competing economic interests when conducting proportionality testing.[205] In *Artegodan v Commission*, for instance, the Court held that authorities must 'take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests.'[206] In *Alpharma Inc v Council*, the Court held that 'the protection of human health, may justify adverse consequences, and even substantial adverse consequences, for certain traders' but 'the protection of public health … must take precedence over economic considerations.'[207] Of course, these decisions are being made in a different jurisdictional context and with reference to the criteria in relevant European treaties. Whether the High Court would take a similar stance with regard to domestic proportionality testing in the context of the ecological limitation is uncertain.

The plaintiff may nevertheless argue that there is nothing exceptional about the economic benefits of the Carmichael mine that warrant endangering future generation Australians' lives, health and constitutional system. As discussed above, alternative means seemingly exist to bring as much if not more economic prosperity to the relevant local areas than those of the Carmichael mine's most optimistic

[205] Hannes Veinla, 'Determination of the Level of Environmental Protection and the Proportionality of Environmental Measures in Community Law' (2004) IX *Juridica International* 89, 95-96.
[206] (T-74/00) [2002] ECR II-4945, [183]; Ibid 96; Hannes Veinla, 'Scope and Substance of the Integration Principle in EC Law and Its Application in Estonia' (2008) XV *Juridica International* 4, 7.
[207] (T-70/99) [2002] ECR II-3495, [356]; Veinla, 'Determination', above n 205, 95-96.

projections that would not carry such a human toll.[208] Further, with regard to the number of jobs created, even Adani's economic witness Fahrer conceded during the *Adani Mining* trial that the proposed 1,434 jobs created is 'not many jobs. We can agree on that.'[209]

The defendant might counter that the size of the contribution that the Carmichael mine makes to bringing about runaway climate change is insubstantial. As stated in Part III, the emissions from the mine alone are estimated to equal approximately 0.53%-0.56% of the carbon budget that remains after 2015 if formulated for a 66% chance of avoiding two degrees.[210] It is a value judgment whether one considers this a substantial contribution or not. As discussed in Part III, a solid argument can be made that even 0.53-0.56% of a contribution to something as profoundly destructive to humankind as breaching two degrees should be considered a substantial contribution.[211]

The defendant may assert that the purported burdens on Australians' life, health and constitutional system are not certain enough to eventuate to warrant jeopardising the Carmichael mine. This recalls the discussion above, in Part III, on factual uncertainty.[212] While no one can know the future with certainty and unknowns remain in the field of climate science, it may be reckless to work from the assumption or unwarranted hope that the predictions of large segments of the scientific community based on decades of data are incorrect.[213] Further, arguments regarding uncertainty extend both ways. First, it is unknowable what economic benefits the mine will reap in the future. It is possible that large amounts of Carmichael mine coal will be sold but at low prices or with fewer jobs created than proposed. This may be the worst case scenario: a large amount of carbon emitted for little economic gain. Second, the plaintiff may argue that the factor of uncertainty demonstrates a need to give *more* weight to the potential ecological threats in order to be prudent regarding the risks of unleashing such serious harms.

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[208] See discussion in: Part V(B)(1).
[209] EDO Qld, 'Adani's over-inflated job figures exposed' (Media Release, 15 December 2015) <edoqld.org.au/adani_s_over_inflated_job_figures_exposed>.
[210] See discussion in: Part III(B)(4).
[211] Ibid.
[212] See discussion in: Part III(B)(5).
[213] Ibid.

This is essentially the logic of the precautionary principle.[214] Thus, if uncertainty is to be taken into account in the 'balance' stage of proportionality testing with regard to the Carmichael mine, the possibility is open that this factor would ultimately favour the plaintiff rather than the defendant.[215]

Finally, the plaintiff may argue that one factor that should help tip the balance in their favour is one with regard to reversibility. If the Carmichael mine is allowed, the potential damage to the Australian constitutional system may not only be significant, but irreversible. This is a defining danger of runaway climate change: it presents hazards to the Earth's life-supporting capacities that humans are unlikely to be able to undo.[216] This means that the consequential damage to the Australian constitutional system is also unlikely to be able to undo. The damage done by the burning of the Carmichael mine coal is effectively eternal. In contrast, if the Carmichael mine does not go ahead, there remain a range of other ways of achieving economic prosperity in Australia, Queensland and the relevant local areas. As discussed above, several economists suggest that alternatives exist that would present *better* economic results for those in question than the mine.[217] In short, approval of the Carmichael mine helps place Australia (and other nations) on a certain path which may cause irreversible damage to the Australian constitutional system. Rejection of the mine does not – and other paths remain open for economic pursuits.

[214] See discussion in: Part III(B)(5)(b). For discussion of how the precautionary principle may operate in the context of proportionality see: Veinla, 'Determination', above n 205; Suryapratim Roy and Edwin Woerdman, 'Situating Urgenda v the Netherlands within Comparative Climate Change Litigation' (2016) 34 *Journal of Energy & Natural Resources* 165.
[215] The defendant may also assert that the threat to Australians' life, health and constitutional system may eventuate regardless of whether the Carmichael mine goes ahead and this should be factored into weighing the relevant benefits and burdens. This re-treads the ground of discussion above in: Part XX.
[216] Will Steffen et al, 'Trajectories of the Earth System in the Anthropocene' (2018) 115 *Proceedings of the National Academy of Sciences of the United States of America* 8252.
[217] See discussion in: Part V(B).

Three stages make up Question 3. The plaintiff is unlikely to be able to successfully argue that there is no rational connection between the Carmichael mine's approval and this objective with regard to the 'suitability' stage. They are on stronger footing arguing that viable alternatives exist to achieve this objective which are less burdensome on Australia's habitability with regard to the 'necessity' stage. The plaintiff also has a reasonably good argument at this final stage regarding 'balance.' The defendant might assert that the economic gains from this mine should not be jeopardised out of fear of what might ultimately be considered an insubstantial contribution to climate change which might not bring the dangers to Australian society that is feared. The plaintiff, however, is in a decent position to withstand such assertions and put forward the claim that the Carmichael mine's threats to Australian people's lives, health and their constitutional system are not proportionate to the possible economic gains that the mine might provide. If the plaintiff convinces the court that any of these stages are not satisfied, then Question 3 would be decided in their favour and government approval of the Carmichael mine would be considered in breach of the ecological limitation.

