CLASSIFICATION AS A TECHNIQUE OF JURISDICTION: CATEGORIES OF TREE PROTECTION IN NEW SOUTH WALES' LEGAL HISTORY

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CERTIFICATE OF ORIGINAL AUTHORSHIP

I, Rachel Bolton, declare that this thesis is submitted in fulfilment of the requirements for the award of Doctor of Philosophy in the Faculty of Law at the University of Technology Sydney.

This thesis is wholly my own work unless otherwise referenced or acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis.

This document has not been submitted for qualifications at any other academic institution.

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ABSTRACT

The central concern of this thesis is to investigate classification as a technique of jurisdiction. It explores how law's classification practices draw entities (persons, objects, places and events) within the domain of law's authority, thereby establishing relations of belonging to law. These broad concerns are examined in the context of the common law, specifically the history and current practices of tree protection laws in New South Wales ('NSW'). The research is guided by the following question: how does law classify protected trees? To answer this question, the thesis works through and extends the resources offered by the jurisprudence of jurisdiction, an area of jurisprudence concerned with how lawful relations are established and maintained as a matter of technique and practice. Drawing on archival and other historical sources, the thesis traces how different institutions have classified law's protected trees in NSW since 1787. The findings are presented across three registers: who, how and effects. As a preliminary matter, sources of authority to classify law's protected trees are discussed. The first register, *who*, then offers an account of the land-granting practices of the early NSW governors, who first exercised the authority to classify law's protected trees in the colony. The second register, *how*, considers techniques of classification. It explores how the NSW governors exercise the authority to make law's categories by writing. This register also considers how the NSW courts sort trees into law's categories by naming. The third register, *effects*, contemplates how different categories of tree protection offer different qualities of belonging to law, bringing trees to law in different forms. Overall, the thesis contributes to the jurisprudence of jurisdiction and to the history of tree protection laws in NSW. Both contributions – to jurisprudence and to trees – support the overall argument that such a jurisprudence of classification offers important insights into how entities come to belong to law and the quality of that belonging.

CHAPTER 1. INTRODUCTION

This thesis proposes a jurisprudence of classification that examines law's classification practices across three registers: who, how and effects. I argue that without understanding *who* has the authority to make law's categories, *how* that authority is exercised and the *effects* of classification, legal scholars risk overlooking how law's classification practices contribute to the making of lawful relations.[1] I make this argument in the context of the history and current practices of New South Wales' ('NSW') tree protection laws, asking: how does law classify protected trees?[2] The aim of this thesis is to contribute to, and extend, jurisprudential scholarship on how the common law classifies by showing how law's categories bind trees to law in different forms. Through the protected tree example, the thesis demonstrates how a jurisprudence of classification can attend to the conditions of legal existence made possible by law's categories.

Law is replete with categories and suffused with classificatory practices.[3] Categories such as 'homicide', 'property' and the 'legal person' loom large in law and legal commentary. But law is also full of more mundane categories, such as 'employee', 'lease' and 'native vegetation'. Working with and through these categories, legal practitioners, judges, officials, scholars and lay-persons all engage in legal classification. Solicitors classify clients' problems into legal categories (for example, does this factual scenario constitute a breach of contract or misleading and deceptive conduct?). Courts resolve disputes about particular classifications (for example, does this agreement constitute a lease? Can a wild crocodile be classified as property?). Government officials classify when drafting new categories contained within statutes or subordinate legislation that pass into law. Legal scholars also classify when crafting legal taxonomies to sort doctrine into categories for pedagogical or critical purposes (property law, criminal law, environmental law), or when explaining or critiquing particular categories such as 'rape' or 'property'. (These two

[1] The term 'lawful relations' comes from the jurisprudence of jurisdiction, discussed at length in Chapter 2. See generally Shaunnagh Dorsett and Shaun McVeigh, 'Questions of Jurisdiction' in Shaun McVeigh (ed), *Jurisprudence of Jurisdiction* (Routledge-Cavendish, 2007) ('Questions of Jurisdiction'); Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Routledge, 2012) ('*Jurisdiction*').

[2] As a key term that shapes the scope of the thesis, the category of 'protected trees' is explained and defined below. To be clear, this is my term, not one taken from legislation or other source.

[3] Jay M Feinman, 'The Jurisprudence of Classification' (1989) 41 *Stanford Law Review* 661, 664–5.

scholarly traditions – making legal taxonomies and category-specific scholarship – will be discussed further in Chapter 2.) Law's categories also work their way into our everyday lives whenever we classify things on law's terms, as 'yours' or 'mine', or as 'theft' or 'assault'. Law's classificatory practices can be thought of as a quotidian flow that runs through and across lives lived with law.

Thinking about law and classification begins, as does this introduction, with categories. Categories sort entities into groups so that entities belonging to the same category may be treated as being equivalent, for a particular purpose.[4] As George Lakoff writes, categorisation is central to the way humans think and engage with one another and the world.[5] Through categories, humans make sense of experience by the identification of kinds.[6] The category 'chair' designates particular objects as being equivalent for a particular purpose (furniture designed to be sat on), as compared to other kinds of things (e.g., books, glasses).[7] The relationship between categories, cognition, ontology and epistemology has been the subject of sustained critical investigation.[8] Of particular note is the influence of Michel Foucault's *The Order of Things*, which offered a post-structural analysis of the way in which classification systems, particularly those of Western science, produce the very order they purport to simply reflect.[9] The focus of this thesis, however, is on *law's categories*, and law's classification practices, rather than categories and classification in general.[10] As this thesis will explore, law's categories do something more than merely sort entities and establish equivalence: law's categories tell us what belongs to law, and the form of that belonging.[11] For example, consider law's categories of 'employer' and 'worker', pursuant to NSW workers compensation law. Both categories sort and order entities for the purposes of determining employer liability for injuries that occur in the workplace.[12] By belonging to the category of a 'worker', a person is drawn

[4] Eleanor Rosch et al, 'Basic Objects in Natural Categories' (1976) 8(3) *Cognitive Psychology* 382, 383.
[5] George Lakoff, *Women, Fire and Dangerous Things* (University of Chicago Press, 1987) 5–6.
[6] Ibid.
[7] Rosch et al (n 4) 383.
[8] For an introduction to this scholarship, see: Lakoff (n 5) 12–57.
[9] Michel Foucault, *The Order of Things* (Random House, 1970).
[10] A related, and complex, question concerns the interaction between law's classification practices and those belonging to other domains. For an important contribution in this area see Brad Sherman, 'Taxonomic Property' (2008) 67 *Cambridge Law Journal* 560. These questions are beyond the scope of the present inquiry, as explained below.
[11] Shaunnagh Dorsett, 'Thinking Jurisdictionally: A Genealogy of Native Title' (University of New South Wales, 2005) 342; Dorsett and McVeigh, *Jurisdiction* (n 1) 71.
[12] *Workplace Injury Management and Workplace Compensation Act 1998* (NSW) ss 4 and 5 (definitions of 'employer' and 'worker').

into a particular set of lawful relations vis-à-vis their 'employer'. It is the category that delimits who or what will belong to law and in what form – in this instance, as a 'worker' in accordance with the specific provisions of NSW workers compensation legislation.

Categories draw law into the practice of classifying and matters of classification. Classification refers to the activity and effects of classifying, which means to sort entities into groups according to an established pattern.[13] Both the noun (classification) and the verb (to classify) stem from the word 'class', which came from the French *classe*, meaning a group of students.[14] *Classe*, in turn, came from the Latin *classis*, meaning class, division, army or fleet. In addition, the Romans related *classis* to the word *calare*, meaning to call out, to proclaim, from the Indo-European *kel-kal*, meaning to call, to shout.[15] Classification is therefore associated with established systems or patterns of ordering that occur at the scale of the institution.[16] This etymology reveals classification's nature as an institutional practice: an established and recognised way of categorising things and an activity attached to, and carried out by, particular institutions. It can be distinguished from 'categorisation', as defined by cognitive psychologists, which is practised by individual organisms.[17] Importantly, the practice of classifying involves two separate, yet inter-related, activities: the making of categories and the sorting of entities. The productive element of category-making comes from the *-fy* suffix, attached to the noun *class*. The *-fy* suffix is used to form verbs from nouns or adjectives, indicating a sense of making or producing.[18] For example, 'to purify' gives the sense of making pure and 'to pacify' gives the sense of producing peace. Hence, classifying give us a sense of making classes, or categories, as well as the activity of sorting entities into and out of those categories. Overall, classification refers to an active and productive practice of category-making and entity-sorting, the results of which are proclaimed to the world at large, rather than to oneself.

[13] *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993) 'classification'.
[14] *The Barnhart Dictionary of Etymology* (H. W. Wilson Company, 1988) 'class' and 'classify'.
[15] Ibid 'class'.
[16] Mary Douglas, *How Institutions Think* (Routledge & Kegan Paul, 1987) 102–8.
[17] For example, cognitive psychologist Eleanor Rosch defines categorisation as an organism's capacity to perceive and categorise stimuli: Rosch et al (n 4) 384. Cf. Geoffrey Bowker and Susan Leigh Star, who include individual acts of categorisation, such as sorting clean dishes from dirty, within their definition of classification: Geoffrey C Bowker and Susan Leigh Star, *Sorting Things Out: Classification and Its Consequences* (Massachusetts Institute of Technology, 1999) 1.
[18] *The New Shorter Oxford English Dictionary* (n 13) '-fy'.

I. THE PROBLEM: MISTAKING CATEGORIES FOR ENTITIES

This thesis engages with classification as a productive legal practice.[19] It does so to address a tendency particularly prevalent in the areas of environmental and real property law: the mistaking of categories for entities. For example, consider this passage from the NSW government's Local Land Services current website, referring to landholders' obligations regarding tree protection:

> Land owners can continue to clear native vegetation when undertaking every-day land management activities, such as environmental protection works …[20]

By referring simply to 'native vegetation', a swift move is made from the category 'native vegetation' to an entity (a situated tree) that might belong to the category.[21] In this context, 'native vegetation' refers to a legal category found in the *Local Land Services Act 2013* (NSW).[22] As a category, 'native vegetation' in this text sorts trees into groups, drawing those belonging to the category into lawful relations of protection pursuant to the provisions of the Act.[23] Law's categories for 'nature' are particularly at risk of being mistaken for entities whenever the name for law's category and the general-use name for the entity are the same.[24] Categories such as 'native vegetation', 'tree', 'forest', 'river' or 'carbon' are obvious examples. Whenever such categories are at play, there is risk of slippage; a fast move between the entity and category such that the two tend to collapse

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[19] As discussed later in the chapter, the thesis does so by drawing on the jurisprudence of jurisdiction.

[20] New South Wales Local Land Services, 'Land Management: Allowable Activities', *NSW Government: Local Land Services* (3 November 2019) <https://www.lls.nsw.gov.au/sustainable-land-management/land-management>.

[21] The term 'entity' is used throughout the thesis to refer to anything (a person, a place, an object, an event, an idea, a chemical process etc) without referring to that entity through a category that also carries legal meaning, such as 'person' 'thing' or object'.

[22] *Local Land Services Act 2013* (NSW) Part 5A, s 60B. Relevantly, law's categories for natural entities may also rely on other bodies of classificatory practices, such as those of science and biology. This point is further discussed in Chapter 6. For an important, broader, discussion of the history of the way in which common law method came to draw on scientific method during the nineteenth-century, see: David Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in William Twining (ed), *Legal Theory and Common law* (Basil Blackwell, 1986) 26.

[23] For example, the website refers landowners to a 'new land management (native vegetation) code'. By clicking on the link to the code, the viewer is taken directly to the *Land Management (Native Vegetation) Code* on the NSW government legislation website. The code applies to all land subject to the native vegetation provisions of the *Local Land Services Act* and adopts the same definition of 'native vegetation' as in the principal Act: *Land Management (Native Vegetation) Code 2018* (NSW) s 4 and s 6.

[24] 'Nature' is itself a complex and contested category, as further discussed in Chapter 2. For an introduction to the history and debate over its meaning, see: Raymond Williams, *Keywords* (Fontana Paperbacks, 1976) 219–24; Kate Soper, *What Is Nature? Culture, Politics and the Non-Human* (Blackwell, 1995); William Cronon, 'The Trouble with Wilderness' in William Cronon (ed), *Uncommon Ground: Toward Reinventing Nature* (WW Norton and Co, 1995); Noel Castree, *Nature* (Routledge, 2005).

into one. One of the aims of this thesis is to demonstrate how and why this slippage is problematic.

Another example of the slippage between category and entity comes from Christopher Stone's landmark article, 'Should Trees Have Standing?', in which he proposes legislative reforms to give legal rights to: 'forests, oceans, rivers and other so-called "natural objects" in the environment – indeed, to the natural environmental as a whole'.[25] Stone's argument is that belonging to law's categories of property and the legal person is not natural nor inevitable. Instead, the boundaries of these categories can, should and do change over time.

The focus of Stone's article is on the ways in which nature might be moved from the category of property to the category of legal rights holder. However, Stone is also alive to the problem of what is to count as 'nature'. He notes in a footnote that

> [t]here are large problems involved in determining the boundaries of the 'natural object' … One's ontological choices will have a strong influence on the shape of the legal system and the choices involved are not easy.[26]

Here, Stone places 'natural objects' in inverted commas, indicating caution around the term and its meaning. However, Stone contains this caution to a question about one's 'ontological choices' suggestive of a choice between predetermined objects rather than a choice between different kinds of categories that draw on different kinds of classificatory practices.

More recently, another example of the slide between entity and category is found in Samantha Hepburn's important article on new property rights in carbon. The focus of Hepburn's analysis is on law's categories of real property interests, while the category of carbon sequestration is collapsed with a natural process:

> This paper examines the different ways in which carbon rights have been verified as property interests. A carbon right is a new and unique form of land interest that confers upon the holder a right to the incorporeal benefit of carbon sequestration on a piece of forested land. Carbon sequestration refers to the absorption from the atmosphere of

[25] Christopher Stone, 'Should Trees Have Standing? Towards Legal Rights for Natural Objects' (1972) 45(2) *Southern California Law Review* 450, 456.
[26] Ibid.

> carbon dioxide by vegetation and soils and the storage of carbon in vegetation and soils.[27]

Just like 'native vegetation' in the previous paragraph, 'carbon sequestration' is, in this context, a legal category and not an entity. Carbon sequestration is a category variously defined by state-based legislation in Australia, to which real property may be attached.[28] It is a category that joins a particular event, photosynthesis, to law in a particular form. The category establishes equivalence and difference between different chemical processes, differentiating, for example, between carbon dioxide absorption by trees and mechanical carbon dioxide capture and storage systems. In both these examples, the distinction between category and entity has been inadvertently collapsed.

Critical environmental scholars and those working in legal geography have drawn attention to the lack of ontological foundation for law's categories for natural entities.[29] In particular, these scholars have drawn attention to law's categories for natural entities as products of particular ways of seeing and knowing.[30] For example, Lee Godden demonstrates the cultural contingency of law's category of 'natural heritage', which constructs nature as 'other' to the human subject, to be preserved and protected.[31] As a result, the category failed to recognise Aboriginal and Torres Strait Islander peoples' historical and continuing relationships to country. The category then potentially contributed to continued dispossession of Aboriginal and Torres Strait Islander peoples and precluded the Australian legal system recognising and incorporating other ways of understanding and forming relations with nature.[32] Other critical environmental law

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[27] Samantha Hepburn, 'Carbon Rights as New Property: The Benefits of Statutory Verification' (2009) 31(2) *Sydney Law Review* 239, 239.
[28] See, eg, *Conveyancing Act 1919* (NSW) s 87A.
[29] See, eg, William Boyd, 'Ways of Seeing in Environmental Law: How Deforestation Become an Object of Climate Governance' [2010] *Ecology Law Quarterly* 843; Nicholas Blomley, 'Cuts, Flows and the Geographies of Property' (2011) 7(2) *Law, Culture and the Humanities* 203; Cristy Clark, Nia Emmanouil and Alessandro Pelizzon, 'Can You Hear the Rivers Sing: Legal Personhood, Ontology and the Nitty-Gritty of Governance' (2018) 45 *Ecology Law Quarterly* 787.
[30] See, eg, Lee Godden, 'Preserving Natural Heritage: Nature as Other' (1998) 22 *Melbourne University Law Review* 719; David Delaney, 'Making Nature/Marking Humans: Law as a Site of Cultural Production' [2001] *Annals of the Association of American Geographers* 487; David Delaney, *Law and Nature* (Cambridge University Press, 2003).
[31] Lee Godden, 'Nature as Other: The Legal Ordering of the Natural World' (Griffith University, 2000); Godden (n 30).
[32] Godden (n 30) 740–2. For other critical environmental law and legal geography scholarship that examines how law's categories for natural entities are culturally constructed, see, eg, Delaney (n 30); Elisa Arcioni, 'What's in a Name? The Changing Definition of Weeds in Australia' (2004) 21 *Environmental and Planning Law Journal* 450; Mark Patrick Taylor and Robert Stokes, 'When Is a River Not a River? Consideration of the Legal Definition of a River for Geomorphologists Practicing in New South Wales, Australia' (2007) 36(2) *Australian Geographer* 183.

scholars have also drawn on new materialism and on science and technology studies to interrogate the contribution of materiality to the making of law's environmental objects.[33] For example, William Boyd reveals the contribution of the science and technology of climate change (including carbon accounting technologies and remote-sensing techniques) to construct tropical deforestation as an object of international climate law.[34] For Boyd,

> [t]oo often, the study of environmental law and governance take the object of governance – be it climate change, water pollution, biodiversity, or deforestation – as self-evident, natural and fully formed without recognizing the significant scientific and technological investments that go into making such objects and the manner in which such investments shape the possibilities for response.[35]

How 'nature', in all its messy, organic, connectedness, comes to be classified by law is an important and complex question.[36] While it is possible to think about this move between entity and category from a number of different theoretical perspectives, including semiotics and epistemology, this thesis addresses this problem as a question of legal technique. The focus of this thesis lies in understanding how law's categories bring nature within the domain of law's authority, providing it with a legal form that allows the classified entity to be drawn into lawful relations with other entities (including humans).

II. The Research Question

This thesis aims to contribute to a better understanding of how law classifies by investigating the classificatory practices of the common law, focusing on NSW.[37] It does so by asking how law has classified protected trees throughout NSW's legal history. Two orientations shape the way the thesis engages the research question. Both orientations inform the scope, aims and methods of the analysis presented in the following chapters.

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[33] On the increasing prevalence of new materialism as a method in critical environmental law, see generally Nicole Graham, Margaret Davies and Lee Godden, 'Broadening Law's Context: Materiality in Socio-Legal Research' (2017) 26(4) *Griffith Law Review* 480; Andreas Philippopoulos-Mihalopoulos and Victoria Brooks, *Research Methods in Environmental Law: A Handbook* (Edward Elgar, 2017). For an important example of new materialism legal scholarship related to trees, see Margaret Davies, 'The Consciousness of Trees' (2015) 27(2) *Law and Literature* 217.

[34] Boyd (n 29).

[35] Ibid 843.

[36] Boyd (n 29); Nicholas Blomley, 'Simplification Is Complicated: Property, Nature and the Rivers of Law' 40 *Environment and Planning A* 1825; Blomley (n 30).

[37] By 'the NSW common law system', I mean the system of laws that was established by, and grew out of, the establishment of the British colony of NSW in 1788. The meaning of the 'common law' is discussed further in detail below.

The first orientation explains how the research question is addressed as a concern of jurisprudence. The second orientation explains why tree protection was chosen as a relevant site for thinking about law's classificatory practices. Both orientations are addressed below.

Overall, this thesis is primarily a work of jurisprudence; one that focuses specifically on classification. While it engages with tree protection categories found throughout NSW's legal history, it is not a work of environmental law. And while the thesis draws on archival and historical materials – for example, to examine who could classify law's protected trees in the early colonial period – neither is it specifically a work of legal history. Undoubtedly, there are a number of perspectives through which these issues could usefully be approached. For example, new materialist frameworks, such as Bruno Latour's Actor-Network Theory, could explore the role of non-human actors in the making and unmaking of laws related to tree protection.[38] Alternatively, Foucauldian discourse analysis could offer insight into how law's classificatory practices reproduce particular ways of thinking and knowing.[39] Another approach might have been to evaluate the efficacy of law's tree protection categories through the lens of regulatory theory.[40] However, rather than one of these approaches, the thesis instead investigates law's tree protection categories in order to make a jurisprudential argument about classification as a particular kind of productive legal practice.

If the research question that drives the thesis is 'how has law classified protected trees throughout NSW's legal history?', then it is necessary to address what is meant by 'protected trees'. To be precise, this thesis is not interested in all kinds of tree protection

[38] Irus Braverman and Margaret Davies' scholarship on law and trees is exemplary in this area. See, eg,: Braverman, Irus, 'Governing Certain Things: The Regulation of Street Trees in Four North American Cities' (2008) 22 *Tulane Environmental Law Journal* 35; Irus Braverman, 'Order and Disorder in the Urban Forest: A Foucauldian/Latourian Perspective' in L Anders Sandberg, Adrina Bardekjian and Sadia Butt (eds), *Urban Forests, Trees and Green Space: A Political Ecology Perspective* (Routledge, 2014) 132; Margaret Davies and Kynan Rogers, 'Tale of a Tree' (2014) 16 *Flinders Law Journal* 43; Davies (n 33).

[39] For an overview of the contribution that Foucauldian discourse analysis can make to critical environmental law, see: Bettina Lange, 'Foucauldian-Inspired Discourse Analysis: A Contribution to Critical Environmental Law Scholarship?' in Andreas Philippopoulos-Mihalopoulos (ed), *Law and Ecology: New Environmental Foundations* (Routledge, 2011) 39.

[40] See, eg,: James Prest, 'The Forgotten Forests: The Environmental Regulation of Forestry on Private Land in New South Wales between 1997 and 2002' (PhD Thesis, University of Wollongong, 2003); Robyn L Bartel, 'Satellite Imagery and Land Clearance Legislation: A Picture of Regulatory Efficacy?' (2004) 9(1) *Australasian Journal of Natural Resources Law and Policy* 1; David Farrier, Andrew Kelly and Angela Langdon, 'Biodiversity Offsets and Native Vegetation Clearance in New South Wales: The Rural/Urban Divide in the Pursuit of Ecologically Sustainable Development' [2007] *Environmental and Planning Law Journal* 427; Robyn Bartel, 'Vernacular Knowledge and Environmental Law: Cause and Cure for Regulatory Failure' [2013] (8) *Journal of Justice and Sustainability* 891.

(for example by protest or activism). Rather, it is specifically interested in lawful relations of tree protection established through common law practices and categories. Law's tree protection categories are here defined as law's categories for trees that impose a restriction on who may cut them down. The definition is not tied to a particular justification for protection, such as sustainable development or protection of biodiversity. Nor must the category protect trees from being cut down by the world at large. It is enough that a category simply establishes a lawful relation of protection vis-à-vis the tree and a particular category of person or activity, for example, protection from being cut down by a tenant or protection from ringbarking. This definition opens the scope of the study to include tree protection categories found throughout NSW's legal history, rather than being limited to contemporary categories designed for contemporary purposes. Such an historical perspective is important, because it allows the thesis to address the variety of legal forms produced by law's categories and to illustrate that law's contemporary classificatory practices might not be the only way of doing things.[41]

Relatedly, the focus of this thesis is on law's classification practices, not on the eventual fate of law's protected trees. It is nevertheless important to acknowledge that colonisation disrupted extensive and pre-existing land-use practices regarding tree growth and distribution, as recently explored in Bruce Pascoe's *Dark Emu* and Bill Gammage's *The Biggest Estate on Earth*.[42] It is estimated that since colonisation, fifty per cent of Australia's forested land has been cleared or 'severely modified' and that, in NSW, the most intensive clearing occurred between 1890 and 1920 due to the rapid expansion of wheat and sheep farming.[43] Of the colony's early period, J. M. Powell observes that attempts by the governors to restrict clearing had 'little effect'.[44] These early clearing practices were underpinned by colonial cultural attitudes to land and trees, commonly expressed through the instrumental idea of improvement.[45] As Tom Griffiths observes, improvement of land during nineteenth century Australia 'especially meant clearing'.[46]

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[41] Dorsett and McVeigh, *Jurisdiction* (n 1) 26.
[42] Bruce Pascoe, *Dark Emu: Black Seeds* (Magabala Books, 2014); Bill Gammage, *The Biggest Estate on Earth: How Aborigines Made Australia* (Allen & Unwin, 2011).
[43] Corey Bradshaw, 'Little Left to Lose: Deforestation and Forest Degradation in Australia since European Colonization' (2012) 5(1) *Journal of Plant Ecology* 109, 111.
[44] JM Powell, *Environmental Management in Australia 1788 - 1914* (Oxford University Press, 1976) 19.
[45] Hancock, W.K., *Discovering Monaro: A Study of Man's Impact on His Environment* (Cambridge University Press, 1972) 72–88; Tom Griffiths, *Forests of Ash: An Environmental History* (Cambridge University Press, 2001) 32–48. Colonial attitudes towards land and property were not homogenous and changed over time: AR Buck, 'Property Law and the Origins of Australian Egalitarianism' 1 *Australian Journal of Legal History* 145.
[46] Tom Griffiths, 'How Many Trees Make a Forest?' (2002) 50 *Australian Journal of Botany* 375, 378.

