Fact and Law

Stephen Gageler*

I

The essential elements of the decision-making process of a court are well understood and can be simply stated. The court finds the facts. The court ascertains the law. The court applies the law to the facts to decide the case. The distinction between finding the facts and ascertaining the law corresponds to the distinction in a common law court between the traditional roles of jury and judge. The court – traditionally the jury – finds the facts on the basis of evidence. The court – always the judge – ascertains the law with the benefit of argument. Ascertaining the law is a process of induction from one, or a combination, of two sources: the constitutional or statutory text and the previously decided cases.

That distinction between finding the facts and ascertaining the law, together with that description of the process of ascertaining the law, works well enough for most purposes in most cases.

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But it can become blurred where the law to be ascertained is not clear or is not immutable. The principles of interpretation or precedent that govern the process of induction may in some courts and in some cases leave room for choice as to the meaning to be inferred from the constitutional or statutory text or as to the rule to be drawn from the previously decided cases. In some courts and in some cases, the validity of the statute or the continuing applicability of the rule may itself be in issue.

Questions can arise in such cases concerning the extent to which the court, for the purpose of ascertaining the law, is entitled or required to have regard to facts. To what extent can facts legitimately bear upon the ascertainment of the law? And to the extent that there are facts that legitimately bear on the ascertainment of the law, what is the nature of those facts and how are those facts themselves legitimately to be ascertained? These questions have to date been little explored in Australian law.

II

The questions can be illustrated in their application to the development of the common law by contrasting two decisions of the High Court concerning liability in negligence to a motorist or a pedestrian who suffers personal injury while using a highway. The first was *State Government Insurance Commission v Trigwell*.[1] The second was *Brodie v Singleton Shire Council*.[2]

In *Trigwell* the High Court was concerned with the ancient common law rule that the owner of land comes under no general duty to take care to prevent an animal from straying onto a highway. The High Court refused to disturb that rule. Justice Mason expressed the view of the majority when he said:[3]

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1 (1979) 142 CLR 617.
2 (2001) 206 CLR 512.
3 (1979) 142 CLR 617, 633.

> I do not doubt that there are some cases in which an ultimate court of appeal can and should vary or modify what has been thought to be a settled rule or principle of the common law on the ground that it is ill-adapted to modern circumstances. If it should emerge that a specific common law rule was based on the existence of particular conditions or circumstances, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the court may be justified in moulding the rule to meet the new conditions and circumstances. But there are very powerful reasons why the court should be reluctant to engage in such an exercise. The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The court does not, and cannot, carry out investigations or inquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the court call for, and examine, submissions from groups and individuals who may be vitally interested in the making of changes to the law. In short, the court cannot, and does not, engage in the wide-ranging inquiries and assessments which are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature.

Turning to the particular common law rule in question, Mason J said:[4]

> It is beyond question that the conditions which brought the rule into existence have changed markedly. But it seems to me that in the division between the legislative and the judicial functions it is appropriately the responsibility of Parliament to decide whether the rule should be replaced and, if so, by what it should be replaced. The determination of that issue requires an assessment and an adjustment of the competing interests of motorists and landowners; it might even result in one rule for urban areas and another for rural areas. It is a complicated task, not one which the court is equipped to undertake.

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[4] (1979) 142 CLR 617, 634.

In *Brodie* the High Court was concerned with the similarly ancient, although less well defined, common law rule that a public authority with responsibility for the management of a highway comes under no general duty to take care to repair that highway. Chief Justice Gleeson quoted at length from the judgment of Mason J in *Trigwell*.[5] He said that the considerations identified by Mason J applied with at least equal force to the case before him.[6] Indeed, he said, they applied with stronger force.[7] The Law Reform Commission of New South Wales had examined the common law rule in issue and recommended its partial abolition. The Law Reform Commission had said that, while it believed in principle that the common law rule should be abolished, the financial consequences would need to be investigated first. Yet the Parliament of New South Wales had chosen not to act on the recommendation of the Law Reform Commission and had chosen instead to incorporate the common law rule by reference in a statutory immunity it conferred on the Roads and Traffic Authority.[8] The common law rule should not in those circumstances be abolished by judicial fiat. But that was a dissenting view. The decision of the majority was that the common law rule in issue should be abolished and that in its place it should be stated that the common law of Australia imposes on a public authority with responsibility for the management of a highway a general duty to take reasonable care that any action or failure to take action does not create a foreseeable risk of harm to users of that highway exercising reasonable care for their own safety. The majority emphasised that '[i]n developing the common law, judges must necessarily look to the present and to the future as well as to the past' and that a court that is not bound by earlier decisions of courts above it in the hierarchy 'may undertake its own inquiry into the common law' and 'may depart from earlier decisions'.[9]

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5 (2001) 206 CLR 512, [39]-[41].

6 (2001) 206 CLR 512, [42].

7 (2001) 206 CLR 512, [42].

8 (2001) 206 CLR 512, [44]-[47].

9 (2001) 206 CLR 512, [108], quoting *Perre v Apand Pty Ltd* (1999) 198 CLR 180, [92] (McHugh J) and *Giannarelli v Wraith* (1988) 165 CLR 543, 584 (Brennan J).