VI CONCLUSION

Overall, a complex series of arguments have to be made to demonstrate that government approval of the Carmichael mine is in breach of the ecological limitation. The plaintiff is reasonably well-placed to draw the causal link required in Question 1 and challenge the 'necessity' and 'balance' of the government's approval of the mine in Question 3. The problem for the plaintiff lies not only in the defendant's possible counter-arguments that largely rest on grounds of deference, but uncertainties in the law regarding how constitutional facts are ascertained (specifically with regard to causation and the standard of proof) and how the concept of deference itself operates. These problems are not to be underestimated. The court's acceptance of a single one of the defendant's possible counter-arguments raised throughout the process of applying the ecological

limitation have the potential to break the chain of arguments that the plaintiff would need to demonstrate to have success in this case. Of course, this is not unique to the ecological limitation. Litigants are regularly placed in a position, in constitutional and other areas of law, where one break in a complex chain of arguments is all that is required for their claim to fail. Nevertheless, this dynamic places the plaintiff in this test case – and in ecological limitation matters generally – in a vulnerable position, despite the overall soundness of their arguments.

In applying the ecological limitation to this specific set of facts, I have been able to provide more details on two key issues related to the doctrinal argument for deriving the ecological limitation. First, it has allowed me to provide a more nuanced explanation of how (a specific example of) government action burdening Australia's habitability may be causally linked with compromising the structural integrity of the Australian constitutional system. As can be seen, drawing such a causal link in practice may be possible, but substantial challenges are likely to emerge when doing so. These challenges stem from the complex operation of climate change (and how one assesses particular governmental contributions to it), the High Court's vague conceptualisation of the Constitution's 'structure' to be protected and, as noted above, the uncertainties surrounding the Court's approach to ascertaining constitutional facts.

Second, applying the ecological limitation in this test case has provided a more detailed exploration of the political decision-making involved for judges in an ecological limitation matter. The possibility that such matters invite too much political decision-making was the foundation for the 'branches of powers' argument against establishing the limitation discussed in Chapter 5.[218] In this chapter, I have demonstrated the ways in which ecological benefits and economic burdens are taken into account and compared in the proportionality stage of analysis with regard to a specific example of government action burdening Australia's habitability. In doing so, I have illustrated the ways in which judges might respond to the political decision-making that is unavoidable in the limitation's application, such as the possibility of them employing deference or gaining guidance from the

[218] See discussion in: Chapter 5(II).

precautionary principle in environmental law. While the investigation of the presence of such decision-making in this test case does not necessarily alter or add to the points raised for and against the 'branches of powers' argument, it deepens one's understanding of the merits of this argument and the concern it is attempting to address.

In the concluding chapter that follows, I offer some final reflections on the ecological limitation. This includes some final reflections on the Carmichael mine test case that help shed light on the potential for deriving and applying this proposed implication in court.

CHAPTER 7: CONCLUSION

I INTRODUCTION

This thesis has been a contribution to both Australian constitutional jurisprudence and climate litigation scholarship. With regard to Australian constitutional jurisprudence, it has provided analysis of whether the ecological limitation has the potential to be derived from the text and structure of the Constitution. In the process, it has offered original insights on the text and structure approach and the High Court's understanding of constitutional implications, particularly in relation to implied structural limitations. With regard to climate litigation scholarship, my exploration of the doctrinal merits of the ecological limitation serves as an inquiry into a potential area of development for future climate litigation matters. This is in the spirit of academic and judicial inquiries occurring across the world to determine what implied or express legal mechanisms exist within respective nations' constitutions to address climate change's various causes and impacts.[1]

In Part II, I summarise the contributions made by this thesis in these areas. These contributions have been doctrinal in nature and are to be understood on these terms. In the remainder of this chapter, however, I venture into discussion beyond doctrine to consider the possible place for the ecological limitation in future scholarship and litigation. In Part III, I outline areas of inquiry, both doctrinal and non-doctrinal, that allow for further exploration of the ecological limitation and the potential for its derivation and application. I conclude this chapter, in Part IV, by placing the doctrinal argument for establishing the limitation presented in this thesis in its wider social and political context. Beyond the merits of the doctrinal argument, a host of factors inform whether judicial recognition of the ecological limitation is likely to be successful and, more generally, is worth pursuing in the short or long term future. These range from considerations of the specific government action in question, the particular membership of the Court at the time of pursuing such recognition and the

[1] See discussion in: Chapter 1(III).

state of Australia's habitability at this time. By considering these diverse factors, a more complete picture can be provided of the contribution made by this thesis.

II CONTRIBUTIONS TO AUSTRALIAN CONSTITUTIONAL LAW AND CLIMATE LITIGATION SCHOLARSHIP

A *Defining and Deriving Constitutional Implications*

One contribution to Australian constitutional jurisprudence made by this thesis relates to the defining of a 'constitutional implication'. Specifically, I articulate what the High Court appears to be referring to when using this term (or derivatives of this term such as reference to what is 'implied from the Constitution') in lieu of the Court providing a definition itself.[2] As discussed in Chapter 2, I define a 'constitutional implication' as an idea conveyed indirectly by the Constitution's words that identifies a feature (or collection of features) of the Australian constitutional system.[3] While other scholars' works on implications help me arrive at this definition (most notably, the works of Jeremy Kirk), no other literature offers a straightforward definition of a 'constitutional implication' as used in Australian constitutional case law.[4] Defining this term provides a helpful foundation for discourse on constitutional implications in the Australian context.[5]

Drawing on this definition, I also contribute to scholarship on the High Court's approach to deriving implications. In Chapter 3, I offer a novel framework for assessing the workings of the text and structure approach by deconstructing what is

[2] For example see: *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 146; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 260; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 274.
[3] See discussion in: Chapter 2(II).
[4] Ibid; Jeremy Kirk, 'Constitutional Implications I: Nature, Legitimacy, Classification, Examples' (2000) 24 *Melbourne University Law Review* 645; Jeremy Kirk, 'Constitutional Implications II: Doctrines of Equality and Democracy' (2001) 25 *Melbourne University Law Review* 24.
[5] For discussion on why this definition is unavoidably broad see: Chapter 2(II).

meant by reference to the Constitution's 'text' and 'structure' in a manner that has not been previously undertaken. Namely, I view 'text' and 'structure' as each representing sets of ideas. The Constitution's 'text' represents the set of ideas conveyed by the Constitution's words. The Constitution's 'structure' represents both those ideas conveyed by the ordering of the Constitution's chapters and provisions and those ideas that make up the Constitution's 'structural elements' – the foundational principles underpinning the Constitution, such as federalism, separation of powers and representative democracy. Deconstructing the terms 'text' and 'structure' to this level allows for a more precise analysis of the ways in which constitutional implications (themselves, a set of ideas – namely, those conveyed indirectly by the Constitution's words) are expected to be derived from these two sources than has been provided in previous scholarship.