Historians W. K. Hancock and Geoffrey Bolton both wrote that the colonists 'hated trees' and William Lines tells of environmental devastation wrought by ringbarking and clearing.[47] Tim Bonyhady and Tom Griffiths offer more nuanced environmental histories that trace the complexities of colonial environmental ethics and aesthetics of trees and clearing.[48] This broader colonial and environmental history provides the background against which this analysis takes place. However, the aim here is not to measure tree protection laws in relation to environmental histories of material change to the landscape. Rather, the aim is to understand how the common law itself sources and shapes the authority to classify; who can exercise that authority in practice, techniques of classification and the jurisdictional effects of these classification practices.

III. ORIENTATION: THINKING ABOUT LAW BY THINKING ABOUT TREES

As noted above, two orientations shape the manner in which this thesis engages with law's classification practices. The first orientation explains how the thesis engages with classification as a question of jurisprudence. Jurisprudence is understood here quite broadly as a 'particular method of study … of the general notion of law itself', which engages with questions concerning the definition, the purposes, the sources and the techniques of law.[49] More specifically, I draw on the conceptual framework of the jurisprudence of jurisdiction, as articulated by Shaunnagh Dorsett and Shaun McVeigh.[50] Conventionally defined, jurisdiction is understood as a court's authority to determine a dispute or the territorial domain of law's authority.[51] But, as Dorsett and McVeigh point out, jurisdiction is also much more than a court's authority. In this jurisprudential sense, jurisdiction can also be thought of as marking the moment of entry into the juridical sphere, telling us what is to count as law and what is not.[52] Dorsett and McVeigh express this idea through the notion of belonging: jurisdiction 'gives us a way of authorising law – of saying that something is lawful or belongs to law – only subsequently is it declared

[47] WK Hancock, *Australia* (Jacaranda Press, 1961) 21; Geoffrey Bolton, *Spoils and Spoilers: Australian's Make Their Environment* (1992) 38; William J Lines, *Taming the Great Southland: A History of the Conquest of Nature in Australia* (Allen and Unwin, 1991) 121–6.
[48] Tim Bonyhady, *The Colonial Earth* (Melbourne University Press, 2000); Griffiths (n 46).
[49] George Whitecross Paton, *A Textbook of Jurisprudence* (Clarendon Press, 3rd ed, 1964) 2.
[50] For introductory texts to the jurisprudence of jurisdiction, see Dorsett and McVeigh, 'Questions of Jurisdiction' (n 1); Dorsett and McVeigh, *Jurisdiction* (n 1).
[51] Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (The Federation Press, 2012) 1; Robert C Casad, *Jurisdiction in Civil Actions: Territorial Basis and Process Limitations on Jurisdiction of State and Federal Courts* (Butterworth Legal Publishers, 2nd ed, 1991) 1–2.
[52] Peter Goodrich, 'Visive Powers: Colours, Trees and Genres of Jurisdiction' (2008) 2 *Law and Humanities* 213, 214.

what that law is'.[53] The jurisprudence of jurisdiction engages with questions of the formal ordering of law's authority, the authorisation of lawful relations and the conduct of lawful relations.[54] It is concerned, then, not with the speech of law, but with 'that speech which gives distinctive form to law and to its modes of authorisation'.[55] It is with this particular aspect of the jurisprudence of jurisdiction, that of the authorisation of lawful relations, that this thesis is centrally concerned. Overall, the jurisprudence of jurisdiction offers a conceptual framework for thinking about how entities come to belong to law and the quality of that belonging.[56]

Primarily, the thesis extends Dorsett and McVeigh's insight that categorisation is a technology of jurisdiction. Dorsett and McVeigh define a technology of jurisdiction as 'something that is designed to, or is capable of, authorising, changing, or altering lawful relations'.[57] In relation to categories and categorisation, Dorsett and McVeigh show how law's categories order legal knowledge (through substantive categories, such as tort and contract) and are capable of producing relations of belonging to law.[58] For example, law's category of 'homicide' establishes a relation of belonging between a particular kind of event (the killing of another human) and law, in the form of a criminal act.[59] This thesis substantially builds on Dorsett and McVeigh's work by considering prior questions about how categories come to be law's categories in the first place. It does this by considering sources of the authority to classify and who can exercise that authority. It also considers techniques of category-making that join categories to law and sorting techniques that join entities to law's categories. It then returns to the jurisdictional effects of classification, to explore how each category offers a different quality of belonging to law. Overall this extension is offered as a jurisprudence of classification that addresses three registers of classification: who, how and effects. In doing so, the thesis contributes to a growing body of literature concerned with how the common law establishes and maintains relations of belonging to law.[60]

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[53] Dorsett and McVeigh, *Jurisdiction* (n 1) 5. This definition draws on Peter Rush's definition of jurisdiction in: Peter Rush, 'An Altered Jurisdiction - Corporeal Traces of Law' (1997) 6 *Griffith Law Review* 144.
[54] Shaunnagh Dorsett and Shaun McVeigh, 'Conduct of Laws: Native Title, Responsibility and Some Limits of Jurisdictional Thinking' (2012) 36 *Melbourne University Law Review* 470, 472.
[55] Dorsett and McVeigh, *Jurisdiction* (n 1) 14.
[56] Ibid 5.
[57] Ibid 14.
[58] Ibid 58–9, 71–6.
[59] Ibid 58–9.
[60] See, eg, Edward Mussawir, 'The Activity of Judgement: Deleuze, Jurisdiction and the Procedural Genre of Jurisprudence' (2010) 7(3) *Law, Culture and the Humanities* 463; Olivia Barr, 'Walking with Empire'

This orientation to the jurisprudence of jurisdiction means that law is here understood as a particular way of doing things: as a technique and a practice.[61] In this way, the jurisprudence of jurisdiction is allied with forms of historical jurisprudence, such as that of Frederick Maitland, Frederic Pollock and F.S.C. Milsom, whose work reveals something about the nature, history and workings of the common law.[62] For example, Pollock suggests that the reason law must be considered distinct from morality and politics is because 'the common law tradition has its own correct way of doing things'.[63] Removing Pollock's reference to correctness, the jurisprudence of jurisdiction is similarly concerned with understanding law as matter of technique and practice: with law as a *particular* (rather than correct) way of doing things. I do this to reveal how law's classificatory practices contribute to the authorised pronouncement of law and the establishment of lawful relations, as discussed in Chapter 2.

The jurisprudence of jurisdiction is here engaged through the practices and idioms of the common law (as compared to other systems of law). The common law is, then, an important category that delimits the scope of the present inquiry. It is, however, a category that carries multiple meanings.[64] In its broader sense, and in the context of NSW, the common law refers to 'case and statute law which, in part, the colonies inherited from England, and which together make up our modern legal system'.[65] In this way, the common law refers to legal systems that are part of a broader particular legal tradition, as compared to, for example, civil law traditions, or those belonging to Aboriginal and Torres Strait Islander peoples.[66] In its narrower sense, however, the common law refers to 'the body of law, originating in custom, as applied and developed in the common law courts'.[67] In this sense, the 'common law' identifies a particular source of legal authority operating within common law systems, as compared to, for example, equity or statute (as

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[2013] *Australian Feminist Law Journal* 59; Marc Trabsky, 'The Coronial Manual and the Bureacratic Logic of the Coroner's Office' (2016) 12(2) *International Journal of Law in Context* 195.

[61] Dorsett and McVeigh, *Jurisdiction* (n 1) 57.

[62] Neil Duxbury, 'English Jurisprudence between Autin and Hart' (2005) 91 *Virginia Law Review* 1, 18–22.

[63] Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford University Press, 2004) 127.

[64] Brian Simpson, 'The Common Law and Legal Theory' in William Twining (ed), *Legal Theory and Common Law* (Basil Blackwell, 1986) 8, 8.

[65] Dorsett (n 11) 1–2 n 4.

[66] As expressed by Peter Goodrich and Yifat Hachamovitch in a discussion of the tradition of the common law: 'A tradition exists as a sense of familiarity, as a sign of identity or inclusion, of "we" against "them"': Peter Goodrich and Yifat Hachamovitch, 'Time Out of Mind: The Semiotics of the Common Law' in Peter Fitzpatrick (ed), *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (Pluto Press, 1991) 159, 161.

[67] Dorsett (n 11) 1 n. 4.

will be discussed in Chapter 3).[68] Both the broad and narrow senses of the common law are relevant to the present inquiry and are used contextually throughout the thesis.

The second orientation explains why the thesis engages with law's classification practices in the context of the history of NSW's tree protection laws. This context provides both historical depth and contemporary relevance to the analysis. Prior to colonisation, the trees growing on Eora, Dharug and Dharawal country (and beyond) did not belong to the common law. Instead, the trees only belonged to pre-existing Indigenous systems of law and were simply outside or beyond the limits of the common law's authority. Beginning in 1787, however, when Governor Phillip was first instructed to reserve 'timber' from all grants of land made within the colony, the trees also came to belong to the common law system of NSW.[69] Indeed the common law's history of tree protection stretches back well before the establishment of NSW as a British colony. As will be discussed in Chapter 3, the authority to classify law's protected trees dates back to the Norman kings of eleventh-century England. The context of tree protection provides an opportunity to explore how classification has progressively bound NSW trees to the body of the common law in different ways.

Tree protection laws are also a topic of contemporary relevance. In NSW, native vegetation protection laws have been repeatedly reformed and repealed since state-wide protections were introduced in 1995.[70] Led by landholders, there have been hunger strikes and protests in relation to these laws.[71] Debate is polarised, framed by arguments in favour of protecting the private property rights of landholders versus environmental arguments in favour of protecting biodiversity, improving water quality and managing risks associated with anthropogenic climate change.[72] In addition, there have been numerous

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[68] For an introduction to the history of the emergence of common law authority see: JGA Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press, 1987).

[69] 'Philip's Instructions' (25 April 1787) in FM Bladen, *Historical Records of New South Wales*, vol 1(2) (Government Printer, 1892) 84, 90 ('*HRNSW Vol 1(2)*').

[70] Robyn Bartel and Nicole Graham, 'Property and Place Attachment: A Legal Geographical Analysis of Biodiversity Law Reform in New South Wales' (2016) 54(3) *Geographical Research* 267, 268–9.

[71] See, eg, 'Farmers Fell Trees to Protest over Land Clearing Laws' [2007] *ABC News Online* <https://abc.net.au/news/2007-0705/farmers-fell-trees-to-protest-over-land-clearing/90524>; 'Hundreds Rally for Hunger-Striking Farmer', *ABC News Online* (online at 4 January 2010) <http://www.abc.net.au/news/2010-01-04/hundreds-rally-for-hunger-striking-farmer/1197122>; Alison Rehn, 'Pole-Sitter Farmer Peter Spencer in Tears over Massive Support for His Cause', *The Daily Telegraph* (online at 3 February 2010) <www.dailytelegraph.com.au/pole-sitting-farmer-peter-spencer-in-tears-over-massive-support-for-his-cause>.

[72] Bartel and Graham (n 70) 271.

public inquiries into, and independent assessments of, the effects and efficacy of these laws, both nationally and for NSW specifically.[73] Important analyses of the history of debates surrounding native vegetation protection laws are offered by environmental law scholars such as Robyn Bartel, Nicole Graham and Justine Bell.[74] Tree protection, as a subject of environmental law, can thus be read as a legal problem framed by a political dispute: an ideological battleground fought by champions of individual freedoms versus collective responsibility for the environment, and for the planet as whole.[75] A jurisprudence of classification is, therefore, particularly worthwhile in this context, because it potentially offers another way of thinking about tree protection law, one that is oriented to institutional practices of classification rather than to particular substantive categories, such as public and private rights, or environmental and property law (as further discussed below).

Finally, thinking about law by thinking about trees is not new to jurisprudence. For example, Peter Goodrich draws our attention the use of tree metaphors by common and civil law jurists to relay the structures and traditions of jurisdiction.[76] He describes how Edward Coke and the classical Roman jurists drew on tree images and metaphors to convey a sense of the inheritance of law's authority: its lineages and relationships of office.[77] In a different way, Frederick Pollock offers the English oak tree as an apt metaphor for the common law. For Pollock, the oak tree represented qualities of organic growth and of continuity through time.

> Our old English oak is rugged and weather-beaten; its branches are not symmetrical; some limbs have spread abroad while others have been stunted; it savours its own soil and knows of none other. But in that soil it is fast rooted, and from the deepest fibres that feed it in the secret places of the earth to the topmost that leap to the air and glance in the sun, it still lives and grows. Our Constitution is popular in that the life of the

[73] See, eg, Productivity Commission, *Impacts of Native Vegetation and Biodiversity Regulations* (No 29, 2004); Finance and Public Administration References Committee, *Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures* (Senate Committee, April 2010); Audit Office of New South Wales, *Managing Native Vegetation* (Auditor-General's Performance Audit, 2019).
[74] Justine Bell, 'Tree Clearing, Hunger Strikes and Kyoto Targets - The Need for Middle Ground' [2011] *Environment and Planning Law Journal* 201; Bartel, 'Vernacular Knowledge and Environmental Law' (n 40); Nicole Graham, 'Tensions between Public Environmental Regulation and Private Property Interests: The Case of Land Clearing in New South Wales' [2014] *Australian Environment Review* 264; Bartel and Graham (n 70).
[75] Nicole Graham and Robyn Bartel, 'Farmscapes: Property, Ecological Restoration and the Reconciliation of Human and Nature in Australian Agriculture' (2017) 26 *Griffith Law Review* 221.
[76] Goodrich (n 52) 215–23.
[77] Ibid 218–21.

> English people, from the greatest to the least, has gone to make it what it is; and it has at all times combined the tenacity of tradition with a great power of assimilating fresh elements, and of adapting existing organs to new purposes. For some considerable time our national institutions and our national character have been confirming one another in this habit. [78]

In this way, the English oak tree symbolised qualities of the common law that Pollock held dear: it may not necessarily be neatly arranged, but its grounding was solid, from its traditional roots to incremental legal development at the leaf tips. Rather than reflecting on law through tree metaphors, this thesis works through examples of protected tree categories to articulate what a jurisprudence of classification might look like and to demonstrate its value.

IV. The Argument, Significance and Innovation

As stated at the beginning of this chapter, this thesis proposes a jurisprudence of classification comprising three registers: who, how and effects. I argue that a jurisprudence of classification that considers *who* has the authority to classify law's protected trees, *how* that authority is enacted, and the jurisdictional *effects* of classification, offers new insights into the institutional relationships between law, classification and authority. Although these three registers overlap and overlay one another, each register is held apart for the purposes of argument. I do this to demonstrate the contribution of each to the quality of lawful relations produced by law's classification practices. My original contribution to knowledge can, therefore, be divided into two parts. The first proposes what a jurisprudence of classification might look like, thereby contributing to my first orientation towards the jurisprudence of jurisdiction. The second contribution demonstrates the value of such a jurisprudence, thereby contributing to my second, and substantive, orientation to tree protection laws in NSW.

Such a jurisprudence of classification is particularly useful because it is not premised on modern categories, such as environmental and property law, or private and public rights. As will be discussed further in Chapter 2, these substantive categories are relatively recent innovations in the history of the common law, yet they exercise a pervasive influence

[78] Frederick Pollock, *Oxford Lectures and Other Discourses* (MacMillan and Co, 1890) 162–3, quoted in Duxbury (n 63) 149–50.

over the way law is conceptualised and practised.[79] It is important to remember that these categories are not the only ways in which law can be structured or analysed.[80] The aim of this thesis is to explore what law might look like when examined through other categories – when we examine who may classify in the name of the law, how they classify, and with what effect.

The thesis builds on and extends Dorsett and McVeigh's insight that categorisation is a technology of jurisdiction.[81] Whereas Dorsett and McVeigh focus on the jurisdictional effects of law categories (how law's categories order legal knowledge and sustain, modify or create lawful relations), my thesis also considers prior questions of how law configures the authority to classify, and how that authority is enacted as a matter of technique. To extend Dorsett and McVeigh's insights, I draw on Alain Pottage's work on the institutional nature of law's categories.[82] In particular, Pottage suggests that law's categories can be treated as institutional artefacts, fabricated and deployed by institutional practices.[83] I do this to highlight the significance of institutions to thinking about law's classification practices. Classification and jurisdiction are not activities of individuated subjects, nor are they universal truths: rather, both classification and jurisdiction work through and are produced by institutions. As a consequence, the jurisprudence of classification presented is intended to produce an account of how particular categories came to be, and how they work within each category's own institutional context, rather than to produce a grand or overarching theory of law and classification.

The second contribution demonstrates the value of my proposed jurisprudence of classification, by making my argument through analysis of a particular area of law: the history of tree protection laws in New South Wales. In so doing, the thesis builds on and contributes to existing environmental law scholarship on how common law systems

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[79] On the bifurcation of property and environmental law, see: Todd S Aagaard, 'Environmental Law as a Legal Field: An Inquiry into Legal Taxonomy' [2009] *Cornell Law Review* 221.
[80] Dorsett and McVeigh, *Jurisdiction* (n 1) 26.
[81] Ibid 52.
[82] Alain Pottage, 'Introduction: The Fabrication of Persons and Things' in Alain Pottage and Martha Mundy (eds), *Law, Anthropology and the Constitution of the Social: Making Persons and Things* (Cambridge University Press, 2002).
[83] Ibid 11. Pottage's argument, that law's categories are fabricated by institutional practices, is different to the institutional theory of law put forward by Neil MacCormick and Otta Weinberger, which is written from within the jurisprudential tradition of legal positivism: Neil MacCormick, 'Institutions and Laws Again' (1999) 77(6) *Texas Law Review* 1429, 1429. See especially Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (D. Reidel, 1986); Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, 2007).

classify nature,[84] and on the history of common law tree protection in Australia.[85] As Margaret Davies articulates, the protection of trees on private property sits at the heart of debates concerning the extent to which law protects private versus public rights and interests.[86] As discussed above, however, the analysis here is structured around a particular relationship of life – tree protection – rather than the substantive categories of property and environmental law. I do so to draw attention to qualities of lawful relations produced by law's categories that are not otherwise readily visible. As will be discussed in the substantive chapters, these qualities relate to the way in which the authority to classify is sourced (Chapter 3), who can exercise it (Chapter 4), how the authority to classify is exercised (chapters 5 and 6), and the jurisdictional effects of classification (Chapter 7). Both contributions – to jurisprudence and to trees – run throughout the chapters of the thesis and are necessary to substantiate my overall argument: that without a jurisprudence of classification that considers the 'who, how, and effects' of classification, we risk overlooking the contribution of classification to the making of lawful relations between humans and nature.

V. OUTLINE OF CHAPTERS

The thesis is composed of eight chapters, structured by the three registers of classification discussed above: who, how and effects. Chapter 2 introduces the conceptual framework that underpins my argument. It begins with a discussion of three general points on classification - from classical philosophy, geography and anthropology – that are relevant to the analysis that follows. It then outlines the existing jurisprudential literature on classification and explains how this thesis proceeds through the jurisprudence of jurisdiction. Lastly, the chapter outlines how the thesis will extend the existing jurisprudence of jurisdiction literature on classification, by treating law's categories as being fabricated and deployed by institutional practices.

Chapter 3 addresses the preliminary question of sources of authority to classify within the common law by examining how the authority to classify law's protected trees has been

[84] See, eg, Theodore Steinberg, *Slide Mountain, of the Folly of Owning Nature* (University of California Press, 1995); Godden (n 30); Delaney (n 30); Eric Freyfogle, *The Land We Share: Private Property and the Common Good* (Island Press, 2003); Boyd (n 29); Nicole Graham, *Lawscape: Property, Environment, Law* (Routledge, 2011); Blomley (n 36).
[85] See, eg, Powell (n 44); TC Grant, *History of Forestry in New South Wales 1788 to 1988* (Star Printery, 1989); Bonyhady (n 48); Griffiths (n 46); Alec Bombell and Daniel Montoya, *Native Vegetation Clearing in NSW: A Regulatory History* (Briefing Paper No 05/2014, NSW Parliamentary Research Service, 2014). For important environmental histories of trees to colonisation, see, eg,: Gammage (n 42); Pascoe (n 42).
[86] Davies and Rogers (n 38) 43.

sourced and shaped throughout the history of the common law. It does this through three examples of different protected tree categories, each sourced differently: the royal forests of mediaeval England; timber of colonial NSW; and endangered species of contemporary NSW. Chapter 4 investigates who exercises the authority to classify in practice, focusing on the office of the governor in early colonial NSW. This chapter demonstrates that the early governors fabricated tree protection categories through the practice of making land grants.

The second register, how law classifies, is addressed in chapters 5 and 6. In this register, the focus is on institutional practices as techniques of classification. Chapter 5 presents the argument that proclamation writing is a technique of category-making. Tracing the history of tree protection categories promulgated by the office of the governor, I argue that NSW governors, since 1803, have exercised and continue to exercise the authority to make law's protected tree categories by writing proclamations. The chapter reveals the continuing importance of writing as an institutional practice within the common law tradition: a practice that makes law's categories, bestowing upon them the force and authority of law. Chapter 6 presents my argument that naming is a sorting technique that establishes relations of belonging between entities and law's categories. This chapter relocates my argument to the courts, as the pre-eminent institution of common law authority. I argue that different naming techniques produce different qualities of belonging to law's categories and, hence, to law. The naming of protected trees as timber produces a relationship of belonging underpinned by lay evidence of customary use in a particular locality. The naming of trees as native vegetation, in contrast, produces relations of belonging founded on expert evidence of a tree's botanical name.

The final register of classification, effects, is considered in Chapter 7. This chapter focuses on the jurisdictional effects of classification, meaning how classification can tell us what belongs to law and the form of that belonging. In the context of the procedural history of *Spencer v Commonwealth*, I argue that each category for disputed trees – timber, native vegetation and, finally, as carbon – offered a different form of belonging to law for the trees, drawing them into different sets of lawful relations vis-à-vis the landholder, the Commonwealth, and the state government.[87] But this effect could only be

[87] *Spencer v Commonwealth of Australia* (2010) 241 CLR 118 ('*Spencer v Commonwealth of Australia (2010)*').

achieved when the category was deployed within an appropriate institutional frame, in this case, by disclosing a reasonable form of action.

The conclusion, Chapter 8, summarises the arguments and findings presented across each register. It considers the implications of those findings and discusses the potential for a jurisprudence of classification to contribute to future scholarship. I argue that by tracing how a particular activity of life – tree protection – has come to belong to law through institutional practices of classification, this thesis has demonstrated how a jurisprudence of classification can articulate the conditions of legal existence made possible by law's categories.

CHAPTER 2. CLASSIFICATION AND THE COMMON LAW

This chapter outlines the conceptual framework that informs the jurisprudence of classification proposed by this thesis. Rather than presenting a general work on the theory of classification (either generally or in law in particular), this chapter focuses on classification as a technique of jurisdiction. If, as outlined in Chapter 1, lawful relations are established and maintained as a matter of technique and practice, then this chapter addresses how we might understand classification as such a technique and practice. In particular, the thesis focuses on investigating classification as a technique of jurisdiction.

The aims of this chapter are relatively modest. It is intended to lay the conceptual groundwork necessary to start investigating how law's categories establish relations of belonging to law. While it does not offer a general theory of classification, the chapter begins by articulating three key general points about classification that help to articulate the aims and scope of the present investigation into law's protected tree categories.[1] These points come, respectively, from classical philosophy, geography and anthropology. Each tells us something important about classification that will be relevant to understanding the particular jurisprudence of classification offered here. Next, it situates the present inquiry in relation to existing jurisprudential literature on classification in the tradition of the common law. Then it offers an introduction to the jurisprudence of jurisdiction and the idea of classification as a technique of jurisdiction. Last, it explains how this thesis extends existing jurisprudence of jurisdiction literature on classification, by thinking about law's categories as products of institutional practices. The chapter establishes the scope and structure of the overall argument. It lays the foundation for a classification of jurisprudence that considers *sources* of the authority to classify; *who* classifies; *how*; and with what *effect*.