What was the inquiry that the majority in *Brodie* undertook into the common law? To what precisely was it looking when it chose to look to the present and to the future as well as to the past? Much of the reasoning of the majority was focussed on the internal coherence of legal concepts: on the removal of what was seen as an ill-defined, unprincipled and anomalous exception to what had come to be the ordinary operation of the law of negligence. Much was also made of the abandonment of the common law rule in issue in other countries. But the reasoning was not confined to looking at patterns of legal thought. History was examined to show that the reasons underlying the rule had never really existed in Australia.[10] And under the heading "The 'highway rule' today", three members of the majority said that circumstances in Australia had in any event changed in that 'the assumption by central governments of significant financial responsibility for road construction and maintenance [had] deprived of some of its force the argument that the 'immunity' always is necessary because all local authorities require it for the protection of the pockets of their ratepayers'.[11] In support of that broad proposition of contemporary political and economic fact, reference was made to Commonwealth legislation providing for the funding of roads,[12] to the observations of the author of a respected legal text[13] and to the evidence recounted in a judgment of another court in another case.[14] It was also said that the ill-defined nature of the common law rule had spawned a 'legion' of cases involving 'expenditure of public moneys in defending struggles over elusive, abstract distinctions with no root in principle and which are foreign to the merits of the litigation'.[15] Although three States had been allowed to file written submissions, their argument that abolition of the common law rule was likely to result in significant disruptive redistribution of risk and resources within the Australian

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[10] (2001) 206 CLR 512, [100]-[101] (Gaudron, McHugh and Gummow JJ), [227] (Kirby J).
[11] (2001) 206 CLR 512, [65].
[12] (2001) 206 CLR 512, [65].
[13] (2001) 206 CLR 512, [65].
[14] (2001) 206 CLR 512, [73].
[15] (2001) 206 CLR 512, [80], [104].

economy[16] was addressed only in very broad terms by one member of the majority.[17] No reference was made in the joint judgment to any factual analysis undertaken by the law reform agencies of several Australian States that had considered the common law rule [18] and no reference was made to the absence of analysis of financial consequences that had been noted by the Law Reform Commission of New South Wales.

What can therefore be seen in *Brodie*, in contradistinction to *Trigwell*, was a willingness to undertake a fairly broad inquiry as to whether a particular common law rule was well-founded historically and as to whether that rule was working well in contemporary political and economic conditions. But what can also be seen in *Brodie* was a reluctance to be seen to stray from strictly legal sources. To the extent that broad conclusions were drawn about contemporary political and economic conditions, those conclusions were expressed to be based on inferences drawn from legislation and from the circumstances of previously decided cases.

The willingness of the High Court to reconsider the historical foundations and contemporary operation of a common law rule doubtless reached its highest point with the abrogation of the doctrine of terra nullius in *Mabo v Queensland [No 2]*.[19] Delivering the leading judgment, Brennan J pointed out that the common law rule was based on a theory that depended on 'the discriminatory denigration of indigenous inhabitants, their social organisation and customs'.[20] He cited no sources – nor would any be expected – for going on to state the proposition that the basis of the theory was 'false in fact' and 'unacceptable in our society'[21] having regard to 'the contemporary values of the Australian people'.[22] In *Wik Peoples v Queensland*,[23]

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16 (2001) 206 CLR 512, 524.
17 (2001) 206 CLR 512, [224].
18 (2001) 206 CLR 512, [225] fn 451.
19 (1992) 175 CLR 1.
20 (1992) 175 CLR 1, 40.
21 (1992) 175 CLR 1, 40.
22 (1992) 175 CLR 1, 42.
23 (1996) 187 CLR 1.

Gummow J explained *Mabo* not as involving 'the rejection of a particular common law rule by reason of its basis in particular conditions or circumstances which, whilst once compelling, since have become ill adapted to modern circumstances' but rather as 'holding that the long understood refusal in Australia to accommodate within the common law concepts of native title rested upon past assumptions of historical fact, now shown to have been false'.[24] Again he cited no sources – nor would any be expected – for the proposition that those 'past assumptions of historical fact' were 'now shown to have been false.' Indeed, he went on to comment that '[t]here remains lacking, at least in Australia, any established taxonomy to regulate such uses of history in the formulation of legal norms'.[25] The truth is that the relevant "fact" was not shown in *Mabo v Queensland [No 2]* to be "false" by the application of specific knowledge of primary fact but by the accumulation of understanding that informed the making at the highest and broadest level of a profound moral judgment.

As *Brodie* well-enough illustrates, to the extent to which it has overtly taken more specific knowledge into account in the development of the common law, the High Court has seldom strayed very far from sources that might be regarded as legal or that could be characterised as falling within the scope of judicial knowledge. By "judicial knowledge" I mean knowledge of a kind that the rules of evidence allow a court to take into account without proof either because it is 'common knowledge in the locality in which [a] proceeding is being held or generally' or because it is 'capable of verification by reference to a document the authority of which cannot reasonably be questioned'.[26] By "legal" sources, I mean to encompass legislation, previously decided cases and legal writings in texts, journals and on occasions the reports of law reform agencies. Of course, few of those sources are ever

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[24] (1996) 187 CLR 1, 180.

[25] (1996) 187 CLR 1, 182.

[26] *Evidence Act 1995* (Cth) s 144; *Evidence Act 1995* (NSW) s 144. *See Gattellaro v Westpac Banking Corporation* (2004) 204 ALR 258, [15]-[18] (Gleeson CJ, McHugh, Hayne and Heydon JJ).

strictly legal in their content. Citation to a legal text or a legal journal or to the judgment of an appellate court in another jurisdiction almost always brings with it, or has underlying it, sociological or economic observations or conclusions about which reasonable persons may find considerable room for debate. Even making a generalisation from the facts of one or more previously decided cases necessarily involves taking a view of the context that allows their facts to be treated for relevant purposes as typical or illustrative.

Much less reticence has been shown in seeking to gain knowledge from a range of sources to assist in the interpretation of statutes. Modern interpretation statutes sometimes specifically authorise recourse to a variety of extrinsic materials either to resolve ambiguity or to confirm the ordinary meaning of statutory language.[27] Beyond that, the High Court has said that it is now settled that the modern approach to statutory interpretation 'insists that context be considered' and 'uses 'context' in its widest sense to include such things as the state of the law and the mischief which, by legitimate means ... one may discern the statute was intended to remedy'.[28] Consideration of the mischief can involve extensive consideration of the context in which statute was intended to operate. Even seeking to determine the ordinary meaning of a statutory term can in an unusual case involve wide-ranging factual considerations. In *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*,[29] extensive reference was made to a range of works of history, philosophy and anthropology in grappling with the question of the essential characteristics of a "religion".