I use this understanding of the Constitution's 'text' and 'structure' to frame my critique of the text and structure approach. It is well-accepted in literature on this approach that it provides insufficient guidance for determining the doctrinal merits of a proposed implication.[6] While I generally agree with this conclusion for reasons discussed in Chapter 3, I disagree with some scholars' reasons for reaching it. These scholars criticise judges for claiming to be deriving implications from the Constitution's text and structure when, in fact, deriving them with significant reliance on 'external' sources.[7] As I argue in Chapter 3, judges are not necessarily breaching the text and structure approach when drawing on 'external' sources in their interpretive process.[8] They generally can be understood as using such sources to shed light on the ideas conveyed by this 'text' and 'structure'.[9] The text and structure approach may still be criticised for doing little to delimit the range of 'external' sources judges might wish to employ in this endeavour. The criticism that this use of 'external' sources is not in keeping with the text and structure approach,

[6] See discussion in: Chapters 1(II)(A).
[7] See discussion in: Chapter 3(V). These scholarly works include: James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 562-563; Tom Campbell and Stephen Crilly, 'The Implied Freedom of Political Communication, Twenty Years On' (2011) 30 *University of Queensland Law Journal* 59, 59-60; George Williams and Andrew Lynch, 'The High Court on Constitutional Law: The 2010 Term' (2011) 34 *University of New South Wales Law Journal* 1006, 1026-1027. For discussion on the potential for other scholars to be viewed as holding similar views on the text and structure approach see: Chapter 3, n 84.
[8] See discussion in: Chapter 3(V).
[9] See discussion in: Chapter 3(IV).

however, is unfounded. Thus, in addition to offering a framework for analysing the text and structure approach by my deconstruction of the concepts of 'text' and 'structure', I also provide an original critique of this portion of scholarship on the topic.

Finally, this thesis offers original analysis on a particular kind of constitutional implication. 'Implied structural limitations', as I refer to them, are implications derived to restrain government action threatening the structural integrity of the Australian constitutional system, such as the *Melbourne Corporation*, *Boilermakers* and political communication limitations. Judges and scholars have analysed the workings of such limitations independently, and drawn various comparisons between them, when considering their derivation and application.[10] In this thesis, I build on this work to offer a unique conceptualisation of this kind of implication. That is, I provide a model of the basic anatomy of implied structural limitations.

They can be understood as *mechanisms* that preserve *attributes* of the Constitution's *structural elements*. For example, the political communication limitation is a mechanism that can be utilised to preserve the Australian people's freedom of communication about government and political matters. This freedom is an attribute of the structural element of representative democracy – it must be preserved for this structural element to be preserved. Implied structural limitations, therefore, protect a segment (an 'attribute') of a segment (a 'structural element') of the Constitution's 'structure'. This means that government action does not need to present a threat to the entirety of the Constitution's structure for an implied structural limitation to be deemed 'necessary', with regard to the necessity test.[11] It may be deemed necessary if it protects (one or more attributes of) one or more structural elements.

Further, the High Court generally regards the derivation of an implied structural limitation as 'necessary' if government action compromises such an element.[12] By

[10] For an example of such comparisons in doctrine, see Mason CJ comparing the *Melbourne Corporiaton* and political communication limitations in *Australian Capital Television v Commonwealth* (1992) 177 CLR 106: 133-135. For an example of such comparisons in scholarship, see Catherine Penhallurick also comparing these two limitations: 'Commonwealth Immunity as a Constitutional Implication' (2001) 29 *Federal Law Review* 151.
[11] See discussion in: Chapter 4(II).
[12] Ibid.

'compromise', I mean partially but substantially weaken or render defective a structural element. The government action in question, therefore, does not need to destroy or totally obliterate such an element to trigger the establishment of an implied structural limitation. While this raises difficulties in determining when any given government action goes 'too far' in its weakening of the structural integrity of the Australian constitutional system, the High Court is ostensibly receptive to the need to protect this structural integrity from being incrementally undermined. Thus, an implied structural limitation may be deemed 'necessary', and therefore eligible for establishment, if it restrains government action that compromises (as opposed to destroys) one or more structural elements (as opposed to the entirety of the Constitution's structure).

My construction of this model for implied structural limitations allows one to more aptly assess the potential for deriving a proposed implication in this vein. As will be seen in the following discussion, this construction grounds my assessment of the potential for deriving the ecological limitation.

B The Ecological Limitation

The central contribution of this thesis is this assessment of the doctrinal merits of the ecological limitation. The argument for its derivation rests on the potential for government action burdening Australia's habitability to be deemed the kind of action that fits the model of established implied structural limitations. As discussed in Chapter 4, the Australian constitutional system requires humans for its fundamental operation.[13] This operation must generally occur within the physical site of Australia.[14] It follows, I argue, that Australia must remain habitable, at least to some extent and in some manner, in order for humans to carry out their constitutional roles within this physical site. If Australia's habitability is destroyed, not only one or more structural elements, but the Australian constitutional system in its entirety, is destroyed. Government action burdening Australia's habitability,

[13] Ibid.
[14] For discussion on exceptions to this statement (such as instances where the Constitution has extra-territorial legal force) see: Chapter 4, n 38.

therefore, has the capacity to compromise (if not destroy) one or more structural elements (if not the entirety of this constitutional system). This indicates that an implication restraining such action, the proposed ecological limitation, is eligible for establishment.

Assessing the viability of the argument for establishing this limitation is complicated due to the shortcomings of the text and structure approach.[15] As discussed in Chapter 3, this approach provides judges with ample opportunity to come to substantially different conclusions on the doctrinal merits of the ecological limitation (or any proposed implication) while maintaining that they have adhered to the tenets of this approach. In terms of the potential arguments that might persuade judges to reject the establishment of this limitation, two broad categories of arguments are identified in Chapter 5. The 'intentionalist' argument asserts that the ecological limitation should not be established because it is incompatible with the framers' intentions.[16] The 'branches of power' argument asserts that establishing this limitation would be a threat to the structural integrity of the Australian constitutional system in itself.[17] This is because it invites the judiciary to act beyond its skills, resources and democratic mandate, ostensibly impairing the relationship between the judiciary and legislative and executive branches. While I conclude that the argument for deriving the ecological limitation is capable of withstanding these counter-arguments for reasons discussed in Chapter 5, the open-endedness of the text and structure approach means that such a conclusion cannot be made with certainty.