I. CLASSIFICATION, GENERALLY

Classification has at different times occupied scholars from a diverse range of disciplines within Western scholarship. As explained in Chapter 1, classification refers to the practice of sorting entities into groups according to an established pattern.[2] It comprises, in

[1] As explained in Chapter 1, law's protected tree categories are here defined as categories that draw trees into lawful relations of protection from being cut down or otherwise injured.
[2] *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993) 'classification'.

particular, two inter-related activities: the making of categories and the sorting of entities into and out of those categories.[3] Within the sciences, scholarship that proposes or evaluates particular classificatory schemas (of plants or diseases, for example) is known as taxonomy.[4] Classification scholarship also includes the study of how particular classification systems come to be, their characteristics and their effects. This scholarship is found in disciplines such as cognitive psychology, anthropology, sociology and philosophy. Each of these disciplines offers important insights into how classification works and what classification systems can reveal about cognitive processes,[5] social structures,[6] power relations[7] and the making (and unmaking) of knowledge.[8] Rather than offering a general survey of this scholarship, I here offer three general points on classification that are relevant to understanding the jurisprudence of classification proposed by this thesis, which come from classical philosophy, geography and anthropology.

The classical theory of classification, generally attributed to Aristotle, emerged from classical philosophers producing ontological schemas of 'the most abstract categories needed to give a true description of the world'.[9] In *Categories*, Aristotle proposed ten top-order categories that would offer a complete list of what exists: substance (e.g., man, horse), quantity (e.g., three), quality (e.g., white), relation (e.g., of, to), place (e.g., in the market), when (e.g., yesterday), position (e.g., sitting), state (e.g., wearing a hat), action (e.g., to hit), being acted upon (e.g., being hit).[10] According to the classical theory of classification, categories function like 'abstract containers'.[11] Entities belong either inside or outside the category, depending on their inherent properties and characteristics. For

[3] See discussion above in Chapter 1.
[4] 'Taxonomy may be defined as the study and description of the variation of organisms, the investigation of the causes and consequences of this variation, and the manipulation of this data obtained to produce a system of classification': Clive Stace A, *Plant Taxonomy and Biosystematics* (Edward Arnold, Second Edition, 1989) 5.
[5] See, eg, Roger Brown, 'How Shall A Thing Be Called?' [1958] (1) *Psychological Review* 14; Eleanor Rosch et al, 'Basic Objects in Natural Categories' (1976) 8(3) *Cognitive Psychology* 382.
[6] See, eg, Emile Durkheim and Marcel Mauss, *Primitive Classification* (University of Chicago Press, 1963); Mary Douglas, *How Institutions Think* (Routledge & Kegan Paul, 1987).
[7] See, eg, Geoffrey C Bowker and Susan Leigh Star, *Sorting Things Out: Classification and Its Consequences* (Massachusetts Institute of Technology, 1999).
[8] See especially Michel Foucault, *The Order of Things* (Random House, 1970).
[9] Ingvar Johansson, *Ontological Investigations: An Inquiry into the Categories of Nature, Man and Society* (Ontos Verlag, 2004) 1.
[10] Aristotle, *Categories*, tr EM Edghill (Virginia Tech, 2001) [4]. Drawing on Thomasson's explanation and description of the ten categories: Amie Thomasson, 'Categories' in Edward N Zalta (ed), *The Stanford Encylopedia of Philosophy* (Summer 2019 Edition) <https://plato.stanford.edu/archives/sum2019/entries/categories/>.
[11] George Lakoff, *Women, Fire and Dangerous Things* (University of Chicago Press, 1987) 6.

example, a flower *is* a 'substance', under Aristotle's classification scheme, because it shares particular inherent and internal characteristics with other 'substances' as compared to, say, the action 'to hit'. According to this theory, classification is passive; it does not produce anything new but, rather, corresponds to, and reflects, a pre-existing order. Entities are assumed to have an 'ontological vocation' to be classified in particular ways.[12]

Several disciplines have destabilised the classical theory of classification, particularly the premise that classification can reveal a pre-existent 'order of things'.[13] Cultural geography offers a diverse set of conceptual resources for thinking about nature as culturally constructed, as explained and exemplified by the work of Noel Castree and Bruce Braun.[14] For example, Braun's study of the temperate rainforest in Clayoquot Sound, British Columbia demonstrates how discourses and practices associated with state forestry, environmental activism, eco-tourism, and landscape painting construct the forest in different ways: as an economic resource, as a wilderness, as home.[15] The forest, perceived as 'nature', that exists outside of and separate to culture, is instead found to be a product of these culturally contingent practices:

> [T]he natures we may seek to save, exploit, witness or experience do not lie external to culture and to history, but are themselves artefactual: objects made, materially and semiotically, by multiple actors (not all of them human) and through many different social and spatial practices (ranging from landscape painting to the science of ecology).[16]

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[12] Alain Pottage, 'Introduction: The Fabrication of Persons and Things' in Alain Pottage and Martha Mundy (eds), *Law, Anthropology and the Constitution of the Social: Making Persons and Things* (Cambridge University Press, 2002) 10.

[13] 'The order of things' comes from the title of Michel Foucault's exemplary work in this area: Foucault (n 8).

[14] This scholarship draws on post-structuralist theory that reveals the cultural contingency of knowledge and the complex relations between language and power. For a discussion of the significance of Foucault's work in this area, see Noel Castree, *Nature* (Routledge, 2005) 146–8. Geography also offers other conceptual frameworks for de-naturalising the relationship between humans and nature, including Marxist analyses of nature as commodity and new materialist frameworks that de-centre human agency. For exemplary works, see, eg, Noel Castree, 'Commodifying What Nature?' (2003) 27(3) *Progress in Human Geography* 273; Sarah Whatmore, *Hybrid Geographies: Natures, Cultures, Spaces* (SAGE Publications, 2002). For an introduction and intellectual history of these various theoretical approaches, see Bruce Braun, 'Nature and Culture: On the Career of a False Problem' in J Duncan, N Johnson and R Schein (eds), *A Companion to Cultural Geography* (Blackwell Publishing, 2004). See, eg, Bruce Braun, *The Intemperate Rainforest: Nature Culture and Power on Canada's West Coast* (University of Minnesota Press, 2002) ('*The Intemperate Rainforest*'); Noel Castree and Bruce Braun, 'Constructing Rural Natures' in *Handbook of Rural Studies* (SAGE Publications, 2006).

[15] Braun, *The Intemperate Rainforest* (n 14).

[16] Ibid 3.

This idea, of a culturally constructed nature, points to the impossibility of classifying nature on the basis of self-evident categories founded on an *a priori* ontological order.[17] In other words, classification and categorisation are recognised as practices that are active and productive, rather than as practices that are passive and reflective.

Scholars working in the areas of critical environmental law and legal geography also draw on conceptual frameworks that treat law's categories for nature as culturally constructed.[18] Lee Godden's critical environmental scholarship is exemplary in this area. For example, in the context of climate law, Godden argues that law's categories for greenhouse gas emissions reproduce a discourse of 'reflexive governance':

> The dominance of discourses based around a reflexive model of climate change regulation can be most clearly demonstrated by the progressive legal redefinition of greenhouse gas emissions. Emissions have been progressively recoded in line with the shifts from law to governance as: first, an atmospheric pollution, a 'waste' and a threat to life; then, as a 'tradeable permission; and ultimately a 'commodity' in terms of emissions trading schemes ...[19]

Here, Godden reveals the discursive paradoxes inherent in law's categories for nature. She argues that law's categories respond to, and reproduce, shifting dominances between discourses of law and governance: of power exercised by the sovereign as control using threat of death to governance that facilitates life and growth.[20] In another example, David Delaney examines the contradictions inherent in law's construction of nature as a 'wilderness', which is all at once a category of law, a physical location and a culturally contingent ideal.[21] Places that belong to law as 'wilderness' are not free of law but, rather,

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[17] See, eg, Castree (n 14) 170–1.

[18] As discussed in Chapter 1. I note that scholars working in the fields of legal geography, critical environmental scholarship and, increasingly, critical legal theory have also turned to new materialist methods to de-centre human agency in relation to thinking about law. For important works in this area, see Nicole Graham, *Lawscape: Property, Environment, Law* (Routledge, 2011); Nicole Graham, Margaret Davies and Lee Godden, 'Broadening Law's Context: Materiality in Socio-Legal Research' (2017) 26(4) *Griffith Law Review* 480; Margaret Davies, *Law Unlimited: Materialism, Pluralism and Legal Theory* (Routledge, 2017); Irus Braverman, 'Order and Disorder in the Urban Forest: A Foucauldian/Latourian Perspective' in L Anders Sandberg, Adrina Bardekjian and Sadia Butt (eds), *Urban Forests, Trees and Green Space: A Political Ecology Perspective* (Routledge, 2014) 132.

[19] Lee Godden, 'Climate Change: Limits Discourses at the Interface of International Law and Environmental Law' in Brad Jessup and Kim Rubenstein (eds), *Environmental Discourses in Public and International Law* (Cambridge University Press, 2012) 263, 284.

[20] Ibid 267.

[21] David Delaney, *Law and Nature* (Cambridge University Press, 2003) especially Chapter 7 pp 162–91.

are found to be thick with it: full to the brim with rules and regulations that determine what kinds of activities can take place within its legally determined boundaries.[22]

This thesis owes an intellectual debt to this important legal scholarship for demonstrating that law's categories for natural entities should not be taken for granted.[23] 'Land', 'trees', 'forests', when authorised as law's categories, do not passively reflect a pre-existing order but actively construct something anew. There are, however, important differences between critical environmental and legal geography scholarship and the jurisprudential approach to classification developed here. Scholarship on the cultural construction of nature concentrates on the relationship between law's categories and culturally contingent discourses and knowledge practices. In contrast, this thesis concentrates on the relationship between law's categories and relations of belonging to law (as discussed below). By working within the resources offered by jurisprudence of jurisdiction, law is here treated as being '(more or less) itself', rather than a repository for, or reflection of, broader social relations.[24] The reason for restricting the scope of the inquiry in this way is to draw out and develop the common law's own way of thinking about classification as a technique that joins entities to law. Both approaches to thinking about law's categories are important; each is oriented to revealing different kinds of connections, relations and effects.

Last, this thesis takes from anthropology Mary Douglas's insight that classification is an institutional practice.[25] As Richard Fandon observes, while other social theorists 'interpreted social life … through the lens of economy or power, Douglas has consistently taken ritual behaviour as the bedrock of society'.[26] This is particularly true of Douglas's work on classification, which she understood as a practice of institutions.[27] In her account,

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[22] Ibid 177.

[23] As discussed in Chapter 1, Boyd offers a clear explanation of how the 'study and practice' of environmental law often naturalises the environmental objects to which those laws refer: William Boyd, 'Ways of Seeing in Environmental Law: How Deforestation Become an Object of Climate Governance' [2010] *Ecology Law Quarterly* 843, 849.

[24] Shaun McVeigh, 'Law as (More or Less) Itself: On Some Not Very Reflective Elements of Law' (2014) 4 *UC Irvine Law Review* 471, 473. On the importance of critical scholarship that engages with law as itself, see also Annelise Riles, 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities' (2005) 53 *Buffalo Law Review* 973; Alain Pottage, 'Law after Anthropology: Object and Technique in Roman Law' (2014) 31 *Theory, Culture, Society* 147.

[25] Douglas (n 6) 91.

[26] Richard Fardon, 'Immortality Yet? Or, the Permanence of Mary Douglas' (2018) 34(4) *Anthropology Today* 23, 24.

[27] See generally Douglas (n 6) especially Chapter 8, p 91–109. Douglas, in developing her account of institutions and classification, drew on the earlier anthropological work of Emile Durkheim and Marcel Mauss on classification: Durkheim and Mauss (n 6). Unlike Durkheim and Mauss, whose analysis was

classification was central to how institutions operated: institutions worked through categories to express shared understandings of the world, to establish qualities of equivalence or 'sameness' and to confer identity.[28] Consider, for example, the way in which people go about their lives as doctors in hospitals, as police officers on the street, as people in shopping malls, or as children in schools. Each individual draws on his or her 'institutional commitments for thinking with'.[29] Unlike taxonomic scholarship that proposed particular classification schemas to better understand particular phenomenon, Douglas's attention was focused on what classification could reveal about the nature of the classifying institutions. In this way, changing classification systems belonging to, for example, eighteenth-century French textile producers or the Californian wine industry, could be opened up to reveal something of the nature of their institutional makers.[30] As Douglas wrote: '[w]e can look at our own classifications just as well as we can look at our own skin and blood under a microscope'.[31]

Unfortunately, a consistent definition of 'institution' was absent from Douglas's work on classification.[32] One definition she offered was of an institution as a 'legitimised social grouping'.[33] As Perri 6 and Paul Richards point out, however, this definition was at odds with her overall argument that 'institutions explain styles of justification, not the other way around'.[34] She did, however, refer to institutional structures, which 6 and Richards helpfully interpret as 'established patterns of positions and relations'.[35] They propose that Douglas implicitly worked with an understanding of institutions as founded in practice.[36] Such a relationship between institutions and practice is reinforced by the etymology of the word 'institution'. 'Institution' combines the prefix *in-* with the Latin verb *statuere*, meaning to set up.[37] The *in-* prefix was used to indicate movement towards, within and

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bound up in a problematic and racist critique of classification systems belonging to cultures other than their own, Douglas also considered how Western cultures classify. She offers a perspective on classification that does not position classification systems on a race-based hierarchy.

[28] Douglas (n 6) especially Chapter 5, 55–68.

[29] Ibid 7.

[30] Ibid 104–9.

[31] Ibid 109.

[32] Perri 6 and Paul Richards, *Mary Douglas: Understanding Social Thought and Conflict* (Berghahn, 2017) 111.

[33] Douglas (n 6) 46.

[34] 6 and Richards (n 32) 111.

[35] Ibid 112.

[36] Ibid. This definition can be contrasted with rule-based, rational choice theories of institutions, such as those developed by John R Searle and David Lewis: John R Searle, 'What Is an Institution?' (2005) 1(1) *Journal of Institutional Economics* 1; David Lewis, *Convention: A Philosophical Study* (Blackwell Publishers, 2002).

[37] *The New Shorter Oxford English Dictionary* (n 2) 'institution'.

sometimes 'expressing onwards motion or continuance'.[38] In this way, the 'institution' can be understood as 'something established, a recognised way of doing things'.[39] Yet the term 'institution' also contemplates continual movement and activity: it is the repeated doing (or undoing) of particular practices that sustains (or undoes) the life of the institution. This definition avoids a binary division between formal rules and practice.[40] Instead, institutions can be understood as operating along spectrum: from emergent practices at one end to formal rules at the other.

> Before the institution becomes articulated in a rule or an explicit statement and before it has been subject to any great self-reinforcing dynamic, it may well be described as 'latent'. Yet it is certainly need not be – on Douglas' own theory – a group, which has to be a strongly integrated arrangement. The group is a product, as it were, of performing a particular kind of dance many times over.[41]

While I do not adopt their metaphor of institutions as dance, this thesis draws generally on 6 and Richards' interpretation of Douglas's work and their practice-based definition of institutions.[42]

Douglas's theory on classification and institutions is relevant to thinking about how law's classificatory practices come to be and what generates and sustains them. This thesis explores these inter-related matters through analysis of two particular NSW institutions: the office of the governor and the courts. Both institutions have exercised the authority to classify law's protected trees throughout NSW's legal history and are key institutional sites within the traditions of the common law. As will be discussed in chapters 4 and 5, the office of the governor was the first institution authorised to classify law's protected trees in the colony of NSW, and continues to play an important role today through the promulgation of legislative and sub-legislative instruments. As will be discussed in chapters 6 and 7, the courts are the pre-eminent institution of common law authority: the institutional site from which law speaks.[43] Whenever there are disputes about law's classification practices, it is the courts that are called upon to resolve them. By drawing

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[38] Ibid 'in-'.
[39] Peter Stein, *Legal Institutions: The Development of Dispute Settlement* (Butterworths, 1984) v.
[40] As encountered in Paul Dresch and Judith Scheele, 'Introduction' in Paul Dresch and Judith Scheele (eds), *Legalism: Rules and Categories* (Oxford University Press, 2015) 1, 23.
[41] 6 and Richards (n 32) 116.
[42] 6 and Richard's work is, to date, the most 'systematic effort to assess [Douglas'] theoretical legacy': Fardon (n 26) 23.
[43] Shaunnagh Dorsett, *Juridical Encounters* (Auckland University Press, 2017) 280.

on archival and other historical sources, this thesis explores the important contribution of these common law institutions to how law classifies protected trees.

II. Common Law Jurisprudence and Classification

To investigate the common law's own resources for thinking about classification, this thesis works with, and within, the writing of common law jurisprudents on classification. For present purposes, it is helpful to think about existing common law jurisprudence as addressing classification in four different ways. One is through category-specific analysis. The second addresses classification somewhat indirectly, through arguments about classification and legal reasoning. The third is through legal taxonomy: the making and evaluation of categorical schemas for legal doctrine. This thesis takes a fourth approach, from the jurisprudence of jurisdiction, to consider classification as a technique of jurisdiction. In this part, however, I will say a little about each of the other three, focusing in particular on legal taxonomies. This literature situates the present study within the field of common law jurisprudence, identifying points of convergence and divergence.

One way that jurisprudents have engaged with classification is through category-specific scholarship. Jurisprudence on the meaning and justification of property provides a good example of category-specific scholarship. Classic works include John Locke's natural rights theory of property, as expounded in 'Of Property' and Jeremy Bentham's utilitarian theory as set out in *Principles of the Civil Code*.[44] Legal scholarship on the justification and meaning of property now extends well beyond the province of jurisprudence, including doctrinal, critical legal theory and socio-legal analyses. For example, in Australia key cases that engage directly with the doctrinal meaning of property include *Yanner v Eaton* and *Victoria Park Racing*.[45] In both cases the court was required to determine whether the activities of the defendant (shooting a wild crocodile; observing and broadcasting results from horse racing on an adjacent parcel of land) constituted an acquisition of the plaintiff's property. In addition, scholarship in critical legal theory, critical environmental law and socio-legal studies offers critiques of property as perpetuating injustice and environmental degradation.[46] For example, working with the

[44] John Locke, *Two Treatises of Government* (McMaster University Archive of the History of Economic Thought, New Edition, 1999) 115; Jeremy Bentham, 'Principles of the Civil Code' in *Property: Mainstream and Critical Positions* (University of Toronto Press, 1978).
[45] *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479; *Yanner v Eaton* (1999) 201 CLR 351.
[46] For an important overview of the history and critical theories relating to property, see Margaret Davies, *Property: Meanings, Histories Theories* (Routledge-Cavendish, 2007). For examples of critical property

conceptual resources of legal geography, Nicole Graham argues that property, defined as rights between persons, perpetuates unsustainable people–place relations by failing to take into account the material conditions and limits of the places to which real property rights refer.[47] Unlike category-specific scholarship, this thesis addresses classification as an institutional practice – as discussed above. The aim, then, is not to critique or evaluate a particular legal category, but to interrogate the capacity for classification, as technique and practice, to establish relations of belonging to law.

Second, jurisprudents have also examined classification as 'an important and ubiquitous aspect of legal reasoning'.[48] A classic example is found in Hart's defence of legal positivism.[49] Hart argues that law's categories contain a 'core' of settled meaning and a 'penumbra' in which the meaning of a particular category is debatable.[50] The hypothetical rule 'no vehicles allowed in the park' is offered as an example. As Hart argues, the rule plainly prohibits automobiles in the park, but what about other kinds of vehicles – toy cars or airplanes: 'are these to be called vehicles for the purposes of the rule or not?'. Hart argues that the existence of law's categories presupposes a core of settled meaning, but that there will always cases that fall within the penumbra, because

> [f]act situations do not await us neatly labelled, creased and folded, nor is their legal classification written on them simply to be read off by the judge.[51]

The error of the legal realists, Hart argues, was to be preoccupied with the penumbra, forgetting about the settled core, into which most cases would fall. In this context, classification is the muddy marsh in which the battle between legal positivism and legal realism was played out.[52] It provided, in other words, a site for the making of a particular jurisprudential argument about the extent to which law and morality could be conceived of as separate and/or separable.[53]

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theory, particularly in relation to the environment, see Joseph L Sax, 'Ownership, Property and Sustainability' [2011] *Utah Environmental Law Review* 1; Eric Freyfogle, *The Land We Share: Private Property and the Common Good* (Island Press, 2003); Nicholas Blomley, 'Landscapes of Property' (1998) 32(3) *Law and Society Review* 567.

[47] Graham (n 18).

[48] Jay M Feinman, 'The Jurisprudence of Classification' (1989) 41 *Stanford Law Review* 661, 664.

[49] HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593.

[50] Ibid 607.

[51] Ibid.

[52] For a statement of the legal realist view of legal classification and legal reasoning, see Karl Llewellyn, 'A Realistic Jurisprudence - The Next Step' (1930) 30 *Colombia Law Review* 431.

[53] Legal realists continue to contend with this issue; see, eg, Hanoch Dagan, 'Doctrinal Categories, Legal Realism and the Rule of Law' (2015) 163(7) *University of Pennsylvania Law Review* 1889.

In a slightly different way, critical legal theorist Duncan Kennedy treats classification as a window into particular styles of legal thought operating at particular times and places.[54] Kennedy demonstrates this approach through a critique of *Blackstone's Commentaries*, drawing on Marxist methods to reveal 'the conscious or unconscious motive of the judge was to further some particular interest'.[55] He argues that the 'intention of Blackstone's Commentaries was to legitimate the eighteenth-century English system for the administration of justice'.[56] Kennedy rejected a classical theory of classification, instead calling legal categories 'social construction[s]' that have been carried over for generations.[57] It appears that, for Kennedy, classification systems were something of a necessary evil. One the one hand, classification was a crucial aspect of legal thinking. On the other hand,

> [a]ll schemes are lies. They cabin and distort our personal experience, and they do so systematically rather than randomly.[58]

Additionally, he argues that classification 'den[ies] the truth of our painfully contradictory feelings about the actual state of relations between persons in our social world'.[59] For Kennedy, uncovering the 'constructed' nature of legal taxonomy opens the door to critical analysis of the ways in which particular legal taxonomies were deployed to legitimate particular kinds of social and economic orders.[60] As compared to Hart, this thesis does not engage with the specific jurisprudential debate about law and morality. As compared to Kennedy, neither does it focus on discerning the relationship between law's classification practices and broader economic or social practices. It does, however, share with Hart and Kennedy a commitment to avoiding classical theories of classification that would suggest, in Hart's terms, that fact situations come to law 'neatly labelled'. Indeed, it digs deeper into how law classifies, by interrogating, as a matter of technique and

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[54] Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28 *Buffalo Law Review* 205.
[55] Ibid 219.
[56] Ibid 256. For the counterargument, that Blackstone's *Commentaries* were instead a significant classificatory achievement that offered an external view of the common law without becoming lost in the complexity of the procedural forms of action, see SFC Milsom, 'The Nature of Blackstone's Achievement' [1981] *Oxford Journal of Legal Studies* 1.
[57] Kennedy (n 54) 215. See above discussion on the idea of categories as constructions, rather than reflections of nature/reality.
[58] Ibid.
[59] Ibid 210.
[60] Critical approaches to legal taxonomy are also now emerging in environmental law that explores how the doctrinal categories of 'property' and 'environmental' law obscure the environmental dimension of real property law. See generally Todd S Aagaard, 'Environmental Law as a Legal Field: An Inquiry into Legal Taxonomy' [2009] *Cornell Law Review* 221; Nicole Graham, 'This Is Not a Thing: Land, Sustainability and Legal Education' (2014) 26 *Journal of Environmental Law* 395.

practice, how law's categories come to be authorised as law's categories, how they are deployed and the effects of classification.