In the exercise of statutory and other judicial discretions, guidance has also been found in contemporary non-legal sources. In formulating the approach to be taken in the exercise of *parens patriae* jurisdiction to the difficult question

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[27] For example *Acts Interpretation Act 1901* (Cth) s 15AB.

[28] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408.

[29] (1983) 154 CLR 120.

of authorizing the sterilisation of an intellectually disabled minor, the High Court, in *Marion's Case*,[30] drew extensively on works of ethics, psychology and medicine as well as the reports of law reform agencies and parliamentary committees.[31] The Family Court has also made use of social science research in informing itself about child custody matters.[32] Other courts have made similar use of such research in sentencing.[33]

There is also a smattering of cases in which the High Court, along with other courts, can be seen to have chosen to consider relatively specific facts of a medical, social or economic nature in the development or formulation of a legal rule and to have been prepared to infer those facts from a range of sources beyond anything that might be regarded either as legal or as within the scope of judicial knowledge. In *Jaensch v Coffey*,[34] for example, reference was made to medical journals and reports in considering whether a duty of care should lie to avoid the infliction of psychiatric harm. On occasions, particularly but not exclusively in relation to questions of practice and procedure, judges have drawn openly on their own professional recollections and experiences.[35]

Whether or not statistics were appropriate to be deployed in the formulation of a common law duty of care gave rise to an interesting debate between two members of the High Court in *Woods v Multi-Sport Holdings Pty Ltd.*[36] I will turn to that

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30 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218.

31 (1992) 175 CLR 218, 252, 259 (Mason CJ, Dawson, Toohey and Gaudron JJ), 272 (Brennan J), 320-1 (McHugh J).

32 Graham Mullane 'Evidence of social science research: Law, practice, and options in the Family Court of Australia' (1998) 72 *Australian Law Journal* 434.

33 For example *Veen v The Queen (No 2)* (1988) 164 CLR 465, 473 (Mason CJ, Brennan, Dawson and Toohey JJ); *R v Hallocoglu* (1992) 29 NSWLR 67, 73-4 (Hunt CJ at CL); *R v Henry* (1999) 46 NSWLR 346, [79]-[110] (Spigelman CJ).

34 (1984) 155 CLR 549.

35 For example *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, [134] (Kirby J).

36 (2002) 208 CLR 460.

debate later. It is sufficient at this point to note that the debate, which occurred only in 2002, marked what appears to have been the first time that the legitimacy and utility of a court taking facts of that nature into account in the development of the common law of Australia was openly subjected to judicial analysis.

III

Much more attention has been paid – judicially and academically – to what have been termed "constitutional facts". 'Highly inconvenient as it may seem', Dixon CJ once pointed out, the constitutional validity of an exercise of governmental power 'must sometimes depend on facts, facts which somehow must be ascertained by the court responsible for deciding [that] validity'.[37] Questions of fact arise, for example: in determining for the purposes of the defence power whether a Commonwealth law is reasonably appropriate and adapted to protecting against some external or internal threat;[38] in determining for the purposes of the external affairs power whether a Commonwealth law is reasonably capable of being considered to be appropriate and adapted to the implementation of an international obligation;[39] in determining for the purposes of the guarantee in s 92 of the Constitution that 'trade, commerce and intercourse among the States ... shall be absolutely free' whether a State law that places a discriminatory burden on an out-of-State producer is reasonably necessary to achieve some competitively neutral objective;[40] and in determining for the purpose of the implied freedom of political communication whether a law has the effect of preventing or controlling communication on a political

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37 *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280, 292.

38 For example *Thomas v Mowbray* (2007) 233 CLR 307.

39 The test stated in *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

40 The test stated in *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, [101]-[103] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

or governmental matter in a manner that is not compatible with the system of representative government enshrined in the Constitution.[41]

The view that commended itself to the High Court in *Australian Communist Party v Commonwealth*[42] was that a question of fact relevant to constitutional validity must be determined strictly in accordance with the rules of evidence. The rules of evidence allowed for the taking of judicial notice of facts but the scope of inquiry by a court into questions of fact permitted by judicial notice was limited to that which 'accepted writings', 'standard works' and 'serious studies and inquiries' revealed to be within 'the common knowledge of educated men'.[43]

That view of constitutional facts as being governed by the rules of evidence was not to prevail. It was strained to the point of breaking by the argument presented to the High Court a decade later in *Breen v Sneddon*.[44] A State law imposed a tax on the interstate movement of vehicles. That State law had been held by the High Court just two years earlier in *Commonwealth Freighters Pty Ltd v Sneddon*[45] to be compatible with s 92 of the Constitution on the basis that the charge imposed by the law was proportionately related to the cost of maintaining the roads used by those vehicles. In concluding in *Commonwealth Freighters Pty Ltd v Sneddon* that the charge imposed by the law was proportionately related to the cost of maintaining the relevant roads, Dixon CJ had acknowledged the relative paucity of evidentiary material before the Court and had described the task of the Court as being nevertheless to ascertain the facts relevant to constitutional validity 'as best it can'.[46] The

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41 The test stated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567-8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) as reformulated in *Coleman v Power* (2004) 220 CLR 1, [95]-[96] (McHugh J), [198] (Gummow and Hayne JJ), [211] (Kirby J).

42 (1951) 83 CLR 1.

43 (1951) 83 CLR 1, 196 (Dixon J).

44 (1961) 106 CLR 406.

45 (1959) 102 CLR 280.

46 (1959) 102 CLR 280, 292.

appellants in *Breen v Sneddon* now wanted to lead detailed evidence before a magistrate for the purpose of showing that the same charge imposed by the same State law in truth was not proportionately related to the cost of maintaining the roads. The appellants said that it was simply a matter of there being a different case between different parties to be resolved by a court on findings of fact to be made by reference to the admissible evidence presented by those parties. Not so, said the High Court. The argument overlooked a fundamental and obvious distinction. As explained by Dixon CJ:[47]

> It is the distinction between, on the one hand, ordinary questions of fact which arise between the parties because one asserts and the other denies that events have occurred bringing one of them within some criterion of liability or excuse set up by the law and, on the other hand, matters of fact upon which under our peculiar federal system the constitutional validity of some general law may depend. Matters of the latter description cannot and do not form issues between parties to be tried like the former questions. They simply involve information which the Court should have in order to judge properly of the validity of this or that statute or of this or that application by the Executive Government of State or Commonwealth of some power or authority it asserts.