As noted in Part I, this assessment of the potential for deriving the ecological limitation is a contribution specifically in the areas of constitutional law and climate litigation. It has involved me intervening into a range of fundamental and ongoing debates in Australian constitutional jurisprudence. These include, among others, debates on how judges derive constitutional implications, employ interpretive methods and engage in political decision-making. I have intervened into these existing debates, however, in order to assess how Australian constitutional doctrine

[15] See discussion in: Chapter 3.
[16] See discussion in: Chapter 5(III).
[17] See discussion in: Chapter 5(II).

might develop to take into account new circumstances. These new circumstances are those brought about by climate change. This thesis not only introduces the concept of the ecological limitation into Australian constitutional law discourse. It also introduces the broader notion that climate change must be understood as a threat to this constitutional system. In doing so, it lays the foundation for this limitation to be established in Australian constitutional law and simultaneously offers something new in the field of climate litigation scholarship – a potential area of development for future climate litigation matters. Some scholars have signalled the possibility of drawing together the disparate topics of Australian constitutional law and climate litigation.[18] This thesis is one of the first to do so in a substantive manner.[19]

III FURTHER INQUIRIES REGARDING THE ECOLOGICAL LIMITATION

As the above discussion demonstrates, the core contribution of this thesis is a doctrinal intervention into Australian constitutional law. In this Part, I look beyond this analysis and consider the doctrinal and non-doctrinal areas of inquiry that may be explored to tease out the potential for this limitation to be derived and applied. These areas of inquiry further interrogate the relationship between the Australian ecosystem and constitutional system and examine the ways in which judges' subjective perceptions of climate change may influence their views on the ecological limitation.

[18] For example see: Mary Emily Good, *Legal Recognition of the Human Right to a Healthy Environment as a Tool for Environmental Protection in Australia: Useful, Redundant, or Dangerous?* (PhD, University of Tasmania, 2016) ch 6; Daniel Goldsworthy, 'Re-Stumping Australia's Constitution: A Case for Environmental Recognition' (2017) *Australian Journal of Environmental Law* 53; Jacqueline Peel, Hari Osofsky and Anita Foerster, 'Shaping the 'Next Generation' of Climate Change Litigation in Australia' (2018) 41 *Melbourne University Law Review* 793, 816-817.

[19] The works of Good and Goldsworthy may be considered other substantial contributions in this vein: above n 18. For discussion on the ways in which this thesis is distinguishable from the works of these two scholars see: Chapter 1(II)(B).

A *The Ecological Dimensions of Structural Elements*

An understanding of the potential for deriving and applying the ecological limitation would be aided by further exploration of the ecological needs of specific structural elements. It is apparent that the structural integrity of the Australian constitutional system has an ecological component, but what this looks like in detail with regard to particular structural elements is an area that has received virtually no examination.[20] The primary exception is the works of Adam Webster.[21] He examines how State government action regarding the use of transboundary river water at the expense of another State or States might compromise the structural element of federalism. Other works discuss the ecological foundations for the general principles that find reflection as structural elements in Australian constitutional law (such as Klaus Bosselmann's vision of the rule of law in ecological terms) or the ways in which a society might collapse without such ecological underpinnings (such as Jared Diamond's work that examines the historical links between societal collapse and several ecological and non-ecological factors).[22]

Further, some works examine the ways in which political and legal systems gained their shape, in part, due to the ecological conditions in which they were forged.[23]

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[20] See discussion in: Chapter 4(III)(A).

[21] See primarily: 'Sharing Water from Transboundary Rivers: Limits on State Power' (2016) 44 *Federal Law Review* 25; *Defining Rights, Powers and Limits in Transboundary River Disputes: A Legal Analysis of the River Murray* (PhD thesis, University of Adelaide, 2014). See discussion in: Chapter 1(II)(B).

[22] Klaus Bosselmann, 'The Rule of Law Grounded in the Earth: Ecological Integrity as a Grundnorm' in Laura Westra and Mirian Vilela (eds), *The Earth Charter, Ecological Integrity and Social Movements* (Routledge, 2014); Jared Diamond, *Collapse: How Societies Choose to Fail or Succeed* (Viking Penguin, 2005). For discussion on the causal link between worsening climate change and the deterioration of democracy (which might assist in teasing out the ecological needs for maintaining the structural element of representative democracy) see: David Shearman and Joseph Smith, *The Climate Change Challenge and the Failure of Democracy* (Greenwood Publishing Group, 2007); Peter Burnell, 'Democracy, Democratization and Climate Change: Complex Relationships' (2012) 19 *Democratization* 813, 818; Marcello Di Paola and Dale Jamieson, 'Climate Change and the Challenges to Democracy' (2018) 72 *Miami Law Review* 369.

[23] For example see: William Ophuls and Ara Boyan, *Ecology and the Politics of Scarcity Revisited* (WH Freeman and Company, 1992) 190-191; Jared Diamond, *Guns, Germs and Steel: The Fates of Human Societes* (WW Norton & Company, 1997); Andrew Dobson, 'Political Theory in a Closed World: Reflections on William Ophuls, Liberalism and Abundance' (2013) 22 *Environmental Values* 241. For an example of critique of such works (that may be defined as works related to the concept of 'environmental determinism') see: William Meyer and Dylan Guss, *Neo-Environmental Determinism: Geographical Critiques* (Springer, 2017).

William Ophuls and Ara Boyan, for example, assert that favourable ecological conditions enabled the emergence of the Agricultural and Industrial Revolutions in Britain which, in turn, allowed liberal democratic principles regarding the sanctity of liberty and property, such as those espoused by John Locke, to take root.[24] This is essentially because a society can only believe in the right of the individual to exploit resources freely if there is an abundance of resources to exploit.[25] The works of Webster and these other areas of scholarship could provide some guidance for inquiries made into the ecological foundations that must be maintained for preserving structural elements.