The third, and perhaps oldest, form of common law jurisprudence on classification is the making of legal taxonomies. Early common law taxonomies took the form of treatises or institutes offering an overview or outline of the common law ordered in various ways, sometimes alphabetically.[61] Examples include *Bracton's Notebook* (c. 1220–60),[62] Coke's *Institutes* (c. 1628–44),[63] and Blackstone's *Commentaries* (1765–69).[64] Contemporary doctrinal categories, such as 'tort', 'criminal' and 'contract' law, were absent from these early common law taxonomies. This was because, up until the nineteenth century, the common law was primarily ordered by procedure: its system of writs.[65] A writ was required to initiate legal proceedings and the choice of writ, one made, was irrevocable. The writ invoked the jurisdiction of a particular court to hear the claim.[66] It also specified the type of evidence that might be adduced, the pleading rules and the available remedy.[67] In this way, the writs provided a kind of pigeon-hole structure for law; cases were decided within the terms and procedures of each type of writ.[68] As Henry Maine observes, in the writ system 'substantive law is secreted in the interstices of procedure'.[69] During the nineteenth century, however, a series of procedural reforms eroded the rigid workings of the writ system, which was eventually abolished.[70] These procedural reforms happened alongside the emergence of a common law textbook tradition to accompany a shift to university-based, rather than apprentice-style, legal education.[71] Through this textbook tradition emerged our contemporary categories of

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[61] Alan Watson, 'The Structure of Blackstone's Commentaries' (1988) 97 *Yale Law Journal* 795.
[62] FW Maitland (ed), *Bracton's Notebook: A Collection of Cases Decided in the King's Courts during the Reign of Henry III; Annotated by a Lawyers of That Time, Seemingly Henry of Bratton* (Cambridge University Press, 1887).
[63] Edward Coke, *The First Part of the Institutes of the Lawes of England, or, A Commentarie upon Littleton, Not the Name of the Lawyer Only, but of the Law Itself.* (Printed for the Societe of Stationers, 1628) ('*First Part of the Institutes*'); Coke, Edward, *The Second Part of the Institutes of the Lawes of England* (M Flesher and R Young, 1642); Coke, Edward, *The Third Part of the Institutes of the Lawes of England* (M Flesher, 1644); Edward Coke, *The Fourth Part of the Institutes of the Laws of England* (M Flesher, 1644).
[64] William Blackstone, *Commentaries on the Laws of England: Book the First* (Clarendon Press, 1765); William Blackstone, *Commentaries on the Laws of England: Book the Second* (Clarendon Press, 1766); William Blackstone, *Commentaries on the Laws of England: Book the Third* (Clarendon Press, 1768); William Blackstone, *Commentaries on the Laws of England: Book the Fourth* (Clarendon Press, 1769).
[65] FW Maitland, *The Forms of Action at Common Law* (Cambridge University Press, 1971) 1.
[66] Dorsett and McVeigh, *Jurisdiction* (n 1) 71.
[67] Maitland (n 65) 3.
[68] Ibid.
[69] Henry Maine, *Early Law and Custom* (John Murray, 1883) 389, quoted in Maitland (n 65) 1.
[70] Maitland (n 65) 1.
[71] Dorsett and McVeigh, *Jurisdiction* (n 1) 74–5.

legal doctrine, such as contract and tort.[72] Against this background came a period in the nineteenth and early twentieth centuries in which common law jurisprudents (particularly those located in university law schools in the United Kingdom and North America) discussed, proposed and developed classification schemas to order law according to the nuance of substantive rules, rather than according to the complexity of procedure.[73]

For present purposes, Roscoe Pound's 'Classification of Law' offers a helpful and important introduction to contemporary jurisprudence on legal taxonomy.[74] Pound argued that the classical theory of classification was unsuited to the task of doctrinal classification.[75] He argued that an assumption that legal taxonomy can reveal 'some fixed ultimate reality behind legal precepts' was misguided, and that legal scholars 'must renounce extravagant expectations about what classification can achieve'.[76] Rather, legal taxonomies were simply tools for ordering legal knowledge to teach, understand, or make more accessible law's rules, principles and procedures.[77]

The approach to taxonomy proposed by Peter Birks, in the late twentieth century, makes a stronger case for legal taxonomy, as compared to Pound.[78] Birks argues that scholarly neglect of legal taxonomy leads to 'error and confusion' and that 'without good taxonomy and a vigorous taxonomic debate the law loses its rational integrity.'[79] To make this argument, Birks implicitly draws on a classical theory of classification:

> Taxonomy is classification. In relation to any particular science, taxonomy is the branch of that science which deals with the accurate classification of the subject-matter of that science … Taxonomy changes nothing, but it promotes understanding.[80]

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[72] Ibid 75.
[73] For an overviews of key common law classifiers in this period, and their motivations, see Gregory Alexander, 'The Transformation of Trusts as a Legal Category, 1800–1914' (1987) 5 *Law & History Review* 303, 305–2. See also Roscoe Pound, 'Classification of Law' (1924) 37 *Harvard Law Review* 933, 951–67.
[74] Pound (n 73).
[75] Ibid 937.
[76] Ibid 937–8.
[77] George Whitecross Paton, *A Textbook of Jurisprudence* (Clarendon Press, 3rd ed, 1964) 235.
[78] Birks's taxonomic writing on private law, particularly in equity and torts, precipitated a slew of taxonomic work concerning classificatory schemas for better understanding and explicating a structure of private law. See generally Emily Sherwin, 'Legal Taxonomy' (2009) 15(1) *Legal Theory* 25.
[79] Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' [1996] *University of Western Australia Law Review* 1, 4 and 22.
[80] Ibid 3.

A good legal taxonomy is like a good map: it offers lawyers and scholars a way to find their way around a particular legal system.[81] However, Geoffrey Samuel suggests that in the tradition of the common law, 'remedies and categories of causes of action allow law to operate close to the facts'.[82] In this way, it may be more appropriate to think of common law categories as relating to particular kinds of factual scenarios, rather than to a system of abstract and logically deduced set of relations. Samuel posits that the common law, by its nature, is not as 'classificatory' as civil law: common lawyers were comfortable with switching from one cause of action to another, from one set of categories to another, 'without giving much thought to the overall structure'.[83] Samuel's insights are relevant because they offer insight into common law classification that does not necessarily require starting from a grand, overall structure. What matters, instead, is the way that particular categories operate in relation to particular fact scenarios, or, perhaps, as will be explored further in Chapters 7, in the context of particular institutional procedures or transactions. While Pound and Birks (with varying degrees of enthusiasm) turned to classification as a tool for the production of legal knowledge, this thesis instead engages with classification as a tool – or, rather, a technique – of jurisdiction.

III. Classification as a Technique of Jurisdiction

Within the idiom of the common law, jurisdiction is predominantly associated today with courts and territory.[84] Pertaining to courts, jurisdiction is understood as 'the authority to decide', referring to the authority of a court to determine a particular dispute.[85] Pertaining to territory, jurisdiction is understood as the geographic boundary that delimits the authority of a sovereign state.[86] As the authority to decide, or as territory, jurisdiction tends to be treated as a matter of procedural preliminaries: a question of which laws will apply, or in which court to commence proceedings. As Edward Mussawir observes, 'the language of jurisdiction still occupies a much larger place in the procedural domain of

[81] Ibid 6–7.
[82] Samuel, Geoffrey, 'Can Gaius Really by Compared to Darwin?' (2000) 49 *International and Comparative Law Quarterly* 297.
[83] Ibid.
[84] See, eg, Robert C Casad, *Jurisdiction in Civil Actions: Territorial Basis and Process Limitations on Jurisdiction of State and Federal Courts* (Butterworth Legal Publishers, 2nd ed, 1991) 1–2.
[85] Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (The Federation Press, 2012) 1.
[86] On the relatively recent conjoining of jurisdiction and territory, and the effect on pre-existent jurisdictions operating in colonised spaces see Shaunnagh Dorsett, 'Mapping Territories' in Shaun McVeigh (ed), *Jurisprudence of Jurisdiction* (Routledge-Cavendish, 2007) 137; Shaunnagh Dorsett and Shaun McVeigh, 'Just So: "The Law Which Governs Australia Is Australian Law"' (2002) 13(3) *Law and Critique* 289 ('Just So'). See also Richard T Ford, 'Law's Territory (A History of Jurisdiction)' (1999) 97(4) *Michigan Law Review* 843.

law than its theory or jurisprudence'.[87] In other words, jurisdiction is predominantly treated as a technical issue of procedure, a question of in which court to initiate proceedings, rather than as matter of jurisprudential or critical interest.

However, several common law scholars have recently reinvigorated this relatively narrow sense of jurisdiction.[88] Here, I draw particularly on the work of Shaunnagh Dorsett and Shaun McVeigh on the jurisprudence of jurisdiction.[89] As Dorsett writes,

> jurisdiction is key to the order of law (and laws). Jurisdiction brings someone or something to a particular law. It binds those persons or things to that law.[90]

Instead of referring to territory or the extent of a court's authority, jurisdiction marks the moment of entry to the juridical domain; it is the action of permitting that entry.[91] As Olivia Barr explains, even modern territorial jurisdiction does not swallow territories whole. Instead, jurisdiction might be better understood as being spread thickly or thinly, as a kind of lumpy and gap-ridden membrane indicating the thickness or thinness of a legal system's authority over a particular domain.[92] To illustrate, not *everything* located within the territorial limits of the jurisdiction of NSW belongs to the NSW common law system. The event of forgetting to water my indoor plants does not belong to law: it is not a crime to neglect a plant. But the event of forgetting to feed and water my dog does belong to law; it is a crime to wilfully neglect to provide feed and water to a domesticated animal.[93] Similarly, I cannot sue for a broken heart, although I can sue for a broken window.[94] Goodrich's metaphor of jurisdiction as key articulates the point well. For

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[87] Edward Mussawir, 'The Activity of Judgement: Deleuze, Jurisdiction and the Procedural Genre of Jurisprudence' (2010) 7(3) *Law, Culture and the Humanities* 463, 463.

[88] See, eg, Peter Rush, 'An Altered Jurisdiction – Corporeal Traces of Law' (1997) 6 *Griffith Law Review* 144; Shaunnagh Dorsett, 'Thinking Jurisdictionally: A Genealogy of Native Title' (University of New South Wales, 2005); Mariana Valverde, 'Jurisdiction and Scale: Legal "technicalities" as Resources for Theory' (2009) 18(2) *Social & Legal Studies* 139; Peter Goodrich, 'Visive Powers: Colours, Trees and Genres of Jurisdiction' (2008) 2 *Law and Humanities* 213.

[89] Dorsett and McVeigh, *Jurisdiction* (n 1); Shaunnagh Dorsett and Shaun McVeigh, 'Questions of Jurisdiction' in Shaun McVeigh (ed), *Jurisprudence of Jurisdiction* (Routledge-Cavendish, 2007) ('Questions of Jurisdiction').

[90] Dorsett (n 43) 11–2.

[91] Goodrich, 'Visive Powers: Colours, Trees and Genres of Jurisdiction' (n 88) 215.

[92] Olivia Barr, 'Walking with Empire' [2013] *Australian Feminist Law Journal* 59, 61. On the history of alternative orderings of jurisdiction, and on the common law's origins as but one jurisdiction among many, see Dorsett and McVeigh, 'Just So' (n 86).

[93] *Cruelty to Animals Act 1979* (NSW) s 8(1).

[94] However, heartbreak has historically belonged to law, in different ways. See Alecia Simmonds, '"She Felt Strongly the Injury to Her Affections": Breach of Promise of Marriage and the Medicalization of Heartbreak in Early Twentieth-Century Australia' (2017) 38(2) *The Journal of Legal History* 179; Peter Goodrich, *Law in the Courts of Love* (Routledge, 1996).

Goodrich, jurisdiction 'precedes law, it marks the point of entry into the juridical sphere'.[95] Further:

> … jurisdiction is the power to allow entry, a threshold condition of access wherein the subject holding the keys can determine who enters and who is excluded from the country, community or court that the gate protects…[96]

Goodrich continues:

> The gatekeeper stands before the law and holds a key as St Peter, as sovereign, as the judge. This is why law stands initially in opposition not to illegality but to excommunication or refusal of membership and jurisdiction.[97]

Jurisdiction establishes law's domain. In Goodrich's account, however, jurisdiction appears as somewhat mythical, a missive from an 'absent God'.[98] It connotes an aura of authority that descends from nowhere, but which functions as a protective skin around that which is recognised and understood as 'law'.

Dorsett and McVeigh, however, tackle jurisdiction by taking the word back to its etymological roots.[99] Jurisdiction combines the Latin *jus*, meaning law, and *dictio*, meaning to speak. Jurisdiction, then, can be understood as the act of speaking or pronouncing law. There is perhaps more than can be drawn out of jurisdiction's etymology. 'Jurisdiction' refers to law by use of the term *jus*, rather than the other Latin term for law: *lex*, which meant written, or codified, law.[100] *Jus* itself was written in early Latin as *jous*, from the Sanskrit *ju*, meaning to join.[101] This sense of *jus*, as an activity, supports Dorsett and McVeigh's conception of jurisdiction as a practice, a particular way of doing things.[102] It also supports Dorsett and McVeigh's insight that the work, or the effect, of jurisdictional practices is to join entities to law. Dorsett and McVeigh express this joining action through the idea of belonging to law, drawing on a language of jurisdiction introduced by Peter Rush.[103] In this sense, jurisdiction 'gives us a way of

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[95] Goodrich, 'Visive Powers: Colours, Trees and Genres of Jurisdiction' (n 88) 214.
[96] Ibid 215–6.
[97] Ibid 216.
[98] Ibid 213.
[99] Dorsett and McVeigh, *Jurisdiction* (n 1) 4.
[100] Goodrich, 'Visive Powers: Colours, Trees and Genres of Jurisdiction' (n 88) 218.
[101] William Smith, William Wayte and GE Marindin (eds), *A Dictionary of Greek and Roman Antiquities* (John Murray, 1890) 'jus', accessed via the Perseus Digital Library at <https://www.perseus.tufts.edu/hopper/> .
[102] Dorsett and McVeigh, *Jurisdiction* (n 1) 14.
[103] Dorsett and McVeigh, *Jurisdiction* (n 1).

authorising law, or saying that something is lawful or belongs to law, and only subsequently is it declared what that law is'.[104] On this point, Dorsett and McVeigh cite Rush's earlier work, in which jurisdiction is described as

> [r]eferring us first and foremost to the power and authority to speak in the name of law and only subsequently to the fact that law is stated – and stated to be something or someone.[105]

For Dorsett and McVeigh, jurisdiction thus comprises two important elements. First, it connotes *authority*, and second, it is an *activity,* or a practice, of speaking or pronouncing law.

Dorsett and McVeigh's treatment of jurisdiction and authority begins with the writing of Hannah Arendt.[106] Arendt draws distinctions between authority, persuasion and force.[107] Persuasion occurs between equals or peers, whereas force involves the use of coercion or violence between persons of unequal power:

> …authority precludes the use of external means of coercion; where force is used, authority itself has failed.[108]

Importantly, also, authority for Arendt is power that is subject to a measure of restraint.[109] In this way authority is also distinguished from power exercised by tyrannical and totalitarian remines.[110] However, whereas Arendt is concerned with the legitimacy of authority, Dorsett and McVeigh are more concerned with how the authority to pronounce law is configured and enacted.[111] Goodrich's gate and key metaphor can here perhaps be reshaped somewhat into a maze, in which there are multiple keys and multiple gatekeepers. One way to move through the maze is to search for its source: the entry and exit points that take us to somewhere else (to myth, to faith, to politics, to philosophy) as the source of law's authority. Another way to move through the maze is to engage with each gatekeeper on her own terms, to understand the way in which jurisdiction, the

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[104] Ibid 5.
[105] Rush (n 88) 150.
[106] Dorsett and McVeigh, *Jurisdiction* (n 1).
[107] Hannah Arendt, *Between Past and Future: Eight Exercises in Political Thought* (Penguin Books, 1978) 92–3.
[108] Ibid 93.
[109] Hannah Arendt, 'Authority in the Twentieth Century' in James McAdams (ed), *Crisis of Modern Times* (University of Notre Dame Press, 2007) 325, 328.
[110] Ibid 327.
[111] Shaunnagh Dorsett and Shaun McVeigh, 'Jurisprudences of Jurisdiction: Matters of Public Authority' (2014) 23 *Griffith Law Review* 569.

authority to pronounce law (to lock or unlock the gate) is exercised as a matter of technique and practice. Prior questions (about source) and subsequent questions (about substance: what happens once we enter through the door?) are productively left aside. Dorsett and McVeigh suggest that authority operates somewhere in the realm between persuasion and power,[112] and treat it as 'a status and something like an assemblage of jurisdictional devices and practices'.[113] This definition orients the jurisprudence of jurisdiction towards understanding the technical means through which the authority to pronounce law is configured, rather than towards questions of legitimacy.

Importantly, jurisdiction is a practice. Like classification, it is also a practice that adheres to institutions, rather than to individuals.[114] The institutional nature of jurisdiction is helpfully illustrated by Goodrich with an example of a US county court judge who went a little rogue in court one day.[115] A defendant appeared before the court on a traffic violation. The judge found the defendant guilty and imposed a fine. In response the defendant called the judge a 'son of a bitch'. The defendant was placed under arrest for contempt of court, and the judge ordered his imprisonment. As he was led out of court, the defendant uttered another obscenity, at which point the judge stepped down from the bench and physically attacked the defendant. As Goodrich writes:

> In stepping down and hitting the defendant, the judge quite simply ceased to be a judge; he demitted his role … meaning he took off his mask and become like everyone else. Without robes, lacking both the ceremony and solemnity alike, law becomes mere administration … Implicit in that observation is the flip side, namely that when on high, enthroned, in full dress and flow within the ordered decorous theatre of trial, the robed judge has become his office and the person has transmuted into the law.[116]

This example also illustrates Douglas's point about individuals thinking with and on behalf of institutions, discussed above. The judge on the bench, enrobed, is thinking with and on behalf of the court as institution of the administration of justice. When the judge leaps out of his or her seat, s/he does not leave or escape the strictures of the institution, although s/he has discarded his or her office-holding position as 'judge'. The individual-

[112] Dorsett and McVeigh, *Jurisdiction* (n 1) 31.
[113] Dorsett and McVeigh, 'Jurisprudences of Jurisdiction: Matters of Public Authority' (n 111) 574.
[114] Goodrich, 'Visive Powers: Colours, Trees and Genres of Jurisdiction' (n 88) 213.
[115] Peter Goodrich, *Legal Emblems: Obiter Depicta and the Governance of Vision* (Cambridge University Press, 2013) 24.
[116] Ibid.

who-was-judge is now enveloped by the institution of the court as a private person, now acting in contempt. In this way, we can think of jurisdiction as an institutional practice that works through institutions and institutionalised roles, such as offices, rather than through individuals.

As an institutional practice, jurisdiction is also about how the authority to pronounce law is enacted as a matter of technique. Dorsett and McVeigh refer to this register of the jurisprudence of jurisdiction as the 'technologies of jurisdiction'.[117] As they write:

> An exercise of a jurisdiction is always an exercise of technology, or an assemblage of devices, that authorises law and in a general sense institutes a life – or at least a life before the law. In common law thought, this technical and material aspect might be characterised in terms of a technology or set of techniques that capture or attach its objects to law.[118]

So, a technology of jurisdiction can be understood as something 'that is designed to, or is capable of, authorising, changing or altering lawful relations'.[119] A quick note here on terminology. Throughout the thesis, I make a distinction between *technology* and *technique*. The two words are closely allied to the notion of producing, crafting or making something, through their etymological roots in the Greek *technê*. As Dorsett and McVeigh observe, in its classical sense *technê* was used to describe '[a] power or capacity to produce things whose eventual existence was "caused" by the craftsman'.[120] For Aristotle, *technê* resulted in the production of artefacts. Artefacts could not reproduce themselves, but were instead generated by the craftsman's work and intervention.[121] Drawing on this etymology, Dorsett and McVeigh adopt a broad sense of technology that includes techniques, devices and organisational strategies.[122] However, I adopt a narrower sense of technology as a device that has a material component.[123] Technique, on the other hand, is understood as a manner or style, of productive enactment or performance.[124] I do this to examine the effect of changing *technologies* on law's classificatory *techniques* (in

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[117] Dorsett and McVeigh, *Jurisdiction* (n 1) 54.
[118] Dorsett and McVeigh, 'Questions of Jurisdiction' (n 89) 11–2.
[119] Dorsett and McVeigh, *Jurisdiction* (n 1) 14.
[120] Ibid 55.
[121] Maarten Franssen, Gert-Jan Lokhorest and Ibo van de Poel, 'Philosophy of Technology' in Edward N Zalta (ed), *The Stanford Encylopedia of Philosophy* (Fall 2018 Edition) <https://plato.stanford.edu/archives/fall2018/entries/technology>.
[122] Dorsett and McVeigh, *Jurisdiction* (n 1) 55.
[123] Don Ihde, *Philosophy of Technology* (Paragon House, 1993) 47.
[124] *The New Shorter Oxford English Dictionary* (n 2) 'technique'.

Chapter 5). While I refer to 'techniques of jurisdiction', Dorsett and McVeigh use the term 'technologies of jurisdiction'.

In *Jurisdiction*, Dorsett and McVeigh consider various techniques of common law jurisdiction, including the courts, writing, precedent, categories and mapping.[125] Each technique offers a different mode of figuring a relation of belonging between entities and law, by bringing those entities to law and subjecting the entities to law's order and authority. For example, precedent can be understood as a technology of jurisdiction that transmits law's authority through time.[126] The doctrine of precedent binds previous decisions by the courts to law in a particular form, producing an institutional order in those decisions that shapes how future decisions will be made. Other scholars have taken up the question of jurisdictional technique, examining how various practices bind particular entities to the authority of law. For instance, Olivia Barr argues that roads and walking are technologies of jurisdiction, because both contributed to the expansion of common law jurisdiction within the colonies of Victoria and New South Wales.[127] Marc Trabsky considers place-making as a jurisdictional technique that bound the places of the dead to law in colonial Victoria.[128] In addition, Mussawir considers how the writing of particular standard form court documents exerts a jurisdiction of control over persons suspected of being terrorists.[129] Each technique is explored as making available a certain way of joining entities to law. Although this thesis touches on other techniques of jurisdiction – particularly writing and naming– the focus here is on understanding the jurisdictional work of categories and classification.

Categories are a technique of jurisdiction because of their capacity to join entities to law, thereby establishing lawful relation. As Dorsett and McVeigh write:

> We identify legal relations by giving them names. This could involve defining certain forms of writing a contractual, it could involve trying to elaborate a general legal concept like property, or is could involve considering what is included within a legal concept such as native title…. It also encompasses the work of accurately trying to

[125] Dorsett and McVeigh, *Jurisdiction* (n 1) 54.
[126] Ibid 67.
[127] Barr (n 92); Olivia Barr, 'A Jurisprudential Tale of a Road, an Office and A Triangle' (2015) 27(2) *Law & Literature* 199.
[128] Marc Trabsky, 'Walking with the Dead: Coronial Law and Spatial Justice in the Necropolis' in Chris Butler and Edward Mussawir (eds), *Spaces of Justice* (Routledge, 2017) 94.
[129] Edward Mussawir, 'Jurisdiction of Control: Judgement and Procedural Forms in Thomas v Mowbray' (2010) 19(2) *Griffith Law Review* 307.

> represent social relations in law. So part of the work of naming or defining homicide or genocide involves the attempt to accurately represent the (moral) wrong of homicide or genocide.[130]

What Dorsett and McVeigh do not explicitly state here, although it is implicit in their general definition of technologies of jurisdiction, is that law's categories also 'capture' or join objects and material entities to law. Consider, for example, law's category of 'native vegetation' in the context of tree protection laws found in NSW's *Local Land Services Act 2013,* as discussed in Chapter 1.[131] As a category, native vegetation does the work of bringing trees to law.[132]

Drawing attention to the way in which jurisdictional techniques establish relations of belonging to law is important, because these techniques also establish different qualities of belonging to law. That is, different jurisdictional techniques can join entities to law in different ways, producing different forms of belonging to law. This aspect of the jurisprudence of jurisdiction is explored by Peter Rush in relation to categorisation. Through an analysis of law's definition of rape, Rush shows how different definitions join the event of a sexual assault to law in different forms. One definition is oriented to the circumstances in which the event took place, another is oriented to the consequences of the event. Categories – and, in particular, category definitions – should, therefore, be understood not as passive descriptions, but as jurisdictional devices that join entities to law in particular ways.[133] Rush's analysis illuminates how different techniques of classification and categorisation join entities to law in different forms, an aspect of classification discussed at length in Chapter 6. Overall, the existing scholarship on classification and jurisdiction focuses on the *jurisdictional effects* of law's categories: their productive capacity to establish relations of belonging to law.

IV. Law's Categories as Institutional Artefacts

This thesis builds on Dorsett and McVeigh's thinking about classification to also consider prior questions concerning the authority to classify and techniques of classifying. To achieve this extension, I draw on Alain Pottage's work on the institutional nature of law's

[130] Dorsett and McVeigh, *Jurisdiction* (n 1) 58–9.
[131] *Local Land Services Act 2013* (NSW).
[132] Drawing on Dorsett and McVeigh's analysis of the jurisdictional work of the definition of native title: Shaunnagh Dorsett and Shaun McVeigh, 'Conduct of Laws: Native Title, Responsibility and Some Limits of Jurisdictional Thinking' (2012) 36 *Melbourne University Law Review* 470.
[133] Ibid.

categories. Pottage's proposition is that law's categories are *fabricated* by institutional practices.[134] Fabrication here refers to a sense of making or manufacturing, rather than lying or deceit. Following Pottage, fabrication refers to

> modes of action which are lodged in rich, culturally-specific, layers of texts, practices, instruments, technical devices, aesthetic forms, stylised gestures, semantic artefacts and bodily dispositions.[135]

Pottage specifically chooses 'fabrication', rather than construction, because 'the specific character of these modes of action would be lost in a general theory of law as an agent of "social construction"'.[136] Writing from the intersection of law and anthropology, Pottage's insights are consistent with Mary Douglas's view that classification is an institutional practice. Thus, rather than treating law's categories as cultural constructs, or as reflecting broader social and economic relations, Pottage offers a perspective on law's categories that is also consistent with the jurisprudential project of exploring law's own, institutionally based, account of classification.