The High Court had decided the question of the validity of the charge in *Commonwealth Freighters Pty Ltd v Sneddon* on information it had considered in that case to be sufficient for that purpose and that was that: the answer to a question of constitutional validity cannot be made to turn on the particular evidence that a particular party might choose to lead in a particular case.

The distinction thus drawn in *Breen v Sneddon* was between 'ordinary questions of fact', which arise between parties and which are to be tried and determined between parties in accordance with the ordinary rules of evidence, and 'constitutional' questions of fact, which 'cannot and do not form issues between parties to be tried like the former questions'

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[47] (1961) 106 CLR 406, 411.

and which cannot be made to depend on the course of private litigation. The distinction was repeated with emphasis by Brennan J in *Gerhardy v Brown*[48] and more recently by Heydon J in *Thomas v Mowbray*.[49]

The same distinction had been drawn much earlier in the United States. It is there generally seen to have had its origin in the innovative argument presented to the Supreme Court in 1908 by Louis Brandeis in *Muller v Oregon*.[50] At issue was the constitutional validity of a State law limiting working hours for women. The case fell to be argued in the wake of the Supreme Courts now infamous decision just three years earlier in *Lochner v New York*,[51] which had invalidated a State law limiting working hours for male bakers but which had left open the possibility that a particular legislative restriction on working hours might be justified on the grounds of health. The argument presented by Brandeis accepted the precedent of *Lochner v New York* but sought to exploit the possibility it had left open. In his written brief of 110 pages, Brandeis spent just two pages on legal argument. The remainder he devoted to the compilation of analogous statutes, findings of legislative committees, reports of bureaus and social science research all designed to demonstrate a rational basis for considering that a general limitation on the working hours of women could indeed be justified on the grounds of health. The tactic was spectacularly successful. The factual material so presented as part of the argument and outside the formal record of the court was seized upon by the Supreme Court to justify the existence of what was said to be 'a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil.'[52] It was said that 'when a question of fact is debated and debatable, and the extent to which a

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48 (1985) 159 CLR 70, 141-2.
49 (2007) 233 CLR 307, [613]-[649].
50 (1908) 208 US 412.
51 (1905) 198 US 45.
52 (1908) 208 US 412, 420.

special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration' and that the Supreme Court was able to take 'judicial cognizance of all matters of general knowledge'.[53]

By the 1920s it had become common in the United States to distinguish "constitutional facts" from "jury facts" and by the 1930s the "Brandeis brief" had become a standard feature of constitutional litigation.[54] A high point was reached in 1954, when the Supreme Court identified material drawn from a Brandeis brief presented by the National Association for the Advancement of Colored People as one of the bases for holding in its monumental decision in *Brown v Board of Education*[55] that 'segregation of children in public schools solely on the basis of race ... deprive[d] the children of the minority group of equal educational opportunities'[56] and thereby violated the "equal protection" clause of the Fourteenth Amendment. In "footnote 11", the Supreme Court referred to the works of a number of social scientists as 'modern authority' that supported the correctness of the finding of a lower court in another case that racial segregation had 'a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'[57]

The High Court's recognition in *Breen v Sneddon* of the distinction between "ordinary" questions of fact and "constitutional" questions of fact has not to date brought with it the recognition of any vehicle for the investigation of constitutional questions of fact equivalent to the Brandeis brief. In *Uebergang v Australian Wheat Board,*[58] the High Court

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53 (1908) 208 US 412, 420-1.

54 Note 'The Presentation of Facts Underlying the Constitutionality of Statutes' (1936) 49 *Harvard Law Review* 631.

55 (1954) 347 US 483.

56 (1954) 347 US 483, 493.

57 (1954) 347 US 483, 494.

58 (1980) 145 CLR 266.

answered in the negative a question formally reserved as to whether an issue of fact relevant to constitutional validity was to be determined solely upon material of which judicial notice could be taken.[59] The majority appears to have contemplated that relevant material would be adduced in evidence by the parties in the usual way.[60] In *Airservices Australia v Canadian Airlines International Ltd*,[61] complex questions of fact relevant to constitutional validity were determined by the Federal Court on remitter from the High Court on the basis of expert evidence. In more recent cases, primary factual material considered relevant by one party or another has generally been placed before the High Court by agreement of the parties.[62] Analogous statutes and reports of parliamentary committees and other parliamentary proceedings have simply been produced without objection in the course of argument. The High Court has undertaken its own, often very extensive, historical research.

However, there have been occasional statements by individual members of the High Court in which a more expansive approach to constitutional facts has been contemplated. In *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales*,[63] Jacobs J said:[64]

> The court reaches the necessary conclusions of fact largely on the basis of its knowledge of the society of which it is a part. The supplementing of that knowledge is a process which does not readily lend itself to the normal procedures for the reception of evidence. ... I only wish to state my view that parties should not feel bound to channel the information which they or any of them desire to have before the court into a pleading or statement of agreed facts or stated case (as was

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[59] (1980) 145 CLR 266, 329 (Question 2).

[60] (1980) 145 CLR 266, 302 (Gibbs and Wilson JJ), 307 (Stephen and Mason JJ).

[61] (2000) 202 CLR 133.

[62] Either in the form of a Case Stated (eg *Telstra v Commonwealth* (2008) 234 CLR 210) or in the form of a Special Case (eg *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418).

[63] (1975) 134 CLR 559.

[64] (1975) 134 CLR 559, 622.

> done in the instant cases). All material relevant (in a general, not a technical, sense) to the matter under consideration may be brought to the court's attention, though it is obviously desirable that it should be previously exchanged between the parties.