B *Perceptions of Climate Change*

In this thesis, I have undertaken doctrinal analysis of the potential for establishing the ecological limitation, conducted in a rationalist manner. I have strictly observed the High Court's reasoning process with regard to deriving implications, grounded by scientific consensus on climate change and drawing on the fundamental logic that this constitutional system requires some standard of habitability in Australia to be preserved for its own maintenance. The cogency of the argument for deriving the ecological limitation, however, fundamentally rests on the seriousness with which a judge takes the societal threat posed by climate change, if they view it as posing a threat at all. The less seriously they take this threat, the less likely they are to view establishing the ecological limitation as 'logically or practically necessary' (and consider its application warranted in particular matters).[26] In other words, judges' willingness to derive and apply this proposed implication might be substantially influenced by a non-doctrinal or extra-legal variable – their subjective views pertaining to climate change.

[24] Ophuls and Boyan, above n 23, 190-191; John Locke, *Two Treatises of Government* (McMaster University Archive of the History of Economic Thought, first published 1689, 1999 ed).
[25] Ophuls and Boyan, above n 23, 191; Mark Whitehead, *Environmental Transformations: A Geography of the Anthropocene* (Routledge, 2014) 32. Note Dobson's critique of elements of Ophuls' interpretation of John Locke's work: above n 23.
[26] With regard to the application of the ecological limitation, a judge's personal views on the gravity of the climate crisis might have particular influence at the proportionality stage of inquiry when comparing the ecological burdens and countervailing societal benefits of the government action in question.

These subjective views might operate in a particularly insidious or unconscious manner due to the complex ways in which humans relate to nature generally and the operation of climate change specifically. To start with, as some Wild Law literature examines, judges may carry with them certain cultural ideas on humans' relationship to the environment that find reflection in their judgments.[27] This is akin to the ways in which judges may harbour certain cultural ideas on race and gender that can influence their interpretation and application of laws related to such issues.[28] Prometheanism, for example, is an ideological position deeply rooted in Western thought.[29] It champions humans' domination of, and interventions in, nature and discourages notions that humans refrain from such interventions out of respect for nature's 'limits.'[30] A judge's willingness to recognise the foundational logic of the ecological limitation might be hindered if they subscribe to this view, consciously or not. This is because the case for establishing the ecological limitation rests on an appreciation of the ways in which human society (or, more specifically, an aspect of it in Australian society – its constitutional system) is intrinsically linked to nature and must operate within its boundaries.

A judge's broader societal or political views (beyond their particular views on nature) might also unconsciously influence their assessment of the ecological limitation. This is because a connection exists between people's thoughts on climate change – whether it exists, what danger it poses and what should be done in response – and their overarching worldview.[31] Dan Kahan, for example, asserts that

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[27] For example see: Nicole Rogers and Michelle Maloney (eds), *Law as If Earth Really Mattered: The Wild Law Judgment Project* (Routledge, 2017). For discussion on the relationship between Wild Law and this thesis as well as discussion of the ways in which anthropocentrism ostensibly shapes Australian constitutional law judgments see: Chapter 1(II)(B).

[28] For example see: Susan Moloney Smith, 'Diversifying the Judiciary: The Influence of Gender and Race on Judging' (1994) 28 *University of Richmond Law Review* 179; Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Bloomsbury, 2010); Pat Chew and Robert Kelley, 'The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and Judges' Race' (2012) 28 *Harvard Journal on Racial & Ethnic Justice* 91.

[29] John Dryzek, *The Politics of the Earth: Environmental Discourses* (Oxford University Press, 3rd ed, 2013) 53; William Meyer, *The Progressive Environmental Prometheans: Left-Wing Heralds of a 'Good Anthropocene'* (Springer, 2016) 11. This ideological position is named after Prometheus, the figure in Greek mythology who stole fire from Zeus thereby increasing humans' capacity to reshape nature at their whim: Dryzek 52. For discussion on alternative names that have been given to the concept of 'Prometheanism' see: Meyer 11-13.

[30] Dryzek, above n 29, 52-53; Meyer, above n 29, 12.

[31] For example see: Bruce Tranter, 'Political Divisions Over Climate Change and Environmental Issues in Australia' (2011) 20 *Environmental Politics* 78; Clive Hamilton, *Requiem for a Species:*

those with strong 'individualistic' and 'hierarchical' values tend to be less accepting of the scientific consensus on climate change.[32] The former group champions personal initiative while the latter respects those in positions of leadership, making both groups generally protective of commerce and industry in its various forms. This leads them towards dismissing climate science for its widespread acceptance would result in restrictions on these activities.[33] In contrast, people with strong 'egalitarian' and 'communitarian' values generally harbour distrust of commerce and industry.[34] This means that they do not share this barrier to accepting the climate science or embracing restrictions on these activities for the sake of environmental protection.[35] Thus, people across the political spectrum are accepting or rejecting information, not always due to an assessment of its evidence base, but on how it fits their 'preferred vision of a good society'.[36] Judges may be similarly influenced by their broader subjective values. This might inform their willingness to appreciate climate change as a danger to the Australian constitutional system and, in turn, endorse the establishment of the ecological limitation.

While people's embrace of information on various topics beyond climate change are also coloured by their political or social values, the specific attributes of climate change appear to exacerbate this tendency.[37] Climate change is not like other challenges, the workings of which are instinctively easy for the human mind to grasp, take seriously and respond to. The existential threat posed by climate change

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Why We Resist the Truth About Climate Change (Allen and Unwin, 2010) ch 4; Naomi Klein, *This Changes Everything: Capitalism vs. The Climate* (Penguin, 2014) ch 1; Dan Kahan, 'Fixing the Communications Failure' (2010) 463 *Nature* 296; George Marshall, *Don't Even Think About It: Why Our Brains Are Wired to Ignore Climate Change* (Bloomsbury, 2014).

[32] Kahan, 'Fixing', above n 31, 296.

[33] Ibid 296.

[34] Ibid 296.

[35] Ibid 296. This is not to suggest that people with strong 'egalitarian' and 'communitarian' values are immune from taking positions on various issues based on how it fits their existing worldview. Kahan's research shows, for example, that the views of people with such values on the safety of vaccines was influenced by the perception of the values of the expert asserting their safety. Namely, when the expert appeared to share their 'egalitarian' and 'communitarian' values, this group of people were more inclined to believe this information than if the expert appeared to harbour 'individualistic' and 'communitarian' values: 296-297.

[36] Dan Kahan, 'Cultural Evaluations of Risk: 'Values' or 'Blunders'?' (2006) 119 *Harvard Law Review Forum* 166, 171; Klein, above n 31, 32.