Two inter-related implications derive from Pottage's insight into the institutional character of law's categories and classificatory practices. The first is that law's categories and classification practices are forum-specific: each institution should be treated as classifying in its own way.[137] Rather than presenting an over-arching theory of law and classification, therefore, the aim is to develop a jurisprudence of classification that allows each category/institution to be investigated on its own terms. The second implication derives from the first: categories act as windows into the nature of their institutional makers. That is, because each institution classifies in its own way, categories and classification practices can tell us something about the nature of the institution from which they emerge.[138] As an institutional practice, classification can be understood as contributing to the making (and un-making) of law's own institutions.

An example from Frederick Schauer drawing on constitutional law in the United States of America helps to illustrate the institutional specificity of law's categories.[139] Pursuant

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[134] Pottage (n 12) 1; Alain Pottage and Brad Sherman, *Figures of Invention: A History of Modern Patent Law* (Oxford University Press, 2010) 9.
[135] Pottage (n 12) 1.
[136] Ibid.
[137] Ibid 5.
[138] Ibid 11.
[139] Frederick Schauer, 'Categories in the First Amendment: A Play in Three Acts' (1981) 34 *Vanderbuilt Law Review* 265, 268.

to the First Amendment to the United States Constitution, Congress is prevented from making laws that 'abridge the freedom of speech'. Schauer observes that the category of 'speech' in the First Amendment can be distinguished from the word 'speech' in everyday language. He does this by listing particular kinds of speech in everyday language which are not protected by the first amendment: obscenities, 'fighting words' and commercial advertising.[140] Similarly, in practice Congress may pass laws that regulate speech without breaching the First Amendment. These include laws related to price fixing, perjury, breaches of contract, threats and extortion. These are all acts which may be committed by speech, yet are not considered to fall within First Amendment protection. He concludes:

> What emerges from all of this is the conclusion that the constitutional definition of the word "speech" carves out a category that is not coextensive with the ordinary language meaning of the word "speech". When we define the word "speech" we are categorizing.[141]

Although Schauer does not use the language of institutions, his analysis points to the way in which law's categories differ from categories of everyday language. And while legal scholars may be comfortable with the technical specificity of law's categories such as 'speech', or 'agreement', the idea that 'timber', 'trees' or 'water' might also be institutionally specific categories is perhaps less obvious.

Drawing on the extensive historical jurisprudence of Yan Thomas, Pottage and Mussawir observe how, at different points in the history of the common and the civil law, jurists have been more comfortable to consider law's categories as operating in institutional isolation.[142] In contrast to the modern tendency of legal scholarship to 'tether' law to the external, Roman jurists were less concerned about constraining law to the 'dictates' of nature.[143] As Pottage writes of Thomas's insights:

> [O]f course Roman lawyers recognised that legal arguments had to do with things in the world, but the material existence was eclipsed by the existence they came to have within the discursive or rhetorical frame of legal debate.[144]

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[140] Ibid 268–9.
[141] Ibid 273.
[142] Pottage (n 12) 17–8; Edward Mussawir, 'To Isolate Law: The Activity of the Jurist in Digest 9.2.27.12 and Digest 45.3.18.2' (2018) 10(1) *Jurisprudence* 54, 56–7 ('To Isolate Law').
[143] Mussawir, 'To Isolate Law' (n 142) 57.
[144] Pottage (n 24) 150–1.

A similar stance towards law's categories is also found in the common law tradition. For example, consider Coke's treatment of 'land' in the context of describing the nature of a fee simple interest:

> *Terra*, Land, in the legall [sic] signification, comprehendeth any ground, soil, or earth whatsoever, as meadows, pastures, woods, moors, water, marches, furses [forests] and heath. … It legally includeth also all castles, houses and other buildings: for castles, houses etc. consist upon two things, viz land or ground, as the foundation and structure thereupon, so as passing the land or ground, the structure or building thereupon passeth therewith.[145]

Coke carefully, but without any particular anxiety, maintains a difference between land-as-entity and land-as-category; there is no sense in which he seeks to tether 'land' to the 'real'. Instead land-as-category is simply contained within the institution of land law. Coke treats 'land' as a term of art, a category with a particular meaning that performs a particular function in relation to the conveyancing of title in fee simple.[146] Mussawir articulates this point well, suggesting that jurisprudence crafts a purely technical meaning for things that may not exist more generally outside law, whilst accepting those things cannot not be reduced to that purely technical form.[147] This scholarship offers a reminder to contemporary jurisprudents that, within both the common law and civil law traditions, there is scope for an austere reading of law's categories – one that does not read into them broader aspects of social, economic or power relations but that, instead, draws out of the category itself the function it serves and the limits of its own existence, expressed by, and reflecting, the confines of the institutional structure from whence it came.

V. CONCLUSION

The jurisprudence of classification proposed here combines Pottage's insight that law's categories are fabricated and deployed by institutional practices with Dorsett and McVeigh's insight that categories are a technique of jurisdiction. The argument is that this institutional and jurisdictional approach to classification opens up new avenues for engaging with law's categories. It offers a framework for thinking about the sources and

[145] Coke, *First Part of the Institutes* (n 63) 4.
[146] 'Land' has a particular relationship to the institution of real property; it delimits what kind of interests can be considered a real property interest. See Tim Murphy, Simon Roberts and Tatiana Flessas, *Understanding Property Law* (Sweet & Maxwell, 4th ed, 2004) 55–6.
[147] Ed Mussawir, 'The Jurisprudential Meaning of the Animal' in Edward Mussawir and Yoriko Otomoto (eds), *Law and the Question of the Animal: A Critical Jurisprudence* (Routledge, 2013) 89, 89–90.

scope of the authority to classify in the common law tradition, and who exercises that authority in practice. It also offers a framework for thinking about how that authority is exercised as a matter of technique, and the jurisdictional effects of classification. This institutionally specific approach to law's categories is not the same as legitimating those categories, nor as accepting them without critical engagement. Critical analysis is instead offered by entering into each category's institutional world. The result is an increased vocabulary for articulating the qualities and characteristics of different *institutions*, rather of particular *categories*. By stepping *inside* the institutional frame of each category, we begin to step *outside* the grip of modern categories – such as property and environment – on how we engage with and think about law. Learning something about how law's institutions, now and in the past, classify protected trees is here explored to offer new perspectives on current classifications practices.[148]

[148] Douglas (n 6) 108–9. Dorsett and McVeigh make a similar point about jurisdiction: Dorsett and McVeigh, *Jurisdiction* (n 1) 25–7.

CHAPTER 3. SOURCES OF AUTHORITY

I. INTRODUCTION

This chapter considers the sources of authority that underpin law's protected tree categories. It argues that, even within the relatively limited context of the history of the common law, sources of the authority to classify can take on a variety of jurisdictional forms.[1] The argument is made through three examples of tree protection categories – the royal forest, timber and endangered species – each from a different period of common law history. Each category is found to be sourced differently. The medieval category of the 'royal forest' is sourced in older forms of Crown prerogative. The colonial category of 'timber' is sourced in the common law. The contemporary category of 'endangered species' is sourced in legislative authority. Importantly, with respect to each, what links the category to its source is an institution: in the case of the royal forest, it is the King that links the category to Crown prerogative; in the case of timber, it is the courts that link the category to the common law; in the case of endangered species, it is Parliament that links the category to legislative authority. This chapter sets up the analysis that follows in subsequent chapters by identifying three key sources of authority to classify law's protected trees in NSW's legal history. It also highlights the significance of law's institutions to its classification practices.

The question of the source of law's authority is addressed in a number of different registers within legal scholarship.[2] This scholarship includes conceptual or 'ideational' accounts of the sources of law and debates over the legitimacy of law.[3] Of particular note is the legal philosophy of scholars such as H.L.A. Hart, Joseph Raz, Ronald Dworkin and Lon Fuller.[4] For example, according to Hart's positivist theory, the 'rule of recognition'

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[1] As well as looking to external, philosophical or conceptual sources of law's authority, we can also examine the way in which authority itself comes to belong to law: Dorsett and McVeigh, *Jurisdiction* (n 1) 36–7; Dorsett and McVeigh, 'Jurisprudences of Jurisdiction: Matters of Public Authority' (2014) 23 *Griffith Law Review* 569.

[2] The authority of law is also a topic taken up by disciplines such as political philosophy and political science. For a discussion, see: Costas Douzinas, 'The Metaphysics of Jurisdiction' in Shaun McVeigh (ed), *The Jurisprudence of Jurisdiction* (Routledge-Cavendish, 2007) 21.

[3] Goodrich defines 'ideational' sources of law as being 'metaphorical and conceptual rather than empirical in its reference': Peter Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (Basil Blackwell, 1986) 5.

[4] See, eg, Hart, H.L.A, *The Concept of Law* (Clarendon Press, 2ND ed, 1994); Roland Dworkin, *Law's Empire* (Harvard University Press, 1986); Joseph Raz, *The Authority of Law* (Oxford University Press, 2nd ed, 2009); Lon L. Fuller, *Anatomy of the Law* (Greenwood Press, 1976).

provides authoritative criteria for identifying which rules are valid laws within a particular legal system.[5] Fuller, in contrast, identifies four 'distinct sources of legal rules': legislation, explicit contract, tacit accommodations (meaning custom) and adjudication (meaning the common law), each with its own shape and set of influences.[6] In a different register, critical legal theorists, such as Peter Goodrich and Robert Cover, offer analyses of how law's authority is intertwined with broader symbolic and literary forms and traditions.[7] Other, jurisprudential, scholarship is directed at understanding the different natures of various sources of authority circulating through common law institutions, such as the authority of precedent or custom.[8] For example, Neil Duxbury offers an in-depth account of the authority of precedent, tracing the emergence of the doctrine of *stare decisis* in the eighteenth century and exploring differences between the authority of case law as compared to legislation.[9] In contrast to scholarship concerned with the legitimacy of law's authority, or accounts of authority from critical legal theory, this chapter offers a more limited and technical discussion of the institutional sources of law.[10] This chapter aims to identify three key sources of law that are relevant to understanding how law classifies protected trees throughout NSW's common law history.[11] This chapter, then, is concerned, in a limited way, with the source – not the legitimacy – of that authority.

It is worth noting here that environmental law is generally treated as a creature of legislation rather than as a creature of the common law.[12] As compared to property or tort law, the foundations of which historically lie in the common law, the rules of

[5] Hart, H.L.A (n 4) 100–1.
[6] Lon L. Fuller (n 4) 112.
[7] See, eg, Robert Cover, 'Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 4; Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (Weidenfeld & Nicolson, 1990).
[8] See, eg, John Chipman Gray, *Nature and Sources of the Law* (MacMillan Company, 1921); For an in-depth historical introduction to the changing views held by common law jurists concerning the authority of the common law as compared to legislation, see: JGA Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press, 1987) 30–56.
[9] Duxbury, Neil, *The Nature and Authority of Precedent* (Cambridge University Press, 2008).
[10] This chapter adopts a doctrinal definition of 'institutional sources of law' meaning those institutions which are recognised as 'legal sources of law' within a particular legal tradition. This definition is taken from Goodrich's interpretation of Hans Kelson's *What is Justice*: Goodrich (n 3) 14.
[11] This approach is similar to that adopted by Shaunnagh Dorsett and Lee Godden in identifying the institutional sources of early Australian land law: Shaunnagh Dorsett and Lee Godden, 'Tenure and Statute: Re-Conceiving the Basis of Land Holding in Australia' (1999) 5(1) *Australian Journal of Legal History* 29.
[12] See, eg, Rosemary Lyster et al, *Environmental and Planning Law in New South Wales* (Federation Press, 4th ed, 2016) 1–2; Gerry Bates, *Environmental Law in Australia* (LexisNexis, 9th ed, 2016) 67. For the counter argument, that the origins of environmental law can be found within common law principles, see: Sean Coyle and Karen Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (Hart Publishing, 2004).

contemporary environmental law are primarily found in modern legislative instruments.[13] Indeed, the majority of NSW's tree protection categories are sourced in legislation. For example, colonial legislation dating from the late 1830s prevented the cutting of 'timber' on Crown land without a valid timber licence.[14] More recent categories include 'native vegetation'[15] and 'carbon',[16] as well as numerous other categories found throughout NSW's legislative history, such as 'tree',[17] 'protected native plants',[18] 'endangered species'[19] and 'habitat'.[20] However, and as this chapter will demonstrate, legislation is not the only source of law's protected tree categories in NSW. As will be discussed in Chapter 4, NSW's first categories of tree protection were sourced in delegated Crown prerogative. By attending to historical and contemporary forms of the authority to classify, this chapter demonstrates the value of a jurisprudence of classification that draws attention to how different sources of common law authority have, over time, underpinned law's protected tree categories.

The chapter discusses three examples of law's categories of tree protection. The first is that of the royal forest, a category sourced in Crown prerogative. The second is that of 'timber', a category sourced in the common law. The third is that of 'endangered species', sourced in legislation. These examples reveal that the authority to classify is shaped from the start: each source of authority delimits the scope of the authority to classify in different ways. The categories and sources are (broadly speaking) addressed in chronological order, from older forms of Crown prerogative, to the common law, and then to the more recent emphasis on legislation. The choice of categories, and the order in which they are

[13] Common law forms of action relevant to environmental law include actions in nuisance and trespass. As compared to legislation, the common law has played a relatively minor role as a source of environmental law: Raymond Cocks, 'Victorian Foundations' in John Lowry and Rod Edmunds (eds), *Environmental Protection and the Common Law* (Hart Publishing, 2000) 1.
[14] *Crown Land Unauthorised Occupation Act 1838* (NSW) s 3. As will be discussed in Chapter 5, 'timber' is also found legislation authorising the Governor to proclaim 'timber reserves', and in legislation relating to leases of Crown land: *Land Acts Amendment Act 1875* s 39; *Crown Lands Occupation Act 1861* (NSW) s 20.
[15] *Native Vegetation Conservation Act 1997* (NSW) s 6 (repealed); *Native Vegetation Act 2003* (NSW) s 6 (repealed); *Local Land Services Act 2013* (NSW) s 60B.
[16] *Conveyancing Act 1919* (NSW) s 87A.
[17] *Ringbarking on Crown Lands Regulation Act 1881* (NSW) s 2; *Soil Conservation Act 1978* (NSW) s 21C (section now repealed).
[18] *Wild Flowers and Native Plants Protection Act 1927* (NSW) s 2.
[19] *Threatened Species Conservation Act 1995* (NSW) s 4 (repealed); *Biodiversity Conservation Act 2016* (NSW) s 1.6.
[20] *Threatened Species Conservation Act* (n 19) s 4 (repealed); *Biodiversity Conservation Act* (n 19) s 1.6.

discussed, sets the stage for the analysis that follows by identifying the sources of law that underpin each of the categories and institutions examined in the following chapters.

II. Royal Forests and Crown Prerogative

The royal forest is one of the oldest categories of tree protection found within the history of the common law, dating from the Norman conquest of England in 1066.[21] Sourced in Crown prerogative, the forest protected large areas of England reserved by the king for the royal hunt.[22] This part of the chapter offers an account of the category of the forest as a category of lawful tree protection sourced in Crown prerogative. As explained in Chapter 1, tree protection is defined in this thesis as protection from being cut down or otherwise injured, even if the category of tree protection only refers to protection from being cut down by a nominated category of person, such as a landholder. This part of the chapter demonstrates how the institution of the King linked law's category and its source in Crown prerogative and examines how Crown prerogative shaped the King's authority to classify land as royal forest in particular ways.

To understand how the category of the forest was first introduced to England, and how it operated as a category of lawful tree protection, it is necessary to take a cursory glimpse into England's medieval history. The category of the 'forest' was introduced to English law by King William I, the Duke of Normandy, who claimed the English throne in 1066.[23] William I, born and raised in France, was also a descendant of the English king Edward the Confessor.[24] When Edward died, childless, William claimed the throne as heir. As van Caenegam writes, the Norman conquest created in England a split society. It became a country inhabited by two nations: the *Franci* and the *Angli*, within which a dominant minority (the Normans) introduced 'values, rules and language different to the native masses'.[25] William I installed in England a 'military and quasi-colonial regime' made apparent through the construction of Norman castles and cathedrals, and his appointment of Norman dukes and administrators to positions of office.[26] The Norman kings, however,

[21] GJ Turner, *Select Pleas of the Forest* (Bernard Quaritch, 1901) x.
[22] Dorsett and McVeigh, *Jurisdiction* (n 1) 46.
[23] William Holdsworth, *A History of English Law*, vol 1 (Methuen & Co, 1903) 95. For a discussion of the degree to which the concept of an exclusive royal hunting ground was new to England, see: Judith A Green, 'Forest Laws in England and Normandy in the Twelfth Century' (2013) 86 *Historical Research* 416.
[24] MT Clanchy, *England and Its Rulers: 1066 - 1307* (John Wiley and Sons, 4th ed, 2014) 28.
[25] RC van Caenegem, *The Birth of the English Common Law* (Cambridge University Press, 2nd ed, 1988) 4.
[26] Ibid.

maintained many of the existing administrative and legal structures.[27] In particular, William I maintained the structure of counties, hundreds and parishes that underpinned England's comprehensive taxation system.[28] The Normans also introduced a number of significant changes. Relevantly, one of those changes was the shift to French and Latin as the languages of the King's officials.[29] Another was the introduction of Norman forest laws, at first by William I and then considerably expanded upon by his heirs.[30]

At the time of the Norman conquest, the French and Latin languages made a distinction between woodlands in general, known as *bois* or *silva*, and woods that were under forest law, known as *forest* or *foresta*.[31] As Pierre Guidard writes of the French forest:

> The word, which derives from the Latin *forestis silva*, refers primarily to the woodland covered by the king's courts of justice.[32]

The Latin *forestis*, was derived from *foris*, meaning outside, so that *forestis silva* is generally understood as 'outside wood', meaning a wood set apart from, or outside of, the general woodlands.[33] The 'setting apart' of the wood referred to a jurisdictional setting apart, a sense in which the woods were subject the authority of the King, rather than to a sense of the woods being physically set apart.[34] The English language, on the other hand, did not have an equivalent word that carried this same jurisdictional meaning.[35] It was only after the Norman Kings introduced the royal forest, as a new domain of the King's authority, that the word forest itself entered the English language.[36]

The forest designated areas of land over which the king held exclusive hunting rights.[37] It was not a category of geographic description but, rather, a jurisdiction: an area of land

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[27] Clanchy (n 24) 33.
[28] Ibid 34.
[29] Ibid.
[30] Ibid 33.
[31] Scott Kleinman, 'Frio and Fredom: Royal Forests and the English Jurisprudence of Lazamon's Brut and Its Readers' (2011) 109(1) *Modern Philology* 17, 26.
[32] Peirre Guiraud, L'ancien francais, 6th edn (Presses universitaires de France, 1980), 168 cited in (and translated by) ibid.
[33] TF Hoad (ed), *The Concise Oxford Dictionary of English Etymology* (Oxford Univeristy Press, 1996) 'forest'.
[34] Dorsett and McVeigh, *Jurisdiction* (n 1) 46.
[35] Kleinman (n 31) 26–7.
[36] Green (n 23) 419. The nature and extend of royal hunting rights under the previous, Anglo-Saxon, rules is unclear. However, Hudson observes that in this earlier period, references to the king's hunting rights tended to coincide with the land held by the king. The innovation of the Norman kings was to extend exclusive rights to game and trees, through a declaration of royal forest, beyond the royal demesne: John Hudson, *The Oxford History of the Laws of England*, vol II (Oxford University Press, 2012) 456–7.
[37] Charles Young, *The Royal Forests of Medieval England* (Leicester University Press, 1979) 1.

to which the laws of the forest applied.[38] The forests created a new domain of the King's authority: a domain that was at once jurisdictional and geographic. The nature of this domain is captured by Coke's classic definition of the forest as comprising eight things: 'Soil, Covert [thickets in which game can hide], Laws, Courts, Judges, Officers, Game and Certain Bounds'.[39] The forests were both a collection of various locations throughout England and a complex institution that oversaw their management on the King's behalf. The forest also overlaid the pre-existing jurisdictions and institutions established by the Anglo-Saxon kings.[40] This meant that the declaration of a royal forest in a particular location did not transfer that land into the possession of the King. As George Turner explains:

> Other persons might possess lands within the bounds of the forest, but were not allowed the right of hunting or of cutting trees in them at their own will.[41]

To illustrate, at one point the entire county of Essex was declared to be royal forest, including all the cultivated land, woodlands, villages and towns within it.[42] The royal forest was a jurisdiction that ran parallel to, and overlaid, existing legal institutional structures and practices.[43]

The forest can be considered a category of tree protection because, within the forest bounds, various kinds of tree clearing and cutting were unlawful without the permission of the King.[44] In particular, there were two categories of clearing that were prohibited under forest law: clearing trees for the making of *assarts* and clearing of trees that resulted in waste.[45] The Norman kings appointed Justices of the Forest, who oversaw a system of forest courts and the forest wardens, responsible for overseeing the enforcement of forest

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[38] Ibid 3.
[39] Edward Coke, *The Fourth Part of the Institutes of the Laws of England* (M Flesher, 1644) 289.
[40] Dorsett and McVeigh, *Jurisdiction* (n 1) 46.
[41] Turner (n 21) ix–x.
[42] Young (n 37) 5.
[43] Dorsett and McVeigh, *Jurisdiction* (n 1) 46.
[44] As Charles Young observes '…all sorts of clearing were tolerated as long as it did not interfere with the deer, and could not be made profitable for the royal treasury…': Charles Young, 'Conservation Policies in the Royal Forests of Medieval England' (1978) 10(2) *Albion* 95, 96. According to the *Leges Henrici* (c. 1115) within the bounds of the forest, the king held exclusive rights over the making of *assarts*, hewing, burning, hunting, carrying of bows and arrows, hambling of dogs (mutilation of their feet so they could not hunt), grazing livestock and building: Hudson (n 36) 459.
[45] Young (n 44) 97. *Assarts* were areas of land cleared for cultivation. The doctrine of waste is discussed in detail in Chapter 6, but in the context of forest law Turner describes waste as 'an abuse' of established tree cutting customs in a particular forest, i.e. increased cutting or clearing as compared to established practices: Turner (n 21) lxxxiii.

law in particular places.[46] Within the jurisdiction established by the declaration of land as royal forest, the categories of *assarts* and waste placed lawful restriction on activities relating to trees. In practice, the number of offences against the vert – the trees and the vegetation – far outweighed the number of offences against the venison, as indicated by Charles Young's archival research into the records maintained by the Forest courts.[47] In the early years, punishment for violation of forest law was violent and brutal, including castration, blinding or death.[48] However, in later centuries the significance of the forest as a royal institution shifted – from violent protection of royal hunting grounds to an important source of revenue. Eventually, financial penalties replaced corporeal punishment.[49] As Young explains, rather than being areas of protected wilderness, the royal forests became highly regulated areas of economic activity.[50] Whether for purposes of protecting animals for the royal hunt, or as a means of raising revenue through fines and licences, the royal forest was a category which established a domain of authority, within which trees were protected from being cut down by anyone who did not have permission from the king to do so.

It was the king's power alone to establish the royal forests; the justice dispensed through the forest courts was separate to the justice dispensed by other judicial institutions operating at the time. The forest jurisdiction operated outside and alongside the workings of the common law; other courts still had jurisdiction over activities unrelated to forest law within the same geographic area [51] A twelfth-century official described the nature of the king's authority over the forest in the following way:

> …the organization of the Forests, and also the punishment or absolution of those doing wrong in them, whether it be pecuniary or corporeal, is separate from other judgements of the realm, and is subject to the discretion of the king alone or of an associate specifically deputed for this. For it has its own laws, which are said to be based not on the common law of the realm … but the arbitrary institution of princes … so that what is done through its law is said to be not just absolutely but just according to the law of the Forest.[52]

[46] Turner (n 21) xiv–xxi.
[47] Young (n 37) 108.
[48] Ibid 11.
[49] Young (n 44) 158.
[50] Young (n 37) 110.
[51] Dorsett and McVeigh, *Jurisdiction* (n 1) 46.
[52] *Dialogue of the Exchequer* quoted in Hudson (n 36) 455.