In *Gerhardy v Brown*, Brennan J went further. He said:[65]

> The court may, of course, invite and receive assistance from the parties to ascertain the statutory facts, but it is free also to inform itself from other sources. Perhaps those sources should be public or authoritative, and perhaps the parties should be at liberty to supplement or controvert any factual material on which the court may propose to rely, but these matters of procedure can await consideration on another day. The court must ascertain the statutory facts 'as best it can' and it is difficult and undesirable to impose an *a priori* restraint on the performance of that duty.

In *Thomas v Mowbray* Heydon J went yet further still. He indicated that he saw no reason why the sources to which a court might have resort should be limited to those that were 'public or authoritative'.[66] He said that in determining constitutional facts a court was neither limited to the facts that had been agreed between the parties nor bound by conditions that the parties had agreed as to the use to which could be made of those facts.[67] On the basis of what he described only in the broadest of terms as 'items of information learned ... over the past years from news broadcasts, the print media and public discussion',[68] his Honour was prepared to infer the correctness of a number of factual propositions that had been advanced by one party orally in the course of argument for the purpose of demonstrating the particular vulnerability of Australia to terrorist attack.[69] He went on to conclude on the basis of those propositions that it was to be inferred 'that there are constitutional facts favouring the conclusion that Australia

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[65] (1985) 159 CLR 70, 142.
[66] (2007) 233 CLR 307, [639].
[67] (2007) 233 CLR 307, [645].
[68] (2007) 233 CLR 307, [646].
[69] (2007) 233 CLR 307, [647].

faced a threat sufficient to support a characterisation of the impugned legislation as falling within the defence power'.[70]

IV

An important article published in 1942 by Professor Kenneth Davis[71] brought a new perspective to the perception of constitutional facts in the United States. Constitutional facts, Professor Davis suggested, did not fall within some unique category but were part of a larger genus. The distinction he drew was between what he called "adjudicative facts" – corresponding to what Dixon CJ would later describe in *Breen v Sneddon* as 'ordinary questions of fact which arise between the parties' – and "legislative facts" of which constitutional facts were just one example. He explained:[72]

> When [a court] finds facts concerning immediate parties – what the parties did, what the circumstances were, what the background conditions were – the [court] is performing an adjudicative function, and the facts may conveniently be called adjudicative facts. When [a court] wrestles with a question of law or policy, it is acting legislatively, just as judges have created the common law through judicial legislation, and the facts which inform its legislative judgment may conveniently be denominated legislative facts. The distinction is important; the traditional rules of evidence are designed for adjudicative facts, and unnecessary confusion results from attempting to apply the traditional rules to legislative facts.

In a subsequent article, Professor Davis said:[73]

> Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their

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[70] (2007) 233 CLR 307, [649].

[71] Kenneth Davis, 'An Approach to Problems of Evidence in the Administrative Process' (1942) 55 *Harvard Law Review* 364.

[72] Ibid 402-3.

[73] Kenneth Davis, 'Judicial Notice' (1955) 55 *Columbia Law Review* 945, 952-3.

> businesses. Legislative facts are those which help the tribunal to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take. Legislative facts are ordinarily general and do not concern the immediate parties. In the great mass of cases decided by courts ... the legislative element is either absent, unimportant, or interstitial, because in most cases the applicable law and policy have been previously established. But whenever a tribunal is engaged in the creation of law or of policy, it may need to resort to legislative facts, whether or not those facts have been developed on the record.
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> The exceedingly practical difference between legislative and adjudicative facts is that, apart from facts properly noticed, the tribunal's findings of adjudicative facts must be supported by evidence, but findings or assumptions of legislative facts need not, frequently are not, and sometimes cannot be supported by evidence.

The distinction so drawn by Professor Davis between adjudicative facts and legislative facts has been highly influential in the United States. His distinction, as well as his terminology, has now long been part of the legal mainstream. The Federal Rules of Evidence, for example, are explicit in stating that the rule concerning judicial notice 'governs only ... adjudicative facts'.[74] The same distinction and the same terminology have also been adopted in the Supreme Court of Canada,[75] the Constitutional Court of South Africa[76] and in the Supreme Court of New Zealand.[77]

In Australia, before 2002, the distinction drawn by Professor Davis and his terminology had been picked up in an essay published in 1982[78] and had been picked up in an introductory

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[74] Federal Rules of Evidence (US) r 201(a).

[75] For example *Danson v Ontario (Attorney-General)* [1990] 2 SCR 1086, 1099 (Sopinka J). See generally Peter Hogg, *Constitutional Law of Canada* (5th ed, 2007) vol 2, 806-12.

[76] For example *S v Lawrence* [1997] ZACC 11; 1997 (10) BCLR 1348; 1997 (4) SA 1176, [42] (Chaskalson P).

[77] *Hansen v The Queen* [2007] NZSC 7.

[78] Peter Carter, 'Judicial Notice: Related and Unrelated Matters' in Enid Campbell and Louis Waller (eds), *Well and Truly Tried: Essays on Evidence in Honour of Sir Richard Eggleston* (1982) 88-99.

passage in the Australian edition of *Cross on Evidence*.[79] It was there said:[80]

> There is a distinction between legislative and adjudicative facts. An adjudicative fact is a fact which is either a fact in issue or is relevant to a fact in issue. These are the facts which normally go to the jury in a jury case. A legislative fact, on the other hand, is a fact which helps the court determine the content of law and policy and to exercise its discretion or judgment in determining what course of action to take. Legislative facts therefore go beyond the interests of the parties. In the case of adjudicative facts the doctrine of judicial notice has restricted scope, for in the common law system the facts are appropriately determined on the evidence presented by the parties unless the fact is of such notoriety that to call for evidence would be a waste of time. The position with respect to legislative facts is otherwise. It is clear from the cases that judges have felt themselves relatively free to apply their own views and to make their own enquiries of social ethics, psychology, politics and history where relevant without requiring evidence or other proof.