[37] Marshall, above n 31, 2-3. For discussion on people's political leanings influence their view on topics other than climate change see: Kahan, 'Fixing', above n 31; Donald Braman et al, 'The Second National Risk and Culture Study: Making Sense of - and Making Progress In - The American Culture War of Fact' (Paper No 211, George Washington University Law Faculty, 2007).

works in a complex, time-delayed and incremental manner that is generally beyond the detection of the naked eye. This provides people with substantial opportunity to gravitate towards an assessment of the seriousness of the climate threat, as well as what should be done in response, that does not challenge their extant views of society (and nature).[38] As George Marshall concludes:

> More than any other issue [climate change] exposes the deepest workings of our minds, and shows our extraordinary and innate talent for seeing only what we want to see and disregarding what we would prefer not to know. … [C]limate change contains none of the clear signals that we require to mobilize our inbuilt sense of threat.[39]

The human mind, therefore, can deftly downplay or compartmentalise concerns regarding climate change in instances where it conflicts with one's societal worldview (even if one nominally accepts the climate science and generally perceives this ecological challenge as a significant threat). In the context of the ecological limitation, this might include judges downplaying or compartmentalising such concerns where it conflicts with their pre-existing view of the 'proper' operation of Australian constitutional law – one which, perhaps, is rooted in discomfort of judges engaging in political decision-making and, likely, has never included an understanding of the Australian constitutional system as fundamentally dependent upon the Australian ecosystem.

Thus, these interconnected cultural, political and psychological factors have the potential to influence a judge's view on climate change. This, in turn, might influence their position on the ecological limitation. While my analysis in this thesis has centred on the rationalist doctrinal argument for deriving this proposed implication, further inquiry is warranted to explore the potential for these non-doctrinal or extra-legal factors to play a significant, but subterranean, role in judges' assessment of this argument.

[38] Marshall, above n 31, 226.
[39] Ibid 2-3.

These areas of inquiry discussed above help build upon the findings in this thesis. The potential operation of this limitation can be more deeply understood by examining the ecological underpinnings of individual structural elements. Analysis of the mental factors shaping judges' views on climate change provides insights on the possibility of deriving and applying this limitation from a new angle. While this thesis offers a doctrinal argument for establishing the ecological limitation, the possible utility of this argument as a legal tool to help address climate change's causes and impacts rests on circumstances beyond the purview of this thesis (and these areas of further inquiry). In the final Part of this chapter, I draw the discussion in this thesis to a close by offering a glimpse at these circumstances and the potential future of the limitation in the courtroom.

IV THE PATH FORWARD FOR THE ECOLOGICAL LIMITATION

My findings in this thesis are that a doctrinally sound argument can be made for the establishment of the ecological limitation. While further inquiries discussed above may help assess this argument's chances for success in court, there are no guarantees that the judiciary would agree with these findings. The argument for establishing this limitation seems viable within the framework of the text and structure approach, but the operation of this approach is vague and contentious. The arguments against its establishment generally appear to hold no greater weight than those similarly raised with regard to other implied structural limitations. It is plausible, however, that the High Court might favour such counter-arguments regardless. While the limitation has doctrinal merit in theory, this does not ensure its establishment by a court in practice.

As seen in Chapter 6 with regard to the Carmichael mine 'test case', significant challenges also exist for a litigant seeking the application of this limitation. The drawing of a causal link between the relevant government action and the

compromising of structural elements is complicated by the High Court's opaque conceptualisation of the Constitution's 'structure' that is to be maintained, uncertainties in law regarding the ascertainment of constitutional facts and the complex manner in which government action contributes to bringing about climate change and its various impacts.[40] Compounding these challenges is the fact that the proportionality analysis required to satisfy the ecological limitation test invites a substantial degree of judicial choice, as is often the case with such analysis, making its outcomes difficult to predict.[41] Thus, even if the High Court is convinced of the argument for deriving the ecological limitation, applying the limitation presents its own obstacles.

The desirability of seeking judicial recognition of the ecological limitation in the short or long term future, however, depends on a confluence of factors. These (social, political, ecological and other) factors go beyond those strictly pertaining to the doctrinal merits of the ecological limitation that have been the subject of this thesis. To start with, this desirability depends on the government action taken. Generally speaking, the more egregious the burdens placed on Australia's habitability by Commonwealth and State legislative and executive powers, the more reason exists for pursuing judicial recognition of this proposed implication. This egregiousness would also likely make it easier for a litigant to derive and apply the limitation in practice. The significance of a government action's burden on Australia's habitability correlates with the ease in which a causal link can be drawn between such action and damage done to this constitutional system. The lack of sufficient countervailing social benefits to justify such action also contributes to a litigant's chances of success at the proportionality stage of the ecological limitation test. In this manner, the particular attributes of the government action at hand help determine the viability of applying the limitation as well as illuminate the need for its derivation in the first place.

[40] See discussion in: Chapter 6(III)(B).
[41] See discussion in: Chapters 3(VI)(C), 4(IV), 5(II)(B) and 6(V).

The contemporary state of Australia's habitability at the time of pursuing an ecological limitation matter also informs the desirability of this pursuit. Climate change's specific impacts on Australian society and constitutional system will become progressively self-evident in time. This will make drawing a causal link between government action burdening Australia's habitability and the degradation of the structural integrity of the Australian constitutional system a less hypothetical endeavour for those involved in ecological limitation matters. In addition, scientific projections of climate change's impacts will continue to become increasingly more sophisticated.[42] This too would progressively help lighten the evidentiary burden for litigants bringing the ecological limitation to court.[43] Through lived-experience or developments in scientific knowledge, climate change's impacts will become clearer and so too will the argument for deriving the limitation and applying it in particular cases.

The contemporary membership of the Court is another factor that must be taken into account. Judges harbour different views on the acceptability of constitutional implications (especially those that are likely to invite a substantial amount of political decision-making) based on their preferred interpretive method.[44] This shapes their individual receptiveness to proposed implications as well as the Court's collective stance with regard to such implications. This is perhaps most prominently exemplified in Australian constitutional law history by the influence of a single member of the Court, Sir Owen Dixon. As discussed in Chapter 2, his presence on the bench was instrumental in ensuring the Court's establishment of various implications, such as the *Melbourne Corporation* and *Boilermakers* limitations, as well as reorienting the Court's position on the act of deriving constitutional implications itself.[45] Further, judges are likely to harbour different views on climate change and appropriate responses to it. As discussed in Part III, this may be rooted

[42] Scientific knowledge on the extent to which specific severe weather events in Australia can be attributed to climate change, for example, has improved substantially in recent years: Andrew King and David Karoly, 'How We Can Link Some Extreme Weather to Climate Change', *Pursuit*, 18 March 2016 <pursuit.unimelb.edu.au/articles/how-wecan-link-some-extreme-weather-to-climate-change>; Committee on Extreme Weather Events and Climate Change Attribution, National Academies of Sciences, *Attribution of Extreme Weather Events in the Context of Climate Change* (National Academies Press, 2016) 1.
[43] See discussion in: Peel, Osofsky and Foerster, above n 18, 811-813.
[44] See discussion in: Chapter 2(III).
[45] See discussion in: Chapter 2(III)(B).

in judges' conscious or unconscious perceptions of this ecological challenge and may, ultimately, influence their position on the ecological limitation.[46] The desirability of seeking the derivation and application of this limitation in court, therefore, partially depends on the views regarding implications and climate change that (one suspects) the members of that court possess.