Responsibility for the day-to-day management of the forests lay with the foresters, appointed by the wardens.[53] Foresters were not paid by the King but, rather, were expected to pay the warden for the privilege of occupying office.[54] Turner and Young argue that many of the excesses of forest law were, in fact, perpetrated by the foresters extorting payment from local villagers.[55] As Turner puts it, the extortion by the foresters was 'more resented by the masses than the restrictions on hunting and woodcutting which constituted the main body of forest laws'.[56]

Law's category of the royal forest was sourced in an older form of Crown prerogative.[57] As H. V. Evatt remarks, the concept of the royal prerogative is often considered a difficult, 'abstruse and archaic' subject.[58] Blackstone's classic statement on prerogative offers a helpful starting point. Blackstone defines Crown prerogative as

> that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in its etymology (from *prae* and *rogo*) something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not those which he enjoys in common with any of his subjects: for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer.[59]

From Blackstone, one element of the nature of prerogative authority is made clear. It is a source of legal authority that resides with the Crown alone.[60] Frederick Pollock, on the other hand, offers a rather more pragmatic definition of prerogative as 'nothing more mysterious than the *residue of the King's undefined powers* after striking out those which have been taken away by legislation or *fallen into desuetude*'.[61]

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[53] Turner (n 21) xxi.
[54] Ibid.
[55] Ibid xxi–xxii; Young (n 37) 81–2.
[56] Turner (n 21) xxii.
[57] Dorsett and McVeigh, *Jurisdiction* (n 1) 46.
[58] HV Evatt, *The Royal Prerogative* (Law Book Company, 1987) 7.
[59] William Blackstone, *Commentaries on the Laws of England: Book the First* (Clarendon Press, 1765) 232.
[60] Evatt (n 58) 12.
[61] Editor's note by Pollock at the end of an article in the Law Quarterly Review: Frederick Pollock, 'Editor's Note' (1918) 34 *Law Quarterly Review* 159, quoted by Evatt (n 58) 12.

Pollock's definition tells us one more thing about the nature of prerogative. Writing in the early twentieth century, Pollock defined prerogative as a residual power, indicating how its nature and scope has changed significantly over time. In the eleventh century, and particularly in relation to the forest laws, the nature of the Crown prerogative was broad. The continued physical expansion of the lands decreed as forests, and harsh punishments for violations of forest law, make for a compelling argument that the king's prerogative authority over the royal forest was without limit, brutal and oppressive.[62]

While the forest, as a jurisdiction, operated outside of the jurisdiction of the common law, prerogative – the source of the king's authority to decree land as forest – arguably, did not.[63] To illustrate, William I paid lip-service to the idea that the Norman kings would be bound by the existing laws of England.[64] William I promised that he would leave 'untouched' the laws of England that existed during the reign of Edward the Confessor:

> This also I command and will, that all shall have and hold the law of King Edward in respect of their land and possessions, with the addition of those decrees I have ordained for the welfare of the English people.[65]

The Norman kings were at pains to legitimate their authority by being seen not as creators of new laws, but keepers of the old.[66] In Norman England, as with the Anglo-Saxons before them, there was distrust of innovation, and a sense that legitimate authority was derived through allegiance to established custom.[67] Kleinman argues that the Norman kings searched for precedents in the Anglo-Saxon legal codes for the existence of royal forests in England under previous rulers, in efforts to increase the perceived legitimacy of the new royal forests.[68] In addition, legal texts at the time emphasised that it was customary for the king to consult with his barons before making new law.[69] Further, it also appeared that if a king made a new law without such counsel, the courts could limit the validity of that law to that particular king's lifetime.[70] In this way, acts by the king

[62] See, eg, Young (n 37); Hayman describes the royal forests as being regarded as the 'acme of Norman despotism'; Richard Hayman, *Trees: Woodlands and Western Civilization* (Hambledon and London, 2003) 23.
[63] On the idea that prerogative attaches to King and Crown 'under the common law' see: Evatt (n 58) 12.
[64] van Caenegem (n 25) 12.
[65] 'Statutes of William the Conqueror' in William Stubbs (ed), *Select Charters* (Clarendon, 9th ed, 1913) 99, quoted in Kleinman (n 31) 24.
[66] Hudson (n 36) 258.
[67] Ibid.
[68] Kleinman (n 31) 24.
[69] Hudson (n 36) 259.
[70] For examples, see ibid 258–60.

which extended beyond the limit of prerogative authority, and which could not in practice be challenged while the offending king remained on the throne, would be judged in the long term by the principles of the common law, which sought to tether law's authority to customs dating back to time immemorial.[71]

The signing of the *Forest Charter* by Henry III in 1217 can be seen as an action taken to undo the excess of office by previous kings.[72] By the end of the reign of Henry II (1189), it is estimated that the forest covered approximately one-quarter of the land in England.[73] Two years prior to the signing of the *Forest Charter*, the *Magna Carta* had attempted to address the injustices of forest law.[74] The forest provisions in the original *Magna Carta* included a demand from England's revolting barons (who had withdrawn their fealty to King John) that all the forests that he had created be 'disafforested', meaning that those areas be removed from the royal forest jurisdiction (rather than meaning to be cleared of trees).[75] King John, however, having signed the *Magna Carta*, immediately returned to wars with the barons, lost and died.[76] He was succeeded by his infant son Henry III and, in 1217, the *Magna Carta* was reissued, without its forest provisions, which were enlarged and contained in a separate charter, the *Charter of the Forest*. The new forest charter committed the infant King Henry III to significant acts of disafforestment, of forests created not only by King John but also by Henry II.[77] As Turner observes, when Henry III came of age, rather than revoking the *Forest Charter* he undertook to review and confirm the status of forest lands, in some cases challenging, and in some cases upholding acts of disafforestment that had occurred during his infancy.[78]

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[71] For an discussions on the relationship between common law authority, custom and time immemorial see, eg, Pocock (n 8); Shaunnagh Dorsett, 'Since Time Immemorial: A Story of Common Law Jurisdiction, Native Title and the Case of Tanistry' (2002) 26 *Melbourne University Law Review* 32.

[72] The 800th anniversary of the *Forest Charter* (in 2017) precipitated some renewed scholarly interest in the charter from environmental and property law perspectives. For example, Christy Clark and John Page argue that the Forest Charter preserved and restored communal rights of access to land and trees: Christy Clark and John Page, 'Of Protest, the Commons and Customary Public Rights: An Ancient Tale of the Lawful Forest' (2019) 42(1) *University of New South Wales Law Journal* 26, 44. See also Paul Babie, 'Magna Carta and the Forest Charter: Two Stories of Property, What Will You Be Doing in 2017' (2016) 94 *North Carolina Law Review* 1431; Daniel Magraw and Natalie Thomure, 'Carta de Foresta: The Charter of the Forest Turns 800' (2017) 47(11) *Environmental Law Reporter* 10934; Alison Million, 'The Forest Charter and the Scribe: Remembering a History of Disafforestation and of How Magna Carta Got Its Name' (2018) 18 *Legal Information Management* 4.

[73] Million (n 72) 5.

[74] Ibid.

[75] Peter Linebaugh, *The Magna Carta Manifesto: Liberties and Commons for All* (University of California Press, 2008) 28–31.

[76] Magraw and Thomure (n 72) 10934.

[77] Million (n 72) 6.

[78] Turner (n 21) xcviii–xcix.

The significance of the *Forest Charter* has largely been overshadowed by its sister, the *Magna Carta*.[79] A detailed account of the relationship between the two charters is not necessary here. What is relevant, for present purposes, is the way in which the institution of the king brought together a particular source of law (prerogative) and a legal category (the royal forest). In this example, Crown prerogative was shaped by emerging common law jurisprudential thought on the way in which Crown prerogative could be limited by reference to immemorial custom, or by the king seeking the counsel of his barons before making new law. In the case of the *Forest Charter,* one way that excesses of prerogative were expressed were as excesses of two previous kings: John and Henry II. In this way, a jurisprudence of classification that examines the sources of law's categories demonstrates how the category of the forest was sourced from older forms of Crown prerogative, a source of law that was shaped by the possibility of undoing the excesses of office once a new king had been installed upon the throne. In this way, a jurisprudence of classification contributes to a jurisprudential vocabulary for expressing how the common law itself sources, and delimits, the authority to classify.

III. TIMBER AND THE COMMON LAW

Timber emerged as a common law category of tree protection around the twelfth century.[80] 'Timber' itself is an Old English word that appeared in the language some time before AD 750. Its original meaning was building or structure.[81] Etymologically, 'timber' is allied with Old Saxon (*timbar*, building), Middle Dutch (*timmer*, building, wood) and Old High German (*zimbar*, meaning dwelling, room or wood). By the late ninth century, Old English 'timber' had also come to mean building material, particularly 'trees suitable for building'.[82] The word 'timber', in general language, referred to wood produced by trees as sources of building material. The common law developed its own specialised definitions of timber, as distinct from the word's meaning in general language. Broadly, however, the common law category 'timber' is allied to the general sense of trees whose wood was valued as a source of building or construction material. As will be discussed further in chapters 4 and 6, the NSW common law developed a number of different legal definitions of timber, depending upon the particular cause of action or transaction in

[79] Babie (n 72); Million (n 72); Clark and Page (n 72) 37.
[80] William Holdsworth, *A History of English Law*, vol 7 (Methuen & Co, 1973) 276.
[81] *The Barnhart Dictionary of Etymology* (H. W. Wilson Company, 1988) 1142.
[82] Ibid.

which the category was deployed.[83] The focus here is on the common law category of timber found in early colonial NSW timber trespass cases, decided by the colonial courts in the first half of the nineteenth century.[84] As discussed in the introduction to this chapter, these examples underpin the analysis that follows by identifying the common law as a source of law's tree protection categories in NSW and the courts as a key institution authorised to classify law's protected trees.

In the context of timber trespass cases, timber can be considered a category of tree protection because it protects trees from being cut down by anyone other than the person holding title to the underlying land. To give a brief example from NSW's colonial timber trespass cases, in *Clift v Jackson*, Clift alleged that Jackson had been regularly cutting timber on a piece of land that belonged to him.[85] Clift's son, seeing Jackson standing next to just-felled trees on his father's property, approached Jackson to ask whether he had permission to cut down the trees. Jackson replied that he did not have permission, but that he did not know 'there was any harm in doing it'. The court fined Jackson ten shillings, as well as awarding Clift one shilling in damages. Recalling the definition of tree protection set out in Chapter 1, timber can be considered a category of tree protection, despite the fact that the trees have already been felled. What is relevant, for present purposes, is not whether the trees are ultimately protected in a physical sense but whether a particular category imposes a lawful restriction on who can cut down a particular tree. In cases of timber trespass, the trees are protected from being cut down by anyone who does not have the permission of the person holding title to the underlying land.

The common law rules of timber trespass stem from a more general common law proposition: that trees belong to the person holding title to the underlying land. Judicial authority for this proposition dates back to the 1600s, and the King's Bench decision of *Masters v Pollie*.[86] In this case, the court was asked to decide whether a tree, planted on the land of one person, became common property if its roots encroached into the soil of a neighbour. The defendant's argument drew on references to Roman law principles of

[83] The significance of the cause of action, or particular transaction through which the activity of classification takes place is discussed further in Chapter 7.
[84] As will be discussed below, this timeframe broadly coincides with the advent of rural fencing as a common practice that provided a visible indication of land subject to Crown grant: John Pickard, 'Post and Rail Fences: Derivation, Development and Demise of Rural Technology in Colonial Australia' (2005) 79(1) *Agricultural History* 27. As will be discussed, the difficulty of knowing whether one was cutting down trees located on private property or on unallocated land was relevant to these early trespass cases.
[85] *Clift v Jackson* (1848), Sydney Gazette and New South Wales Advertiser (27 September 1848) 2.
[86] *Masters v Pollie* (1620) 2 Rolle Rep 141 ('Masters v Pollie').

tree ownership found in *Bracton's Notebook*.[87] This argument, as explained by Pound, is premised on the classical Greek notion that trees were made up of two substances: soil and water, both of which were drawn up by the tree's roots from the earth.[88] If the soil belonging to A was drawn up into a tree growing on the land of B, the tree would be held by A and B as tenants in common, because A's soil had now become part of the tree.[89] In *Masters v Pollie*, the court declined to apply this rule, because, it reasoned, the plaintiff could not limit the growth of the tree's roots:

> [L]e plaintiff ne poyet limit le roots del' arbor, how far they shall grow and go.[90]

Instead, the court held that ownership was determined by the location of the trunk. The decision in *Masters v Pollie* was affirmed in the 1827 case of *Holder v Coates*.[91] Peter Butt's leading textbook on Australian land law similarly cites *Masters v Pollie* as authority for the proposition that a tree belongs to the person that owns the land upon which it grows.[92] What is relevant for present purposes is not so much the substantive reasoning behind the rule, but that the source of its authority lies in the common law.

One of the earliest NSW references to this general common law proposition on tree ownership is found in a proclamation issued by Governor King in 1803.[93] The proclamation begins with a general definition of 'timber' within the colony. It continues:

> Timber in this Colony includes She and Swamp Oaks, Red, Blue, and Black-butted Gums, Stringy and Iron Barks, Mahogany, Box, Honeysuckle, Cedar, Light-wood, Turpentine, &c. --- *The property of all which, and every other kind of Trees fit for Timber, or likely to become so, lies in the Proprietor of the Land*, either by Grant or Lease, excepting Timber fit for Naval or other Public Purposes, which those authorised by the Governor may mark, cut down and remove in and from any situation public or private. [my emphasis][94]

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[87] For a discussion of the link between Roman law rules of tree ownership, *Bracton's Notebook* and *Masters v Pollie*, see Roscoe Pound, 'Juristic Science and Law' [1918] *Harvard Law Review* 1047, 1049–51.
[88] Ibid 1050.
[89] '…the tree is to be regarded as a different tree, being nourished by a different soil': Henrici Bracton, *Legibus et Consuetudinibus Angliae* (William S. Hein, 1990) 71.
[90] *Masters v Pollie* (n 86).
[91] *Holder v Coates* (1827) 13 E R 1099.
[92] Peter Butt, *Land Law* (Thomson Reuters, 6th ed, 2010) 68.
[93] Governor King, 'Proclamation', *Sydney Gazette and New South Wales Advertiser* (Sydney, 26 June 1803) 1.
[94] Ibid 1.

With the exception of timber suitable for naval purposes, King's proclamation made it clear that timber belonged to the person holding underlying title to land. The proclamation goes on to state that any person cutting, or damaging, timber would be 'answerable' to the law:

> Any person cutting down, barking, damaging or destroying any Timber or Trees … will be answerable to the Laws provided in that behalf and according to the situation of the inhabitants of this Colony.[95]

Although King does not detail the legal consequences of unlawful timber cutting, his proclamation makes it clear that timber, within the colony, was a category of lawful tree protection. The legal effect of the category was to protect trees from being cut down by anyone other than the proprietor (unless they had the proprietor's permission to do so). The reference in the proclamation to the 'Laws provided on that behalf' suggests that King's proclamation was intended to clarify and re-state an already existent rule sourced in the colony's inherited common law, rather than creating a new category or a new rule sourced in the authority of the Governor.

This part of the chapter next considers how colonial landholders in NSW sought to protect trees on their land through making claims and allegations of timber trespass in the colonial courts. The contemporary action of trespass to land is classified, doctrinally, as a strict liability tort.[96] As a tort, trespass to land is generally defined as 'a direct and intentional interference by a defendant with a plaintiff's exclusive possession of land'.[97] Here,

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[95] King's reference to the 'Laws provided on that behalf and according to the situation of the inhabitants of this Colony' reflects the orthodox common law principle that in British colonies such as New South Wales, acquired by 'settlement' rather than by conquest or cession, the English inhabitants carried with them English law as a matter of birthright. As articulated by William Blackstone, there was, however, a significant restriction on this general principle: 'Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony.': William Blackstone, *Commentaries on the Laws of England: In Four Books*, vol I (Harper & Brothers Publishers, 21st ed, 1854) 107. For an introduction to the legal history of the reception of English laws in NSW, see: Alex Castles, *An Australian Legal History* (The Law Book Co, 1982) 11–9; Kercher, Bruce, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995); Bruce Kercher, 'Why the History of Australian Law Is Not English: Second Alex Castles Lecture in Legal History' [2003] *Flinders Journal of Law Reform* 177. The common law category of the 'settled colony', which underpins the reception of English law into NSW, remains highly contested: see, eg, Peter Rush, 'An Altered Jurisdiction – Corporeal Traces of Law' (1997) 6 *Griffith Law Review* 144; Irene Watson, 'Aboriginal Laws and Colonial Foundation' (2017) 26(4) *Griffith Law Review* 469.

[96] Kit Barker, Peter Cane and Mark Lunney, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 165. Under contemporary NSW law, trespass to land also constitutes a, statutory-based, minor summary offence: *Inclosed Lands Protection Act 1901* (NSW) s. 4. For further discussion of the statutory rules of criminal trespass, see: David Brown et al, *Criminal Laws* (Federation Press, 6th ed, 2015) 1032–5.

[97] Barker, Cane and Lunney (n 96) 155.

'intentional' interference refers to whether the defendant intended to enter the land, not whether the defendant specifically intended to trespass on another's property.[98] For example, a person propelled involuntarily onto the land is not liable in trespass.[99] It is not a defence if the defendant was simply unaware that the land belonged to someone else.[100] Trespass, however, has a long history within the common law. It originated in the thirteenth century as a way of bringing a defendant to court for unlawful acts of physical violence to land, body or chattels.[101] Originally, it was a 'quasi-criminal' action, as Holdsworth puts it, an action that both recognised the violence against aggrieved individual and against the King's Peace, resulting in punishment of the offender and compensation to the plaintiff.[102] By the eighteenth century, trespass was increasingly heard as a civil, rather than a criminal matter, before the English common law courts.[103] Relevantly, however, minor cases of timber trespass continued to be heard as criminal offences by Justices of the Peace, pursuant to 1 Geo. 1 st. 2 c. 48 ('*Preservation of Timber Trees Act 1715*') and 6 Geo. 3 c. 48 ('*Preservation of Timber Trees Act 1766*').[104] The effect of these statutes was to authorise Justices of the Peace to hear allegations of timber trespass and to establish the relevant penalties.

The early NSW cases on timber trespass were also, generally, dealt with by the colony's Justices of the Peace (also known as magistrates). As Hilary Golder writes, the office of the Justice of the Peace 'arrived in New South Wales with the First Fleet' and the colony's justices were, broadly speaking, given the same formal authority as their English counterparts.[105] The office of the magistrate, and the Magistrates' Bench (comprising

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[98] RP Balkin and JLR Davis, *Law of Torts* (LexisNexis Butterworths, 5th ed, 2013) 118.
[99] Ibid.
[100] *Public Transport Commission of NSW v Perry* (1977) 137 CLR 106: trespass not committed by a person who suffered an epileptic fit and fell onto the railway track.
[101] FW Maitland, *The Forms of Action at Common Law* (Cambridge University Press, 1971) 53.
[102] William Holdsworth, *A History of English Law*, vol 2 (Methuen & Co, 4th ed, 1936) 364–5.
[103] See, for example, *R v John Storr* (1765), in which the King's Bench held that trespass to land which did not involve forcible entry (meaning actual violence or threats of violence) should be heard as a civil, rather than criminal matter: *R v John Storr* (1765) 3 Burr. 1698.
[104] *Preservation of Timber Tree Act 1715* (UK) s 2; *Preservation of Timber Trees Act 1766* (UK) s 3; Hilary Golder, *High and Responsible Office: A History of the NSW Magistracy* (Sydney University Press, 1991) 3. The English justices were also authorised to hear other minor criminal offences related to protection of private estates, such as poaching: ibid 3. See also Alex Castles' general discussion on the authority of the colony's first magistrates: Castles (n 95) 68–70.
[105] New South Wales justices of the peace were given 'the same power to keep the peace, arrest, take Bail, bind to good behaviour, Supress and punish Riots, and to do all other Matters and Things with respect to the Inhabitants residing or being in the place of Settlement aforesaid as Justices of the peace have within that part of the Kingdom called England within their respective Jurisdictions': 'Charter of Justice' (2 April 1787) *Historical Records of Australia*, vol I (The Library Committee of the Commonwealth Parliament, 1922) 6, 12.

three or more magistrates) formed a key part of the fledgling colony's legal system. As compared to the Court of Criminal Jurisdiction (1788–1823) and the Court of Civil Jurisdiction (1788–1814), the Magistrates' Bench offered an 'informal, inexpensive and accessible' forum for the summary resolution of minor legal matters.[106] Due to their accessibility and efficiency within the colony, the magistrates offered an expedient forum for the resolution of minor criminal offences, as compared to the colony's superior courts.[107]

The first documented timber trespass case heard in NSW, *Devine v Sims*, was heard by the Magistrates' Bench[108] and briefly reported in the *Sydney Gazette* as follows.[109]

> At the last Bench of Magistrates convened at Sydney, a complaint was proffered by Mr. Nicholas Devine against two persons, named *Sims and Stempson*, for cutting down timber and otherwise trespassing on his freehold lands near Sydney, thereby disregarding repeated cautions against so doing; & sufficient proof having appeared to convict Sims, as the principal aggressor, he was fined in the sum of thirty shillings sterling.

The newspaper article, separate to its reporting of the decision, then set out 'as a warning to those who otherwise would have the temerity to offend', the criminal penalties under English law for the unlawful cutting of timber on private property, referencing the timber protection statutes noted above. A second timber trespass case was heard by the Magistrates Bench in 1816. In this case, *Lawrie v O'Neil*, the defendant was charged for having cut a quantity of timber from Lawrie's farm. The farm overseer had warned the drivers of two carts, one with the name James O'Neil written on the side and both loaded with wood, against 'trespassing' on Lawrie's farm. The case, however, was dismissed for lack of evidence, presumably about the location from which the wood had been cut.[110] Similarly, in the 1826 case of *Matthews v Kemp*, Kemp was charged with having 'cut a

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[106] Bruce Kercher, *Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict New South Wales* (The Federation Press, 1996) 19. The court of civil jurisdiction was given authority to hear actions in trespass: ibid 10. The colony's first Supreme Court was given similar authority. In 1824, the new Supreme Court was given broad authority over all civil and criminal matters. For details, see Castles (n 95) 46–50.
[107] Castles (n 95) 67.
[108] *Devine v Sims* (1815), Sydney Gazette and New South Wales Advertiser (9 September 1815) 2.
[109] The *Sydney Gazette and New South Wales Advertiser* was the colony's first newspaper and is discussed further in Chapter 4.
[110] *Lawrie v O'Neil*, 30 November 1816, SRNSW, SZ/755, Bench of Magistrates County of Cumberland Minutes of Proceedings Bench Book 1815–21.

quantity of bark' from trees on Matthews' land and having loaded the bark onto a nearby boat.[111] Kemp did not deny having taken the bark, but 'declared it was from trees standing on lands on which there was no occupant or owner'. In this case, the Magistrates Bench fined Kemp 'in the mitigated penalty' of £1 and cited the *Preservation of Timber Trees Act 1766* discussed above. Through allegations of trespass brought before the magistrates, colonial landholders asserted their right to decide which trees would be cut down on their land, and by whom.

Relevantly, up until the 1850s the fencing of rural properties was relatively rare.[112] Problem of timber-getting from private property and damage caused by freely roaming animals were rife.[113] There are numerous examples of private notices published in the *Sydney Gazette* warning against the cutting of timber on private property.[114] A typical example is the following notice from landholder John Palmer, published on 31 March 1805:

> No Person whatever is to cut Timber, Palings or Shingles, or in any manner trespass on the undermentioned Farms in the District of Bulamaning [sic], and belonging to JOHN PALMER Esq without previous permission had and obtained, on pain of prosecution, viz…[115]

The lack of fencing, which provides such an obvious marker of the boundaries of private property, coupled with the popularity of threatening notices warning against trespass in the *Sydney Gazette,* indicate that it was not always clear whether trees were growing on land subject to a Crown grant.[116] As the governors proceeded to make grants of land, whether as a lease or in fee simple, to individuals within the colony, the physical boundaries of those grants may not have been immediately discernible on the landscape.[117]

These early timber trespass cases show that those accused of timber trespass might escape conviction, or at least a heavy fine, by arguing that they did not know they were trespassing or that they had not previously been warned against cutting trees in that

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[111] *Mathews v Kemp* (1826) Sydney Gazette and New South Wales Advertiser (4 October 1826) 3.
[112] Pickard (n 84).
[113] Kercher (n 106) 108–11; Pickard (n 84).
[114] Pickard, John, 'Trespass, Common Law, Government Regulations, and Fences in Colonial New South Wales, 1788–1828' (1998) 84(2) *Journal of the Royal Australian Historical Society* 130, 132–4.
[115] John Palmer, 'Notice', *Sydney Gazette and New South Wales Advertiser* (31 March 1805) 4.
[116] On the significance of fences, and other physical objects as visual markers of private property, see: Nicholas Blomley, 'Landscapes of Property' (1998) 32(3) *Law and Society Review* 567.
[117] The granting of land by the early NSW governors is discussed in Chapter 4.

particular location. The case of *Farnell v Riley* provides one such example.[118] The brief report of this case reads as follows.