However, as I have already foreshadowed, the first judicial acknowledgment of the distinction was to occur in Australia only in 2002 in *Woods v Multi-Sport Holdings Pty Ltd.* The case concerned the scope of the duty of care owed by the owner and operator of a sporting facility to a person participating in a game of indoor cricket and came before the High Court as an appeal. While other members of the Court made no reference to it, a debate occurred between two members of the Court concerning whether or not to have regard to a national health survey available on the Internet to show the extent to which sport or recreation-related activity contributed to the overall scale and cost of injury-related medical conditions within Australia. The use of that statistical information was strongly favoured by McHugh J; Callinan J reacted strongly against it. Adopting the definition in *Cross on Evidence,* McHugh J said that the statistics fell within the class of "legislative facts" that

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[79] John Dyson Heydon, *Cross on Evidence* (6th ed, 2000).

[80] Ibid [3010].

it was open to a court to 'use to define the scope or validity of a principle or rule of law'.[81] Although McHugh J went on to explain "legislative facts" as falling within a category of facts capable of being 'judicially noticed', it is clear from his discussion that he was not invoking "judicial notice" in its most strict and technical sense.[82] He pointed out that Justices of the High Court had '[o]n countless occasions ... used material extraneous to the record, in determining the validity and scope of legal rules and principles' and that they had 'frequently relied on reports, studies, articles and books resulting from their own research after the case [had] been reserved and parties [had] made their submissions'.[83] Justice Callinan referred to the 'great caution' with which courts had traditionally approached the taking of judicial notice and continued that he would 'resist any suggestion that the same degree of caution is not required when the extrinsic facts are so-called legislative facts, or facts a knowledge and understanding of which may assist the court to determine or develop the law, whether on grounds of policy or otherwise'.[84] He said that he rejected the suggestion that judges were 'free to apply their own views and to make their own enquiries of social ethics, psychology, politics and history without requiring evidence or other proof' and that he did so for two reasons. The first was that 'the parties must be given an opportunity to deal with all matters which the court regards as material'. The second – here invoking the strict concept of judicial notice – was that 'rarely is there any universal acceptance of what are true history, politics and social ethics'.[85]

Since 2002, the analysis of McHugh J has been quoted with approval in the Supreme Court of Tasmania[86] and in the Western

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81 (2002) 208 CLR 460, [63].
82 (2002) 208 CLR 460, [64]-[71].
83 (2002) 208 CLR 460, [67].
84 (2002) 208 CLR 460, [163].
85 (2002) 208 CLR 460, [165].
86 *Alderton v Department of Police and Emergency Management* [2008] TASSC 69.

Australian Court of Appeal.[87] The term "legislative fact" has been used in passing in the Victoria Court of Appeal.[88]

The debate in *Woods v Multi-Sport Holdings Pty Ltd* was the subject of comment by the late Bradley Selway QC, then Solicitor-General for South Australia and subsequently a Judge of the Federal Court, in an article published in the same year in the University of Tasmania Law Review.[89] He suggested that it was more appropriate to think in terms of a tripartite classification involving: facts in issue (which must be proved, including by judicial notice); constitutional facts (which do not need to be proved but should be tested by the parties); and facts (including historical facts) involved in legal reasoning (which do not need to be proved and do not need to be tested by the parties).[90]

The debate in *Woods v Multi-Sport Holdings Pty Ltd* was also noted by Heydon J in the course of his judgment in *Thomas v Mowbray*. Although he was concerned in that case only with constitutional facts, he said that it was convenient to divide facts that may have to be established in litigation into five categories. The first was Dixon CJ's 'ordinary questions of fact which arise between the parties'. The others were: constitutional facts; 'facts going to the construction of non-constitutional statutes'; 'facts going to the construction of constitutional statutes' and 'facts which relate to the content and development of the common law'.[91] He said that in relation to each category there were potentially three issues

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87 *Carlin v Hamersley Iron Pty Ltd* [2003] WASCA 270.

88 *R J E v Secretary to the Department of Justice* [2008] VSCA 265, [109] (Nettle JA).

89 Bradley Selway, 'The Use of History and Other Facts in the Reasoning of the High Court of Australia' (2002) 20 *University of Tasmania Law Review* 129.

90 Cf David Faigman, 'Normative Constitutional Fact-Finding: Exploring the Empirical Component of Constitutional Interpretation' (1991) 139 *University of Pennsylvania Law Review* 541 (dividing Professor Davis' "legislative fact" category into two further sub-categories: "constitutional-rule" facts and "constitutional-review" facts).

91 (2007) 233 CLR 307, [613]-[614].

that arose. One was whether it was permissible to take the fact in question into account at all and, if so, for what purpose. The second was as to the application of the rules of evidence applied. The third was the extent to which a court could consider the fact without giving notice to the parties. As to the second and third of those questions, he was quite clear. The rules of evidence apply to 'ordinary questions of fact' but not to any of the other categories that he identified.[92] However, 'it is [simply] not open to courts to conduct their own factual researches without notice to the parties'.[93] As to the scope of material capable of being taken into account by a court – on notice to the parties but outside the evidence – it was not necessary for him to reach a concluded view. But he suggested in respect of what he described as "category two" facts (and by implication also in respect of all facts other than those he put into "category one") that the material capable of being taken into account could probably be circumscribed no more restrictively than that it 'ought to be sufficiently convincing to justify the conclusion that it supports'.[94]

V

It may well be that the terminology of "legislative facts" and "adjudicative facts" sits uncomfortably within the Australian judicial landscape. Our conception of the separation of judicial power and our traditionally close adherence to formal judicial technique make a definition of "legislative fact" that involves a description of a court acting as a legislator sound somewhat jarring to an Australian lawyer. It may also be that, for some purposes, a more precise division of what is encompassed within the category of "legislative facts" is warranted. I do not want to multiply the terminology and I do not want to engage in further legal taxonomy.