This desirability also partially depends on the aims of the litigant and the options available to pursue them. Litigation generally comes with financial risks and other burdens on a litigant's time and resources. These burdens may be exacerbated in an ecological limitation matter, where the litigation ventures into untested legal areas and can be expected to attract strong opposition from governmental or corporate defendants.[47] Lobbying, protest and other politically-based avenues for addressing climate change's causes and impacts, however, have their own substantial shortcomings.[48] In other words, all of the options available in pursuit of climate action are limited. Those concerned about climate change, therefore, are in a position where they must employ litigation and political means for climate action in a tactical fashion. Their employment (separately or in tandem) is based on a strategic assessment of their respective strengths and weaknesses in pursuit of specific objectives.[49]

Thus, while litigation on the ecological limitation has drawbacks for those seeking climate action, it also offers unique benefits. With regard to climate litigation broadly, Jacqueline Peel and Hari Osofsky observe from interviews conducted with Australian climate litigation participants that these interviewees generally view the court as 'an independent, less politicized, forum for consideration of climate change issues'.[50] One unnamed interviewee concludes that

[46] See discussion in: Part III(B).
[47] For discussion see: Peel, Osofsky and Foerster, above n 18, 836.
[48] For discussion see: Mark Diesendorf, *Climate Action: A Campaign Manual for Greenhouse Solutions* (UNSW Press, 2009).
[49] For discussion see: Ibid; Danny Noonan, 'Imagining Different Futures through the Courts: A Social Movement Assessment of Existing and Potential New Approaches to Climate Change Litigation in Australia' (2018) 37 *University of Tasmania Law Review* 25; Peel, Osofsky and Foerster, above n 18.
[50] *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015) 262. Also see discussion in: Chapter 5(II)(B).

> on the whole, what judges do that politicians don't do is that they actually listen to both sides of the argument, they weigh it up, the rules of evidence apply, a lot of stuff that's irrelevant gets swept to one side and you tend to get in those cases where hard issues are involved and perhaps a lot of money is involved, you do get some reasonably good experts giving their opinions.[51]

With regard to the ecological limitation specifically, gaining a judicial determination that certain government action is unconstitutional has the benefit of nullifying a government's ability to take such action in a more totalising way than otherwise possible. While gaining such a judicial determination presents challenges, it might nevertheless be worth pursuing given the tendency of Commonwealth and State governments to amend laws and make executive decisions to buffer its environmentally-damaging activities from attack.[52] This includes closing the legal and political avenues through which such attacks may be made (and extinguishing successes gained from them).[53] As part of the Constitution, the ecological limitation would be an exceptional avenue for restraining government action worsening climate change that could not be undercut in this manner.

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[51] Peel and Osofsky, above n 50, 262.

[52] Noonan, above n 49, 40, 66.

[53] For example see: Ben Smee, 'Queensland Parliament Passes Laws to Crack Down on Climate Protesters', *The Guardian*, 24 October 2019 <theguardian.com/australia-news/2019/oct/24/queensland-parliament-passes-laws-to-crack-down-on-climate-protesters> (Queensland passed the *Summary Offences and Other Legislation Amendment Act 2019* to restrict the activities of climate protesters); EDO NSW, 'EDO Offices Face Closure After Federal Funding Cuts' (Media Release, 17 December 2013) (the Commonwealth cut significant amounts of funding from Environmental Defender's Offices. According to Noonan, this was substantially in response to a high-profile success by the plaintiffs against NSW government approval of an open cut coal mine extension in *Bulga Milbrodale Progress Association v Minister for Planning and Infrastructure* [2013] NSWLEC 48: above n 49, 66); Ben Doherty, 'Queensland Extinguishes Native Title over Indigenous Land to Make Way for Adani Coalmine', *The Guardian*, 31 August 2019 <theguardian.com/business/2019/aug/31/queensland-extinguishes-native-title-over-indigenous-land-to-make-way-for-adani-coalmine> (Queensland extinguished native title over Wangan and Jagalingou country to help ensure that the Carmichael mine proceeds); 'Laws Pass to Keep Springvale Coal Mine Open as Labor Raises Fears Over Sydney's Water', *Sydney Morning Herald*, 12 October 2017 <smh.com.au/environment/laws-pass-to-keep-springvale-coal-mine-open-as-labor-raises-fears-over-sydneys-water-20171012-gyzc82.html> (NSW passed the *Environmental Planning and Assessment Amendment (Sydney Drinking Water Catchment) Act 2017* to overrule the Supreme Court's decision in *4nature Incorporated v Centennial Springvale Pty Ltd* (2017) 95 NSWLR 361 and enable the Springvale coal mine to remain open).

Further, the ecological limitation represents the kind of legal avenue that members of the Australian environmental advocacy community are currently seeking. The contemporary 'first generation' of Australian climate litigation is typically conducted under environmental and planning legislation.[54] These matters often focus on highlighting procedural errors made by government decision-makers when granting approvals to emissions-intensive projects.[55] Inspired by climate litigation cases in diverse areas of law internationally, such as the use of negligence law in the Dutch case of *Urgenda Foundation v The State of the Netherlands* and constitutional law in the ongoing United States matter of *Kelsey Cascade Rose Juliana v The United States of America*, a potential 'next generation' of climate litigation is garnering support in Australia.[56] Such matters would focus on holding governmental and corporate actors more directly accountable for climate change's impacts in ways that might have a deeper policy and regulatory impact than those of the 'first generation' and its frequent focus on procedural grounds.[57] They may also serve to use the courtroom as an arena 'of political and cultural authority' in more innovative ways to capture the public imagination.[58] That is, such matters may offer a unique opportunity to publicly highlight and systematically scrutinise the existing power dynamics and societal narratives at play in climate change discourse.[59]

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[54] Peel, Osofsky and Foerster, above n 18, 795, 803.