> Thomas Riley, appeared by summons to answer the complaint of Thomas Farnell, for taking timber from the deponent's land, and threatening to cut off the first man's head that opposed him. The prisoner, who was a tenant of the plaintiff's, stated that not having been shown the boundaries of his farm, did not know he was trespassing. Dismissed.

Similarly, in the case of *Clift v Jackson*, discussed above, the court imposed on Jackson only a light fine because Jackson had not previously been warned against the cutting of timber in that location:

> As it appeared Johnson [sic] had not been personally cautioned not to fell timber there, the bench inflicted a light penalty, fining Johnson [sic] 10s and costs and 1s for damages.[119]

These cases reveal a particular shape to the authority of the early colonial magistrates' courts to classify protected trees as timber. In particular, it points to the courts being unwilling to find the accused guilty if they were unaware that they were cutting down trees growing on privately held land. In other words, the authority of the court was shaped by the way in which the common law offence of trespass was interpreted and applied by the colony's local courts. Relevant to the magistrates' decision to classify trees as protected, through the offence of trespass, was whether the defendant was aware that the trees were growing on privately held land.

In the 1839 case of *Scott v Dight*, a timber trespass case was brought before the NSW Supreme Court as a civil action.[120] In this case, the plaintiff, Scott, complained that the defendant, Dight, had

> broke and opened the closes of the plaintiffs and eat up the grass and cut down the trees, thereby causing a great deficiency in the grass which made the plaintiff's cattle suffer from want.[121]

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[118] *Farnell v Riley* (1827) Sydney Gazette and New South Wales Advertiser (16 May 1827) 3.
[119] *Clift v Jackson* (1848) (n 85). In the report of the case in the *Maitland Mercury*, the defendant is first referred to as 'Henry Johnson', and later as 'Jackson'.
[120] The NSW Supreme Court was established by the *New South Wales Act 1823* (Imp) and was given the 'full and ample' jurisdiction of the English common law courts (namely, the courts of the King's Bench, Common Pleas and Exchequer) to hear 'all Pleas, Civil, Criminal or Mixed': *New South Wales Act 1823* (Imp) s 2. See generally Castles (n 95) 180–215.
[121] *Scott v Dight* [1839] NSWSupCt 16 (22 March 1839).

When spoken to, the defendant had 'positively refused to move his sheep'. Dight argued that the plaintiffs occupied more land than they could 'actually use' and that there was plenty of room for both parties to graze sheep or cattle on the land in question. The judge, however, instructed the jury that if it was proved that the defendant had taken his sheep into the plaintiff's land, 'there was undoubtedly a trespass'.[122] In other words, arguments about each party's capacity to make productive use of the land was irrelevant. If the jury believed the evidence of the plaintiff, the only question for them to decide was that of damages. In this case, the jury found for the plaintiff and awarded damages of £200.

The category of 'timber', found in colonial timber trespass cases, was sourced in the common law. More specifically, these courts' authority to classify was sourced in the common law action or offence of trespass. These actions were underpinned by a more general common law principle, that a tree belongs to the person who owns the land upon which it grows. Under contemporary actions of tortious trespass to land, the court's authority to classify protected trees as timber would be shaped by the trespass as a strict liability tort. In contrast, the colonial timber trespass cases show how the authority of the magistrates to classify protected timber was shaped differently. The criminal timber trespass cases indicate that the magistrates were willing to take into account the knowledge held by the defendant regarding whether the trees were growing on privately held land. This points to the importance of understanding law's categories as belonging to particular institutions, whose sources of authority is shaped and expressed in different ways. In addition, this example lays the foundations for the following chapters that consider law's categories of tree protection sourced in the common law, and the significance of the NSW courts as an institution authorised to classify law's protected trees.

IV. Endangered Species and Legislative Authority

This last example considers law's category of 'endangered species' sourced in the legislative power of the NSW Parliament. The endangered species category completes the three examples offered in this chapter, which together demonstrate that the sources of authority to classify law's protected trees can take on a variety of forms. The endangered species category is typical of contemporary environmental law categories sourced in statute, rather than the common law. In this last example, the category and the source of

[122] Ibid.

law are brought together through the institution of the NSW legislature, which then delegated its legislative authority to a scientific committee. This example identifies constitutional legislative power as a key source for protected tree categories in the common law of New South Wales and illustrates that authority is shaped when it is delegated from one institution to another.

The category of 'endangered species' is found in legislation, sourced in the constitutional legislative power of the NSW Parliament. Specifically, the categories of endangered and vulnerable species were first enacted in the *Threatened Species Conservation Act 1995* (NSW) ('the Act') s 4, which provided that

> **endangered species** means a species specified in Part 1 of Schedule 1.[123]

Rather than offering a conceptual definition of endangered and vulnerable species, the Act specified that entities would belong to the category of 'endangered species' if they belonged to a species that was listed in the Schedule to the Act. More detail on the meaning of the category was set out in Part 2, which addressed the listing procedure. Here, the Act set out three eligibility criteria for listing entities as endangered species:

- if it was likely that the species would become extinct 'unless the circumstances and factors threatening its survival or evolutional development cease to operate',
- if the number of the species had been reduced to a critical level, or habitats so drastically reduced that it was in immediate danger of extinction, or
- that the species might already be extinct, but was not presumed extinct.[124]

These definition provisions, and the eligibility criteria for listing, formed the basis of a new category of tree protection in NSW law.

Unlike the previous two examples, the endangered species category was sourced in legislation, rather than the common law or Crown prerogative. The legislation was the state's first attempt to address, in a systemic fashion, the rates of animal and plant

[123] *Threatened Species Conservation Act* (n 19) s 4. Although the *Threatened Species Conservation Act 1995* (NSW) has now been repealed, its successor, the *Biodiversity Conservation Act* 2016 (NSW) establishes a Scientific Committee on similar terms. For a discussion of some of the key differences between the old and new biodiversity legislation, see: Guy J Dwyer, 'A Legislative Pigsty? The New Regime for Assessing and Managing Biodiversity Impacts Associated with State Significant Development in New South Wales' (2018) 35 *Environmental and Planning Law Journal* 670.
[124] *Threatened Species Conservation Act* (n 19) s 10.

extinction occurring throughout NSW.[125] The object of the Act was to preserve biodiversity and promote ecologically sustainable development.[126] The Act established a legislative framework that comprised three main mechanisms: declarations of critical habitat areas; recovery plans for threatened species; and the integration of threatened species considerations into existing planning and development controls.[127] In addition, threatened species fell under the protection of the *National Parks and Wildlife Act 1974* (NSW), which provided that a person may not pick or harm a threatened species.[128] These mechanisms, however, could only be triggered by the listing of particular species as 'endangered' or 'vulnerable' (two sub-categories of 'threatened species') pursuant to the provisions in the Act.[129]

In this example, the NSW Parliament forms the institutional link between law's 'protected tree category and its source in constitutional legislative authority. Through the provisions of the Act, the NSW Parliament also delegated its legislative authority to a new body – a Scientific Committee created by the Act. Section 127 of the Act established the Scientific Committee, responsible for determining which species were to be listed as endangered species in Schedule 1.[130] The source of the committee's authority to classify protected trees, in turn, lay in the provisions of the *Threatened Species Conservation Act 1995* (NSW). It can be argued that the procedural provisions which set out how the committee members were to be appointed and listing gave shape to the Scientific Committee's authority to classify trees (and other entities) as endangered.

In practice, the legislature regularly delegates aspects of its law-making authority to the executive arm of government. A common example is of the legislature delegating power to make regulations under a principal Act to the relevant minister or to the governor. However, in this case the legislature delegated its authority to a newly established body

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[125] Jeff Smith, 'Skinning Cats, Putting Tigers in Tanks and Bringing Up Baby: A Critique of the Threatened Species Conservation Act 1995' (1997) 14(1) *Environmental and Planning Law Journal* 17, 18.
[126] *Threatened Species Conservation Act* (n 19) s 3(a).
[127] Nicholas Brunton, 'The Nature of Recent Environmental Law Reforms in New South Wales' (1996) 13 *Environmental and Planning Law Journal* 71, 78.
[128] *National Parks and Wildlife Act 1974* (NSW) s 118A.
[129] Andrew H Kelly and James Prest, 'Implementation of Threatened Species Law by Local Government in New South Wales' (2000) 17(6) *Environmental and Planning Law Journal* 584.
[130] The decision to give the Scientific Committee, rather than the Minster, final say on which species were listed was debated at length in Parliament and later critiqued by one ecologist as being 'unconstitutional'. The legislation was eventually passed with an amendment that removed the Minister as the final authority on listing. For more details, see: Leong Lim, 'The 10 Lords of the Universe - the New South Wales TSC Act's Scientific Committee' [1997] *Pacific Conservation Biology* 4; Paul Adam et al, 'The 10 Lords of the Universe Respond to Lim' (1998) 3(4) *Pacific Conservation Biology* 319.

that was independent of ministerial control.[131] The original Bill had specified that the minister would oversee the listing process and was required to approve the committee's decisions before listing. During parliamentary debate over the draft Bill, the Opposition, the Democrats and the Greens supported removing the minister as the final authority on listing:

> The Minister has been introduced as the gatekeeper of future listing on the threatened species schedule. This introduces a totally unwarranted political element into the basic information available to the Government and the public: the list. The list should be solely based on science. There is plenty of opportunity for the Government to influence future development decisions later on in the process.[132]

The amendment was eventually passed, with the result that the Scientific Committee, not the minister, was granted final say over listing decisions.

The authority of the Scientific Committee, however, was not broad and unfettered. Rather, the Act established a procedural framework that shaped how Committee members were to be appointed and how they made their decisions. Relevantly, s 129 provided that all committee members were to be appointed by the minister. However, the minister did not hold complete discretion over the appointments: Committee members were to be appointed on the basis of institutional affiliation and scientific expertise, as follows:

- two scientists employed by the National Parks and Wildlife Service,
- one scientist employed by a public authority,
- one scientist nominated by CSIRO,
- one scientist employed and nominated by the Australian Museum Trust,
- one scientist employed and nominated by the Botanic Gardens and Domain Trust,
- one scientist nominated by the Ecological Society of Australia,
- one scientist nominated by the Entomological Society,
- one scientist employed by a tertiary education institution, selected by the minister, and
- one scientist having expertise in agricultural science and natural resources management, selected by the minister.[133]

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[131] 'The Scientific Committee is not subject to the control or direction of the Minister': *Threatened Species Conservation Act* (n 19) s 135.
[132] New South Wales, *Parliamentary Debates*, 15 December 1995, [9.29] (R. S. L. Jones); Brunton (n 127) 78.
[133] *Threatened Species Conservation Act* (n 19) s 129.

While the last committee member was left to the discretion of the minister, all the other appointments were to be made, in the first instance, on the basis of institutional affiliation, either by employment or nomination. In addition, s 129(3) provided that each person appointed to the committee was expected to have expertise in one or more of nine specified fields, including vertebrate biology, plant biology, terrestrial ecology and plant community ecology.

On the one hand, s 129 presents itself as a relatively straightforward provision regarding eligibility for appointment to the Scientific Committee. On the other hand, it can also be read as a provision that shapes the authority to classify law's protected trees in particular ways. To illustrate something of the shape of this authority, it is helpful to consider what kinds of institutional affiliations or other markers of suitability are *not* referenced in s 129. For instance, the provision makes no reference to poets, to local landholders, or to persons with qualities such as kindness or compassion. Granted, these hypothetical markers of suitability do not reflect Parliament's stated objective of creating a listing process that was conducted as a technical matter of scientific inquiry. However, from a jurisdictional perspective – one that considers how the authority to classify can be sourced, and sourced differently – these provisions can be understood as giving the authority of the committee a particular shape and as offering a vocabulary for expressing how the authority of the committee to classify can be validly exercised. The source of the committee's authority, in other words, lay partly in these procedural provisions that specified the composition of the committee. Like the sources of authority discussed above, in Crown prerogative and the common law, that authority is shaped from the start. In this example, that shaping takes the form of institutional affiliation and formal expertise in a particular subject matter.

There is another example of procedural provisions found within the Act that also shape and delimit the authority of the Scientific Committee to classify law's protected trees: the legislative provisions that set out the listing process.[134] The authority of the Scientific Committee was tied to a specific set of steps to be undertaken before a species could be listed as endangered. These procedures did not relate to scientific methods of biodiversity conservation but, rather, to standardised procedures concerning who may initiate a listing procedure, mandatory consultation with the minister and with the public, and publication

[134] Ibid Part 2.

of the committee's decisions. Specifically, the Act provided that the committee, the minister and 'any other person' may initiate an action for listing.[135] Whether considering its own proposal for listing, or a request from the minister or by a third party, the committee was required to make a preliminary determination.[136] The Act required that the preliminary determination be communicated (where relevant) to the requesting minister or nominating party, and published in a newspaper circulated throughout the state and in the government gazette.[137] Publication of the preliminary determination must invite persons to make written submissions to the Committee regarding the proposed listing.[138] The Scientific Committee was then required to 'consider all written submissions', before making a final determination.[139] Upon making a final determination on listing, the committee was to notify (where relevant) the requesting minister or nominating third party, and to publish notice of its decision in a newspaper and in the government gazette.[140] The procedural requirements under the Act make no reference to the committee undertaking field trips, considering statistical data, or other scientific methods that might be utilised within the biological and life sciences regarding threats of extinction. Rather, the authority of the committee was configured according to requirements regarding consultation with the relevant minister and allowance for some level of public participation in the listing process. In addition, these provisions ensured that preliminary and final decisions of the committee were placed on the public record, through newspaper publications and gazettal.

The category of 'endangered species' is typical of contemporary environmental law categories sourced in legislation or legislative instruments (such as regulations etc.). The category's source of law lies in legislative authority. As with the previous examples, law's category and source of law are brought together by the institution, in this case, the NSW legislature. Here, the legislature also delegated to a Scientific Committee the authority to classify particular species as belonging to the category of 'endangered species'. The procedural provisions of the Act, which detailed who was eligible to be appointed to the committee and standard procedures for listing, shaped the delegated authority of the

[135] Ibid s 18.
[136] Ibid s 22(1).
[137] Ibid s 22(2).
[138] Ibid s 22(3).
[139] Ibid s 22(5).
[140] Ibid s 24.

committee. This final example demonstrates that there are a range of different sources of law from which law's protected tree categories spring. The legislative provisions concerning appointment of the committee and the listing process provide one example of the way in which the authority to classify assumes a particular jurisdictional form. It is these provisions that give shape to, and provide a measure of, the lawfulness of the committee's acts of classification.

V. CONCLUSION

The examples outlined in this chapter demonstrate that the authority to classify in law's name can arise from a number of different sources. From the royal forest, sourced in Crown prerogative, to timber, sourced in the common law, to endangered species, sourced in legislation, each category was sourced in authority that assumed a different jurisdictional form. Attending to the ways in which law's categories are sourced is important because each source of authority is shaped differently. Each source tells us about the shape and scope of the authority to classify in law's name. This chapter has examined how early forms of Crown prerogative, common law rules of trespass and legislative procedural provisions each shaped the authority to classify differently. By engaging with the sources of law's categories in this way, a jurisprudence of classification contributes to a jurisprudential vocabulary for articulating how law's institutions themselves express and articulate the sources and shape of law's authority to classify. Each example revealed how the source of authority to classify is itself joined to law in a particular form.

Importantly, this chapter has laid the necessary groundwork for the analysis that follows. It has done so by signalling the importance of the institution that brings source and category together. Drawing on different sources of authority, the Crown, the NSW colonial courts and the NSW Parliament all classified law's protected trees: as forest, as timber or as endangered species. In addition, the chapter has identified the key sources of law for the tree protection categories and institutions discussed in the following chapters. The next chapter builds on this analysis by engaging the first register of my proposed jurisprudence of classification that enquires into 'who' can classify? Chapter 4 attends to this question by investigating who, as a matter of practice, first exercised the authority to classify law's protected trees in the colony of NSW.

CHAPTER 4. WHO CLASSIFIES: NEW SOUTH WALES GOVERNORS, 1787–1825

I. INTRODUCTION

This chapter engages the first register of a proposed jurisprudence of classification by examining who, as a matter of practice, exercises the authority to make law's categories. To investigate this question, I have chosen to examine one of the first categories of tree protection in the colony of NSW, that of protected timber. This is a particularly useful example because it demonstrates that tree protection categories were found in NSW's early colonial legal history, as well being found in contemporary environmental law. I argue that it was the early NSW governors who made law's category of 'timber', a category which drew trees into lawful relations of protection. The governors did so through the institutional practice of making land grants that included reservations of timber to the Crown. Drawing on Alain Pottage's insight that law's categories are fabricated by institutional practices (as explained in Chapter 2), I argue that thinking about 'timber' in this way offers insight into the identity of the category's institutional maker.[1] The chapter, then, does not look to law's category of 'timber' for insight into broader colonial attitudes towards nature or for evidence of colonial economic activity. Instead, the chapter asks what law's category of 'timber' can tell us about the institution which brought the category into being. Attending to 'who classifies' in this way develops the capacity of jurisprudential inquiry to articulate the source, shape and expression of the authority to classify in the name of the law.

The early NSW governors' authority over protected tree classification provides a useful and relevant context for exploring who classifies for two reasons. First, it builds on the analysis of sources of authority in the previous chapter in order to demonstrate the continuity of the prerogative as a source of authority for law's protected tree categories within the NSW common law system. As discussed in Chapter 3, contemporary categories of environmental law are predominantly sourced in legislation. However, as this chapter will demonstrate, the first categories of tree protection in the colony of NSW

[1] Alain Pottage, 'Introduction: The Fabrication of Persons and Things' in Alain Pottage and Martha Mundy (eds), *Law, Anthropology and the Constitution of the Social: Making Persons and Things* (Cambridge University Press, 2002) 11.

were sourced in delegated Crown prerogative and located in land title deeds rather than in legislation. Second, this chapter focuses on the land-granting practices of the early governors, from Phillip to Brisbane, between 1787 and 1825. It does so because it was during this period that the office of the governor was first authorised to fabricate law's category of 'timber' when granting land within the colony.[2] By focusing on the formative years, the chapter demonstrates that categories for lawful tree protection have been part of the NSW common law system since the earliest years of the colony. In so doing, the chapter allows for an exploration of how law's protected tree classification practices were first institutionalised: who was authorised to classify law's protected trees; and how that authority was shaped and expressed, as a matter of institutional practice. That is, rather than attending to conceptual or ideological origins of colonial practices, the chapter attends to institutional origins: the way in which the colony organised and exercised authority in situ.[3] This provides an important background and point of comparison for thinking jurisprudentially about how other institutions and other institutional practices have come to classify law's protected trees throughout the history of the common law in NSW.

This early period of NSW land law has generally been treated by historians as chaotic: a period in which the governors adopted reactionary approaches to land policies precipitated by various crises (such as floods), operated with scant administrative resources and implemented informal conveyancing practices.[4] This picture reflects a more general sense of the colony operating on a bare-bones administrative structure that lurched from one crises to the next (rebellions, food shortages). Overall, the colony's early administration was primarily oriented towards the expedient management of a convict population and was overseen by an autocratic governor with limited oversight

[2] As will be explained, Governor Darling's Royal Instructions, issued in 1825, removed the requirement that the governor include Crown reservations of timber when disposing of land.
[3] Shaunnagh Dorsett, 'How Do Things Get Started: Legal Transplants and Domestication: An Example from Colonial New Zealand' (2014) 12 *New Zealand Journal of International and Public Law* 103, 104.
[4] See generally Stephen Roberts, *History of Australian Land Settlement* (MacMillan, 1924); C. J. King, *An Outline of Closer Settlement in New South Wales* (Department of Agriculture, NSW); Brian H Fletcher, *Landed Enterprise and Penal Society: A History of Farming and Grazing In New South Wales before 1821* (Sydney University Press, 1976); Lynne McLoughlin, 'Landed Peasantry or Landed Gentry: A Geography of Land Grants' in Graeme Aplin (ed), *A Difficult Infant: Sydney Before Macquarie* (New South Wales University Press, 1988) start page; Bruce Kercher, *Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict New South Wales* (The Federation Press, 1996) 122–31.

from London.[5] As Bruce Kercher observes, the first NSW governors held authority over the local judiciary, the administration of the colony and law-making.[6] Specifically in relation to the governors' authority over land, a cascade of preferential land grants made by interim administrators, Francis Grose and William Paterson, to officers in the NSW Corps and the proliferation of informal promises of land are presented as evidence of land administration system in a permanent state of disrepair.[7]

These histories of NSW land law, however, have largely been written on the basis of formal documents and published correspondence between the governors (and other colonial officials) and their superiors in London. Far less attention has been paid to the archival records of how the colony's early land law institutions operated in practice. [8] For example, Enid Campbell's in-depth doctrinal analysis of the formal scope of the governors' authority over land draws on official documents, published correspondence with the governor and/or doctrinal sources concerning the source of the governors' authority.[9] More recently, Sharon Christensen et al.'s work on the conditions and reservations attached to colonial land grants relies on a published summary of the archival record between 1788 and the 1820s.[10] However, this summary does not reflect all the information recorded in the Colonial Secretary's *Register of Land Grants and Leases*, including the conditions and reservations attached to individual grants.[11] Exceptions include Bruce Kercher's *Debt, Seduction and Other Disasters*, which examines archival records of land title disputes brought before the New South Wales Court of Civil Jurisdiction between 1788 and 1814.[12] In another example, Shaunnagh Dorsett has examined the archival records of proceedings brought before the Court of Claims (1833–

[5] Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law* (Harvard University Press, 2016) 33; Bruce Kercher, 'Perish or Prosper: The Law of Convict Transportation in the British Empire 1700–1850' (2003) 21(3) *Law and History Review* 527, 542.
[6] Bruce Kercher, 'Resistance to Law under Authority' (1997) 60 *Modern Law Review* 779, 780.
[7] Fletcher (n 4) 7; McLoughlin (n 4) 122–3; Enid Campbell, 'Promises of Land from the Crown: Some Questions of Equity in Colonial Australia' (1994) 13 *University of Tasmania Law Review* 1.
[8] Shaunnagh Dorsett, 'The Court of Claims and the Resolution of Informal Land Claims in New South Wales 1833–1835' [2014] *Property Law Review* 5, 6.
[9] Enid Campbell, 'Crown Land Grants: Form and Validity' [1966] *The Australian Law Journal* 35; Campbell, 'Promises of Land from the Crown: Some Questions of Equity in Colonial Australia' (n 7); Enid Campbell, 'Conditional Land Grants by the Crown' [2006] (1) *University of Tasmania Law Review* 44; Enid Campbell, 'The Quit Rent System in Colonial New South Wales' (2009) 35(1) *Monash University Law Review* 32.
[10] S Christensen et al, 'Early Land Grants and Reservations: Any Lessons from the Early Queensland Experience for the Sustainability Challenge to Land Ownership' [2008] *James Cook University Law Review*.
[11] RJ Ryan, *Land Grants: 1788–1809* (Australian Documents Library, 1981).
[12] Kercher (n 4) 121–30.

1855), authorised to resolve burgeoning conflicts over land that stemmed from governors' informal land grants.[13] Both these studies demonstrate the importance of institutional practices to understanding how colonial institutions pragmatically drew on various sources of authority to resolve disputes over land title within the colony.