What is important is to recognise that the distinction between law and fact is not hermetically sealed. There is a category

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92 (2007) 233 CLR 307, [619], [635]-[636].
93 (2007) 233 CLR 307, [618].
94 (2007) 233 CLR 307, [639].

of facts that can properly be described as "ordinary facts" or "adjudicative facts". They are facts, questions as to which arise in the ordinary course of litigation between parties. They are subject to the rules of evidence. They are subject to rules of pleading and to principles of estoppel. There is another category of facts that cannot in any meaningful sense be described as "ordinary". They are facts that go not simply to the scope of the dispute that the parties bring before the court for resolution in accordance with some legal rule or standard, but to the validity or content of the legal rule or standard by which their dispute is to be resolved. That other category of facts – if only for want of a better name – can usefully be labelled "legislative facts". That other category of facts need not be adduced in accordance with the rules of evidence. Nor can legislative facts be defined or confined by the agreement or conduct of the parties. Their ascertainment is a matter for the court itself.

In *Aon Risk Services Australia Ltd v Australian National University*[95] five members of the High Court recently pointed out in a joint judgment that '[t]he allocation of power between litigants and the courts arises from tradition and from principle and policy' and that it is now 'recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings'.[96] The allocation of power between litigants and the courts with respect to "adjudicative facts" and "legislative facts" needs to be considered under that rubric. It is informed not only by tradition but by principle and policy.

The extent to which courts ought to take legislative facts into account – particularly in the development of the common law – is not beyond controversy and perhaps cannot meaningfully be separated from much larger questions of judicial methodology and of the province and function of the courts.[97] Without delving into those larger normative questions, the empirical

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[95] [2009] HCA 27.

[96] [2009] HCA 27, [113] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[97] Ann Woolhandler, 'Rethinking the Judicial Reception of Legislative Facts' (1988) 41 *Vanderbilt Law Review* 111, 112.

conclusion is inescapable that courts do take legislative facts into account. They have probably always done so, although the extent to which they have done so has varied from age to age and from place to place.

In Australia, the phenomenon is likely only to increase in the future. It is inevitable that findings of legislative fact will fall increasingly to be made by courts discharging responsibilities of the kind imposed by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT) to interpret legislation in a way that is compatible with human rights[98] and, for that purpose, 'taking into account all relevant factors' to determine whether or not such limits as might in a particular case be shown to be imposed on the exercise of a particular human right by a particular law are 'reasonable' and 'can be demonstrably justified in a free and democratic society'.[99]

What, if any, limits should be placed on the "legislative facts" that can be taken into account by a court? The prevailing view in the United States where the topic has been thought about long and hard is that there should be none. It has been observed that a 'disinclination to regulate judicial incorporation of legislative facts has been uniform through time and across United States jurisdictions'.[100] Professor Edmund Morgan wrote in 1944:[101]

> In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data

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[98] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32; *Human Rights Act 2004* (ACT) s 30.

[99] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28.

[100] Peggy Davis, '"There is a Book Out ..." An Analysis of Judicial Absorption of Legislative Facts' (1987) 100 *Harvard Law Review* 1539, 1541 fn 10.

[101] Edmund Morgan, 'Judicial Notice' (1944) 57 *Harvard Law Review* 269, 270-1.

> to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present. ... In all this he is entitled to the assistance of the parties and their counsel, for he is acting for the sole purpose of reaching a proper solution of their controversy. But the parties do no more than to assist; they control no part of the process.

The Notes of the Advisory Committee on the Federal Rules of Evidence quote that statement and continue:[102]

> This is the view which should govern judicial access to legislative facts. It renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level. It should, however, leave open the possibility of introducing evidence through regular channels in appropriate situations.

As to the nature of the material that can be taken into account by a court for the purpose of ascertaining legislative facts: any material to be taken into account would need to tend logically to show the existence or non-existence of legislative facts relevant to the issue to be determined, that is, it would need to have probative value; material ought not be taken into account if its probative value was outweighed by other considerations bearing on the interests of justice (such as its tendency to cause prejudice to a party or to cause undue cost or delay); and cumulatively – to adopt the language of Heydon J in *Thomas v Mowbray* – the material taken into account 'ought to be sufficiently convincing to justify the conclusion that it supports'. But beyond that it is impossible to be more prescriptive. Often the material could be expected to be from sources that are publicly available and official but neither of those characteristics can in principle be treated as a prerequisite: the interests of justice in a free and democratic society must always allow for the possibility that information

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[102] *Notes of Advisory Committee on the Federal Rules of Evidence* (US) r 201(a).

that is publicly available and official might be countered by information that is neither.

As to the procedure by which a court might go about ascertaining legislative facts, it would be wrong to consider that one size could ever fit all, no matter what degree of categorisation or sub-division might be sought to be undertaken. Much will depend on the nature of the particular facts that might be thought to bear on the validity or content of the particular legal rule or standard under consideration;[103] the centrality or marginality of those facts; whether they are specific or general; whether they are historical, contemporary or predictive; whether they are concrete or evaluative; how much they might be controversial; how much they might be known to or knowable by a party; whether and, if so, how they may be capable of proof or disproof by a party. However, a number of general points can usefully be made.

The first is that a question of legislative fact will always arise for the consideration of a court in the context of a specific case. It will arise in the context of the performance by the court of its duty to decide that specific case and, for that purpose, to ascertain the applicable law. The central message of *Trigwell* therefore remains valid: whatever its position within the appellate hierarchy, a court is neither a legislature nor a law reform agency; its mandate is confined to ascertaining the facts and the law applicable to the case before it; and its procedures historically have been moulded to that end. Professor Davis may therefore have put it too strongly when he said that a court 'should recognise its affirmative responsibility to [ensure] that reasonably available legislative facts that may affect its lawmaking are adequately developed'.[104] Legislative facts must be ascertained and used judiciously.[105] Ultimately, a court must 'do the best it can' given the procedural tools at its disposal.

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[103] Cf Kenneth Davis, 'Facts in Lawmaking' (1980) 80 *Columbia Law Review* 931, 932-3.