[55] Ibid 795, 803; Noonan, above n 49, 42. These procedural errors are sometimes unrelated to concerns regarding climate change: Noonan 42. The Mackay Conservation Group challenge to the Carmichael mine, for example, resulted in the Commonwealth Environment Minister rescinding development approval for the mine in acknowledgment that its impact on two endangered species, the yakka skink and the ornamental snake, had not been given due consideration: Federal Court of Australia, 'Statement re NSD33/2015 Mackay Conservation Group v Minister for Environment' (Media Release, 19 August 2015).

[56] Hague District Court, ECLI:NL:RBDHA:2015:7196, C/09/456689/HA ZA 13-1396, 24 June 2015; 217 F Supp 3d 1224 (D Or, 2016); Peel, Osofsky and Foerster, above n 18, 805. Also see discussion in: Chapter 1(III); Justice Brian Preston, 'Mapping Climate Change Litigation' (2018) 92 *Australian Law Journal* 774.

[57] Peel, Osofsky and Foerster, above n 18, 803.

[58] Nicole Rogers, 'Climate Change Litigation and the Awfulness of Lawfulness' (2013) 38 *Alternative Law Journal* 20, 20; Ibid 793, 830; Noonan, above n 49, 56.

[59] Rogers, above n 58, 20. As Noonan notes, this ability to challenge societal narratives relating to climate change disputes is often lacking in 'first generation' matters: above n 49, 42-44. This is substantively due to the framing of the issue in 'first generation' matters as merely being 'the decision-maker's inherently fixable procedural or legal errors that has resulted in an injustice': 43. This is in contrast to the messaging from 'campaign groups outside the courtroom … that the development's very approval constitutes an injustice': 43.

Litigation on the ecological limitation aptly fits this model of 'next generation' matters. In terms of a deeper policy and regulatory impact, its establishment would ensure that political branches give due consideration to maintaining Australia's habitability when developing relevant policies and regulations, alongside other assessments of their constitutionality. In terms of capturing the public imagination, judicial consideration of the ecological limitation may be particularly valuable in this regard, whether or not the plaintiff in this matter succeeds. The Constitution is the foundational law of this nation. It ties past, present and future generations of Australians together and acts as the fundamental source of Australian governmental power.[60] Interrogations of the extent to which this document permits government action worsening climate change offers a unique opportunity to bring to public attention questions of intergenerational responsibility and the proper use of governmental power in relation to climate change. While this 'next generation' of matters might present challenges not faced by those pursuing litigation under environmental and planning legislation, an ecological limitation matter appears to have greater rewards in the event of success and compensatory benefits in the event of failure.[61]

Thus, the desirability of pursuing the ecological limitation in court depends on a host of factors. The contribution to knowledge made by this thesis is its interrogation of whether a doctrinal argument can be made for deriving the ecological limitation in the event that those factors emerge. It is possible that they have emerged already. One might conclude that government action exists, such as executive approval of the Carmichael mine, that is egregious enough or otherwise lends itself to litigation on this proposed implication. One might conclude that the alternative options for combatting such action have shown themselves to be insufficient.[62] While the chances for success in an ecological limitation matter are likely to improve in the future when climate impacts will be better understood, the time-sensitive nature of the climate crisis must be taken into account. The fact that

[60] See discussion in: Chapters 4(III)(B) and 6(III)(B)(1).
[61] For discussion on how the challenges compare for litigants pursuing 'first generation' as opposed to 'next generation' litigation see: Peel, Osofsky and Foerster, above n 18 (see in particular: 828-836); Noonan, above n 49 (see in particular: 37, 50).
[62] For discussion on the political campaigns (and climate litigation in areas outside of constitutional law) that have been employed in opposition to the Carmichael mine see: Chapter 6(I).

time is running out to avoid generating runaway climate change, if it has not substantially lapsed already, means that the most effective climate action (be it in the realm of climate litigation or otherwise) is that which is taken now.[63] While these circumstances cannot be considered optimal, they might nevertheless be right for judicial consideration of the ecological limitation.

The story of a constitutional implication's establishment is rarely straightforward. The political communication limitation, for example, first gained some form of judicial consideration from Murphy J in the late 1970s;[64] gained majority support from the High Court in the early 1990s;[65] attracted significant criticism from diverse quarters almost immediately after this majority support was attained;[66] ultimately gained the High Court's unanimous support in *Lange v Australian Broadcasting Corporation* despite this criticism;[67] but continues to remain the subject of debate on its formulation and application two decades later in cases such as *McCloy v New South Wales*.[68] The *Boilermakers* limitation, for another example, was built on the findings in previous separation of powers cases such as *New South Wales v Commonwealth* ('*Wheat Case*') in 1915;[69] gained judicial support in the eponymous 1956 case;[70] was widely criticised in subsequent decades with its 'eventual overruling' seeming 'only a question of time' by George Winterton in 1983;[71] only to survive such predictions and find renewed support in more recent years.[72] These implications secured a place in Australian constitutional law in the face of substantial criticism and took the time, work and experimentation of judges, lawyers, scholars and countless other actors.

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[63] See discussion in: Chapter 6(III); Noonan, above n 49, 35-36.
[64] *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 88; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 670.
[65] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.
[66] See discussion in: Chapter 2(IV).
[67] (1997) 189 CLR 520. See discussion in: Chapter 2(V).
[68] (2015) 257 CLR 178. See discussion in: Chapter 4(V).
[69] 20 CLR 54.
[70] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers*').
[71] *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983) 63.
[72] Fiona Wheeler, 'The Boilermakers Case' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 160, 172-174.

The stories of constitutional implications' establishment need to start somewhere. This thesis is offered as a starting point for a discussion on the derivation of the ecological limitation. Taking seriously the need to maintain the Australian constitutional system for future generations means taking seriously the threat climate change poses to it. The High Court's derivation of the political communication, *Melbourne Corporation* and other implied structural limitations positions the Constitution as, in essence, a self-preserving document. The Constitution does not permit Australian governments to take action that tarnishes the Constitution itself. If it is accepted that climate change is (among other things) a constitutional problem, then it is important to interrogate the potential for constitutional solutions to it in the spirit of this self-preservation. The ecological limitation developed in this thesis has been proposed as such a solution.

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