[104] Ibid 940.

[105] The following statement in *McCormick on Evidence* (6th ed, 1999) vol 2, 446 is salutary:

The second is that it remains in every case the fundamental duty of the court to afford procedural fairness to the parties. Just as the parties are entitled to be heard on an ordinary question of fact,[106] so they are entitled to be heard on a question of legislative fact. Just as they are entitled to have drawn to their attention any question of law not raised by one or more of them that a court might consider to be 'decisive, or materially influential, in the outcome',[107] so they must be entitled to have drawn to their attention any question of legislative fact of the same quality. If the court considers that some particular question of legislative fact arises that has not been identified by the parties, it is incumbent on the court to raise that question with the parties. And whatever the nature of the information that the court may consider taking into account by the court on a question of legislative fact, the parties ought to be on notice of it and have an adequate opportunity to address it by way of evidence or submissions. Of course, as with any question of procedural fairness, the specificity of the required notice and the extent of the opportunity required to be afforded to the parties to respond can be expected to vary from case to case and will be informed by a variety of considerations to some of which I have already referred.[108]

> When it comes to the utilization of these lawmaking facts, three problems can beset constitutional law decisions. The first is that the forest can sometimes be lost sight of for the trees. That is to say, so much historical and sociological data are rehearsed that an opinion appears to be bottomed upon purely pragmatic considerations and not upon any compelling constitutional norm. The second is that an outpouring of learning appears inordinate to the requirements of the problems at hand. The third is that data can appear to be included as an exercise in fustian excess, often in a losing cause. The first would appear to be a problem of draftsmanship, hard cases perhaps making bad law, but the latter two appear less defensible.

106 *Stead v State Government Insurance Office* (1986) 161 CLR 141, 145 (Mason, Wilson, Brennan, Deane and Dawson JJ).

107 *Friend v Brooker* (2009) 83 ALJR 724, [118] (Heydon J).

108 *In Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [135]-[156] Kirby J considered statistics concerning the number and duration of acting appointments to the Supreme Court of New South Wales in the context of considering the constitutional validity of the appointment of acting judges to that court. The statistics were

The third is that, within the context of our adversarial system of justice, the self-interest of the parties and the competence of their legal representatives can in most cases be relied upon to identify relevant issues of legislative fact and to bring forward relevant material, whether in evidentiary or other form. As with any material probative of any fact, the weight to be accorded to such material as a party may bring forward must be assessed in the light of that party's knowledge and ability to prove.

The fourth is that it may be in the interests of justice that, in addition to the parties, those with an interest in, and ability to assist the court with, ascertaining the relevant constitutional fact be given an opportunity to intervene. The point is not just one of procedural fairness but of ensuring that the court is provided with the greatest possible assistance. This is achieved in part, in constitutional litigation, by the conferral of a statutory right of intervention on the Attorneys-General of the Commonwealth, States and Territories.[109] In proceedings under the *Charter of Human Rights and Responsibilities Act* and the *Human Rights Act*,[110] Attorneys-General have similar statutory rights of intervention. Those statutory rights of intervention must, of course, be balanced by the judicious use of the court's discretion to allow others with potentially conflicting interests to intervene or to become a "friend of the court" where they may be able to give assistance to the court beyond that which can be given by the parties.[111] The scope of

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compiled by his Honour after argument but circulated to the parties for comment. As his Honour noted at [145]-[146] '[n]one of the parties seeking to defend the validity of the legislation raised any formal or evidentiary objection to this court's receiving and acting on the matters of public record' revealed by the statistics but '[t]hey joined issue on the facts as revealed' and 'were critical of the quality of [the] evidence'.

[109] *Judiciary Act 1903* (Cth) s 78A.

[110] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 34; *Human Rights Act 2004* (ACT) s 35.

[111] *Levy v Victoria* (1997) 189 CLR 579, 603-4 (Brennan CJ), 651-2 (Kirby J); *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, [104] fn 232 (Kirby J)

intervention always lies within the discretion of the court and, in an appropriate case, additional costs required to be borne by a party by reason of an intervention can be compensated for by an award of costs.[112]

To re-emphasise the message of *Aon Risk Services Australia Ltd v Australian National University*, the court retains paramount control over its own procedures. Those procedures can be moulded in an appropriate case to allow for a variety of processes by which legislative fact-finding might be assisted. For the High Court, remitter (or the threat of remitter) to another court[113] has generally been sufficient to deal with any specific technical facts that might be of significance. But beyond that, the procedural armoury of a court has always included the ability to obtain for itself assistance of such nature as the court considers appropriate.[114]

It is instructive finally to note the position set by the procedural rules of the Constitutional Court of South Africa:[115]

> 1. Any party to any proceedings before the Court and [a friend of the court] properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts –
>
> a. are common cause or otherwise incontrovertible; or
> b. are of an official, scientific, technical or statistical nature capable of easy verification
>
> 2. All other parties shall be entitled, within the time allowed by these rules for responding to such document,

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[112] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 576, Order 5.

[113] *Judiciary Act 1903* (Cth) s 44.

[114] For example *Court of Chancery Act 1852* (UK) s 42; *High Court Rules 1903* (Cth) O 38 (Statutory Rules No 23 of 1952).

[115] *Constitutional Court of South Africa Rules* r 31.

> to admit, deny, controvert or elaborate upon such facts to the extent necessary and appropriate for a proper decision by the Court.

As a default position, absent particular considerations applying to a particular case, that procedural approach has much to commend it.

VI

It was predicted more than a century ago by Oliver Wendell Holmes that while '[f]or the rational study of the law the blackletter man may be the man of the present', 'the man of the future is the man of statistics and the master of economics'.[116] That prediction has not been fully realised in Australia or even in the country where it was uttered. But for the rational ascertainment of the law in the modern world even the 'blackletter man' (or woman) cannot avoid questions of fact and it is best that he (or she) be properly informed.

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[116] Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 469.