This chapter adds to this existing literature by drawing on archival records of land grants made by the governor, as recorded in two series of land grant registers: the Colonial Secretary's *Registers of Land Grants and Pardons* (1792–1810) and the Colonial Secretary's *Registers of Land Grants and Leases* (1810–1825).[14] This chapter uses these archival resources to examine how institutional practices provide insight into the nature of an institution's authority to classify, whether historical or contemporary. The aim is to demonstrate how the source and shape of the authority to classify, and the institutional practices through which classification takes place, tell us something about the character of the classifying institution. The historical context also provides a comparative reference point for thinking about who can currently classify in law's name, illustrating that 'who classifies' in law's name can and does change over time.[15] In this way, the chapter attends to one of the important aims of a jurisprudence of jurisdiction: to examine how the common law's jurisdictional practices change over time, which serves as a reminder that current practices are not the only possible way of doing things.[16]

My analysis of the two registers is informed by the institutional and jurisdictional approach to classification outlined in Chapter 2. This differentiates the aim of the present research, for example, from Christensen et al.'s analysis of colonial land grant and conditions. Christensen et al. argue that Crown reservations of natural resources in colonial land grants can be read as evidence that the colonial land grants scheme 'incorporated two elements integral to contemporary approaches to sustainable land and

[13] Dorsett, 'The Court of Claims and the Resolution of Informal Land Claims in New South Wales 1833–1835' (n 8).
[14] Colonial Secretary, *Register of Land Grants and Pardons Vol. 1*, 1792–1795, SRNSW, NRS 1215, SZ75; Colonial Secretary, *Register of Land Grants and Pardons Vol. 2*, 1795–1800, SRNSW, NRS 1215, SZ47; Colonial Secretary, *Register of Land Grants and Pardons Vol. 3*, 1800–1809, SRNSW, NRS 1215, SZ76; Colonial Secretary, *Register of Land Grants and Pardons Vol. 4*, 1809–1810, SRNSW, NRS 1215, [no item reference]; Colonial Secretary, *Register of Land Grants and Leases Vol. 2*, 1810–1821, SRNSW, NRS 13836, 7/447; Colonial Secretary, *Register of Land Grants and Leases Vol. 3*, 1816–1822, SRNSW, NRS 13836, 7/448; Colonial Secretary, *Register of Land Grants and Leases Vol. 4*, 1822–1836, SRNSW, NRS 13836, 7/449.
[15] Dorsett and McVeigh, *Jurisdiction* (n 1) 25–7.
[16] Ibid 26.

resource management'.[17] These two elements were the idea that private property rights were inherently subject to communal obligations, and that rights to natural resources should be disaggregated from rights to the underlying land.[18] In contrast, instead of measuring the colonial land grants against an ideal (such as environmental sustainability), this chapter investigates what these records can tell us about who can classify – in this instance, about the office of the governor. This analysis draws on Pottage's insights that law's categories are created by institutional practices. As Pottage states:

> If the 'making' of persons and things is approached by way of a reflection on institutional creativity, two general issues present themselves. First, the techniques by means of which the law manufactures and deploys the categories of person and thing can be seen as defining the peculiar nature of (legal-)institutional action … [O]ne might say that the identity of legal institutions consists in the ways they build conventions and transactions round the cardinal points of person and thing.[19]

Pottage directs his comments at law's categories of person/thing, but I suggest that the point holds true more generally, as this chapter will explore. By adopting an institutional perspective on classification, each of law's categories can be treated as an artefact of particular institutional practices. Those practices offer a window into the nature of the institution engaged in category-making. This chapter explores this potential for law's categories to tell us about 'who' classifies, through an account of the institutional practices that fabricated one of NSW's first protected tree categories.

It is important to note two other points in relation to the way that the governors exercised the authority to classify trees for purposes of lawful protection in the colony. The first point is that the early governors classified law's protected trees in more than one way. Most commonly, the governors classified protected trees by making land grants, as this chapter demonstrates. However, the governors also fabricated categories of tree protection by making proclamations. For example, in 1795 Governor Hunter, despairing at the quantity of timber which had been 'wasted, or applied to purposes for which timber of less value might have answered', ordered that 'no timber whatever be cut down on ground which is not marked out, or allotted to individuals, on either of the Banks or

[17] Christensen et al (n 10) 44.
[18] Ibid 144.
[19] Pottage (n 1) 11.

Creeks' of the Hawkesbury River.[20] In 1803, Governor King issued a similar order, remarking on the 'improvident methods' of the 'First Settlers in Cutting Down Timber and Cultivating the Banks' of the Hawkesbury.[21] This chapter focuses on the making of land grants as the most common practice of protected tree category fabrication in the colony's early years, while Chapter 5 considers proclamation making. The second point, as explained in Chapter 1, is that the focus of this chapter is on the practice of legal classification – the making of law's category of 'timber' – rather than measuring the effects of the classification on tree clearing practices. This chapter aims to understand who first fabricated categories for lawful tree protection trees in the colony of NSW and on what terms.

The chapter is structured as follows. First, it identifies delegated Crown prerogative as the source of the colonial category of protected timber, meaning trees whose wood was suitable for naval purposes. This part of the chapter examines how the Crown constituted the Office of the Governor and delegated to it the authority to classify law's protected trees as timber. Second, the chapter examines the archival records of land grants made by the governors up until 1825. I argue that the practice of executing valid land title deeds, which created interests in land and which included reservations of timber to the Crown, brought law's category of 'timber' to life. Lastly, the chapter draws out two particular aspects of the governors' authority to classify revealed by the archival record. The first is that the governors routinely included timber reservations on *all* grants of freehold land, not only on grants to emancipated convicts as formally instructed. Second, the governors developed and drew on standard forms when granting land. I argue that the use of standard forms can be understood as an important device that contributed to the repeated and routine fabrication of 'timber' by the governors. The use of standard forms suggests that the manner in which the governors exercised their authority over land is a complex matter. Yes, informal promises of land caused conflict and uncertainty over land title, yet the routine inclusion of timber on the land grants also suggests an element of uniformity and repetition, at least with respect to the execution of formal land title documents. Overall, the chapter demonstrates that it was the Office of the Governor, the oldest of NSW's legal

[20] Governor Hunter, 'December 8 1795' *New South Wales General Standing Orders: Selected from the General Orders Issued by Former Governors, From the 16th of February 1791 to the 6th of December 1800, Also General Orders Issued by Governor King from the 28th of September 1800 to the 30th of September 1802* (Government Press, 1802) 2.
[21] Governor King, 'General Order', *Sydney Gazette and New South Wales Advertiser* (Sydney, 9 October 1803) 1.

institutions,[22] which fabricated 'timber' as one of law's protected tree categories. In so doing, the chapter offers an account of what it might look like to think jurisprudentially about who can classify in law's name, by attending to the institutional source, shape and exercise of that authority.

II. WHO IN PRACTICE: THE AUTHORITY OF THE NSW GOVERNORS TO CLASSIFY LAW'S PROTECTED TREES

In March 1791, the first Governor of NSW, Arthur Phillip, made his first formal grant of land to a former convict James Ruse.[23] Phillip described Ruse as a 'very industrious' convict, and his grant of 30 acres in Parramatta had been conditional upon Ruse first demonstrating his willingness and capacity to cultivate a smaller lot of one acre.[24] Phillip's intention was to develop a sense of how long it make take a man to 'cultivate a sufficient quantity of ground to support himself' and therefore no longer rely on government provisions.[25] Phillip's grant to Ruse included a number of conditions, including that Ruse, as grantee, 'improve' and 'cultivate the land'. Relevantly, the grant also included a reservation of timber to the Crown, in the following terms:

> …such timber as may be growing, or to grow hereafter upon the said land, which may be deemed fit for naval purposes to be reserved for the use of the Crown…[26]

The legal effect of the reservation was that trees which might belong to the category of 'timber' were reserved from the grant of freehold title.[27] In other words, real property rights in the trees, which would have otherwise flowed from the underlying right to land, were dissociated from the land on which they grew.[28] In this way, timber trees were drawn into a lawful relationship of protection vis-à-vis the landholder. As the holder of title to an estate in fee simple to the granted land, Ruse was now entitled to the exclusive use and possession of that land. However he had not been granted property over timber trees:

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[22] Brian Galligan, 'Australia' in David Butler and DA Low (eds), *Sovereigns and Surrogates: Constitutional Heads of State in the Commonwealth* (MacMillian, 1991) 61, 77.

[23] 'Governor Phillip to Under Secretary Nepean' (17 June 1790) FM Bladen, *Historical Records of New South Wales*, vol 1(2) (Government Printer, 1892) 349 ('*HRNSW Vol 1(2)*'). There is some disagreement in the literature as to the date of Phillip's first land grant. The confusion arises because, as will be discussed, in 1792 Phillip recalled and reissued the land title deeds he had executed in the previous year. The date given here refers to the earlier, recalled grant, as recorded in Phillip's *Return of Lands* sent to the state secretary for the colonies: 'Governor Phillip to Lord Grenville' (5 November 1791) ibid 540.

[24] 'Phillip to Nepean, 17 June 1790' in *Historical Records of NSW* 349–50.

[25] Ibid 349.

[26] 'First Land Grant' (22 February 1792) *HRNSW Vol 1(2)* (n 23) 593.

[27] Christensen et al (n 10) 49.

[28] For discussion of common law's general proposition that rights to trees flow from rights to the underlying land, see above Chapter 3.

these were reserved from the grant. The trees were not offered absolute legal protection. The Crown retained a right to enter and cut timber trees suitable for naval purposes. Importantly, what made the category valid – what made the category law's category – was not its correspondence to any external or material referent (such as the trees themselves), but the fact that the category was contained within a validly executed grant of land. This point matters because it directs our attention to who was authorised to dispose of land in the colony, the source of that authority, and the shape of its scope.

As discussed in Chapter 3, there are multiple sources of legal authority for law's categories of tree protection. Most contemporary categories of tree protection are sourced in legislative authority. However, the colony's early tree protection categories, which were contained in Crown grants of land, which were not sourced in legislative power nor in the common law. Instead, the source of authority for these grants and the categories they contained lay in delegated Crown prerogative.[29] As Toohey J stated in *Wik*:

> When the Australian colonies were first established there was no doubt as to the power of the Crown with respect to the disposition of waste lands. The Royal Prerogative was initially the source of grants of land in Australia.[30]

As detailed by Dorsett and Godden, it was not until the 1840s that the authority to grant land started to become subject to statutory control, initially by Imperial rather than locally promulgated legislation.[31]

As a matter of practice, the Crown delegated the authority to dispose of land to the colony's successive governors. This delegation of authority took the form of *Royal Commissions* and *Instructions*, issued from the Crown to each governor. The effect of executing these Commissions and Instructions was to constitute the Office of the Governor as the Crown's personal representative in the colony, and to confer upon that office the authority to undertake particular practices on behalf of the Crown. Each time a new governor was appointed, the incumbent governor's Commission was revoked by that of the incoming governor.[32] While the Commissions constituted the office of the governor

[29] Shaunnagh Dorsett and Lee Godden, 'Tenure and Statute: Re-Conceiving the Basis of Land Holding in Australia' (1999) 5(1) *Australian Journal of Legal History* 29, 33.
[30] *The Wik Peoples v the State of Queensland & Ors* (1996) 102 CLR 1, 108–9.
[31] Dorsett and Godden (n 29) 32–8.
[32] For example, Governor Hunter's *Commission* begins 'Whereas wee did, by our Letters Patent…constitute and appoint our well-beloved Arthur Phillip, Esquire, to be our Captain-General and Governor-in-Chief in and over our territory called New South Wales. … Now, know you that wee have revoked and determined,

and personally appointed an individual to that office, the Instructions, issued separately, provided additional detail as to how it was expected the governors would exercise that authority. In this way, the Commissions and Instructions are comparable to the relevant provisions of the *Threatened Species Conservation Act 1995* (NSW), which established, and shaped the authority of, the Scientific Committee. From a doctrinal perspective, these sets of instruments seem unlikely companions: one relates to NSW's history of colonial rule, the other to the contemporary challenges of protecting biodiversity. However, a jurisprudence of classification illuminates what they have in common. As will be shown, both sets of documents simultaneously establish a nominated body and delegate to it the authority to classify law's protected trees. In other words, both sets of documents tell us something about who is authorised to classify law's protected trees, and the formal shape and scope of that authority. In particular, both sets of instruments also specify that law's categories be fabricated through a particular institutional practice. For the Scientific Committee, that practice was of one of listing 'endangered species', as per the procedural provisions of the Act. As the following analysis of the governors' Commissions and Instructions will demonstrate, for the NSW governors, that practice was one of granting land.

The Commissions constituted the NSW governor as the highest ranked official in the colony.[33] As the personal representative of the Crown in the colonies, the office of governor was the highest post in the British colonial service.[34] It was an office fraught with contradiction; beholden to London superiors, locally the governor was an 'administrative autocrat' who held extensive authority over the administration of the colony.[35] When Arthur Phillip was appointed as NSW's first governor, it was the established practice to invest in governors broad and discretionary authority as strategy designed to meet the challenge of administering numerous and geographically disparate colonies.[36] As Bayly argues, this was an era in which the British managed Empire by

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and by these presents do revoke and determine, the said recited Letters Patent and every clause, article and thing therein contained': 'Governor Hunter's Commission' (6 February 1794) FM Bladen (ed), *Historical Records of New South Wales*, vol 2 (Government Printer, 1893) 110–11 ('*HRNSW Vol 2*').

[33] Alex Castles, *An Australian Legal History* (The Law Book Co, 1982) 34.

[34] Arthur McMartin, *Public Servants and Patronage: The Foundation and Rise of the New South Wales Public Service, 1786–1859* (Sydney University Press, 1983) 44.

[35] Zoe Laidlaw, *Colonial Connections, 1815–45: Patronage, the Information Revolution and Colonial Government* (Oxford University Press, 2005) 61–2.

[36] Ibid 39–41. Arthur Phillip was first commissioned as Governor of New South Wales by brief, military, commission issued on 12 October 1786. He later received a second Commission, which set out in detail the authority of his office. Hereafter, all references to Phillip's *Commission* are to the second document, dated 2 April 1787: Bladen, *HRNSW Vol 1(2)* (n 23) 24–5, 61–7.

establishing 'colonial despotisms'.[37] The office of the NSW governor was particularly autocratic when compared to many of Britain's other colonies.[38] As Britain's only penal colony, NSW was governed with a bare minimum of constitutional institutions. There was, at first, no legislative body in the colony, no executive council to advise the governor, and, until 1809, the colony's first judicial officers were instructed to obey the orders of the governor.[39] In particular, between 1823 and 1855 there was a 'progressive dilution' of the NSW governors' broad and discretionary power, both through the establishment of new local institutions (such as a legislative body, an executive council and a supreme court) and increased regulation and oversight from London.[40] As detailed by Zoe Laidlaw, by the 1830s the Colonial Office increasingly sought to intervene more closely in colonial affairs, asserting a tighter 'metropolitan control' over the actions of the governors.[41] In New South Wales, colonial self-government was achieved in 1855, a transition that was staggered over a number of decades and marked by the establishment of the colony's first legislative body in 1823.[42] Authority over matters relating to land was deliberately withheld from the local legislature until 1855.[43] As acting Chief Justice Barton of the High Court put it in 1913:

> Up until the passage of the New South Wales *Constitution Act* in 1855 … the successive grants of legislative power to the Colony carefully reserved to the Crown of the United Kingdom, subject of course to any Imperial statute, the lands belonging to the Crown within the Colony, and their entire control and management.[44]

Between 1787 (Phillip's Commission) and 1825 (Darling's Commission), the general terms of the governors' authority, including over land remained relatively unchanged.[45] This chapter examines the land granting practices of the early governors during this period.

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[37] CA Bayly, *Imperial Meridian: The British Empire and the World, 1780–1830* (Longman, 1989) 8.
[38] Benton and Ford (n 5) 33; Kercher, 'Resistance to Law under Authority' (n 6) 780.
[39] Kercher, 'Perish or Prosper: The Law of Convict Transportation in the British Empire 1700–1850' (n 5) 542.
[40] Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987) 34–5.
[41] Laidlaw (n 35) 39–57.
[42] For history of the institutional reforms that transitioned the colony to self-government, see: Castles (n 33) Chapters 7 and 8; RD Lumb, *The Constitutions of the Australian States* (University of Queensland Press, 5th ed, 1991) 7–19.
[43] Lumb (n 42) 12–3.
[44] *Williams v Attorney General for New South Wales* (1913) 16 CLR 404, 424.
[45] ACV Melbourne, *Early Constitutional Development in Australia* (University of Queensland Press, 1963) 9.

The NSW's governors' Commissions and Instructions are particularly important because they tell us something about who, within the colony, was authorised to fabricate law's category of timber and they link that authority to a particular institutional practice: the granting of land. As well as constituting the governor as the highest ranking official in the colony, the Commissions also vested in the governors the power to undertake particular activities on behalf of the Crown. These included the power to administer oaths, appoint justices and coroners, appoint market towns, discharge and emancipate convicts and punish offenders under martial law.[46] Relevantly, the Commissions vested in the office of the governor the authority to dispose of land within in the colony on the Crown's behalf. For example, Phillip's Commission stated that:

> Wee do hereby likewise give and grant unto you full power and authority to agree for such lands and tenements and hereditaments as shall be in our power to dispose of them...[47]

Each successive governor, up until the appointment of Governor Darling in 1825, was authorised in these terms to grant land on behalf of the Crown within the colony.[48] The Commissions also specified how the governors were, as a matter practice, required to dispose of land within the colony. To be valid, a land grant had to be 'sealed by our seal of territory' and also 'entered upon record by such officer or officers as you shall appoint thereto'.[49] Once sealed and recorded, a grant of land made by the governor would, according to the Commission 'be good and effectual in law against us our heirs and successors.'[50] Although these passages in Phillip's Commission relate to uncontroversial formal matters of conveyancing, from a jurisprudential perspective concerned with how law shapes the authority to make law's categories, these passages also speak to the shape of the governors' authority over land. In particular, this part of the governors' Commissions reveals two things. First, it was the governor who was authorised to create interests in land in the colony on the Crown's behalf. Second, this authority was to be

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[46] See, eg,: 'Phillip's Commission' (2 April 1787) *HRNSW Vol 1(2)* (n 23) 63–7.
[47] 'Phillip's Commission' (2 February 1798) ibid 66.
[48] 'Governor Hunter's Commission' (6 February 1794) in *Historical Records of New South Wales*, vol 3 (Government Printer, 1895) 110 at 115 ('*HRNSW Vol 3*'); 'Governor King's Commission' (23 February 1802) in *Historical Records of New South Wales*, vol 4 (Government Printer, 1896) 697 at 702 ('*HRNSW Vol 4*'); 'Governor Bligh's Commission' (23 May 629) in *Historical Records of New South Wales*, vol 5 (Government Printer, 1897) 628 at 633 ('*HRNSW Vol 5*'); 'Governor Macquarie's Commission" (8 May 1809) in *Historical Records of New South Wales*, vol 7 (Government Printer, 1901) 126 at 132. ('*HRNSW Vol 7*').
[49] 'Phillip's Commission' (2 February 1787) *HRNSW Vol 1(2)* (n 23) 61 at 66.
[50] 'Phillip's Commission' (2 February 1787) ibid.

exercised through a particular practice: the executing of documents with the seal of the territory and entering those grants onto an official record. In other words, the Commissions gave shape to the governors' authority to create interests in land. They specified that the governors were not authorised to grant land through other kinds of institutional practices, such as, for example, oral or ceremonial proceedings.[51]

The governors' Royal Instructions, issued separately and subsequently to the Commissions, set out in more detail how the Crown expected the governors would exercise their authority over land. It is here that the colony's first category of protected tree, 'timber', is found. Through the Instructions, the Crown established the details of colonial land policy, such as to whom the governors could grant land, the expected sizes of each grant and any conditions or reservation which were to be attached to these initial grants. Up until the Crown Instructions issued to Governor Darling in 1825, the early governors were all instructed to include in their grants a reservation of 'timber' to the Crown. Phillip's first set of Instructions authorised him to make grants of land in the colony only to emancipated convicts. Upon discharging convicts from their servitude, Phillip was authorised to grant land to the newly discharged convicts if he considered them to be 'industrious' and 'worthy of his favour'.[52] The Instructions also specified the size of each grant: thirty acres to single men, with twenty acres more if they were married and an extra ten acres permitted for each child. The grants were to be free of 'all fees, taxes and quit-rents' for a period of ten years, after which an unspecified annual quit-rent would become payable.[53] Phillip was also required to attach non-financial obligations to each grant. These conditions required that the grantee cultivate and improve the land, expressed in the following terms:

> [T]he person to whom the said land shall have been granted shall reside within the same and proceed to the cultivation and improvement thereof.[54]

[51] On the history of changing practices of land transfer in the English common law tradition, see: Alain Pottage, 'The Measure of Land' (1994) 57 *Modern Law Review* 361.
[52] 'Phillip's Instructions (22 April 1787) *HRNSW Vol 1(2)* (n 23) 90.
[53] NSW quit rents system, in part, reflected the history of tenurial land holding in England and were 'a perpetual annual payment of a fixed amount, in money or in kind, which have been reserved by Crown grant in lieu of other tenurial services'. The quit-rent system was also intended to ensure that land grantees contributed to the resources of the colonial government, however enforcement was patchy: see, eg,: Campbell, 'The Quit Rent System in Colonial New South Wales' (n 9) 32, 43.
[54] 'Phillip's Instructions' (25 April 1787) Bladen, *HRNSW Vol 1(2)* (n 23) 84, 90.

In addition, when making land grants to ex-convicts, Phillip was also instructed to include a reservation of timber to the Crown:

> [R]eserving only to us such timber as may be growing, or grow hereafter, upon the said land which may be fit for naval purposes.[55]

As discussed above, by including such a reservation in a valid grant of land from the Crown, the effect of law's category of 'timber' was to protect trees belonging to that category from being cut down by the grantee. The reservation legally excises timber 'which may be fit for naval purposes' from the grant of fee simple; such property in them does not pass to the grantee.

The conditions and reservations outlined in Phillip's Instructions reflected numerous imperial policies. Giving land to ex-convicts was intended as an inducement to remain in the colony, rather than return to England.[56] The conditions of cultivation and improvement illustrate a particular colonial attitude towards land and nature, as discussed in Chapter 1. These conditions also reflected pragmatic concerns of cost and the risk of starvation; it was in the British government's interest for the colony to become self-reliant, without the need for costly food imports.[57] Relevantly, the timber reservation reflected the significance of the British naval forces to its geopolitical power during the late eighteenth century. During this time, Britain was at war with France and Spain and these battles were waged as naval battles at sea, both in European waters and in the vicinity of colonial territories from the West Indies to India.[58] Britain did not have an adequate domestic supply of naval timber to supply its fleets. Imported timber was therefore crucial to Britain's capacity to meet domestic ship-building demands.[59] Through these Instructions, Phillip's authority to classify trees as timber was allied to his authority to land grant and to discharge convicts: the Instructions specified that Phillips' authority was to be exercised by including reservations of 'timber' on grants of land to ex-convicts.

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[55] 'Phillip's Instructions' (25 April 1787) ibid.
[56] It is unclear exactly what prompted this decision to give land to former convicts. It is likely to have been a policy that reflected a number of different objectives, including a therapeutic ideal of reform of criminal behaviour through agrarian labour: Fletcher (n 4) 14–5.
[57] Ibid 6.
[58] Richard Harding, *Seapower and Naval Warfare 1650–1830* (UCL Press, 1999) 219. For a detailed treatment of Britain's naval capacity during this time period, see above Chapter 4 'The Battle for Primacy 1750–1815' in Jeremy Black, *The British Seaborne Empire* (St Edmundsbury Press, 2004) 113–70.
[59] Harding (n 58) 219.

The Commissions and Instruments were two different types of legal instruments, and the difference is relevant to understanding how each differently shaped the governors' authority to fabricate law's category of timber. The Commissions took the form of letters patent. As Campbell observes, letters patent were public documents and, as such, the Commissions can be understood as formally establishing the office of the governor and the scope of its authority.[60] Actions which lay outside the terms of those Commissions would be invalid, or *ultra vires*, beyond the governor's authority.[61] The Instructions, however, took the form of letters close and were sealed with the royal sign manual. The sign manual was used by the Crown to seal private documents, in this context between the Crown and governor.[62] It is, therefore, arguable that an action by the governor which was consistent with a governor's Commission, but inconsistent with his Instructions, may have placed the governor in the Crown's displeasure, but would not have rendered the action invalid at law. Rather, significant derogation from Instructions might trigger a governor's recall from office.[63] This distinction is particularly relevant in relation to the governor's authority over land. Although the Instructions provided more detail on the intended terms and conditions of Crown land grants in the colony, it was open to the governors to adapt these conditions and terms as they saw fit, without rendering invalid the Crown grant of land title.

Subsequent Instructions, to Phillip and to the other early governors, indicate that the Crown shaped the governor's authority over granting land through a modality of personal status. By this I mean that the Instructions required the Governors to attach different terms, conditions and reservations on land grants depending on the personal status of the grantee.[64] Initially, as outlined in the paragraph above, Phillip was authorised to grant land to ex-convicts only. However, Phillip later received additional instructions that authorised him to also make land grants to free settlers and ex-officers.[65] However, these

[60] Campbell, 'Crown Land Grants: Form and Validity' (n 9) 36.
[61] Ibid.
[62] Ibid.
[63] Campbell, 'Crown Land Grants: Form and Validity' (n 9).
[64] As Brian Fletcher observes 'The motives of the [British] government in making land grants available, however, varied from one category of settler to the next': Fletcher (n 4) 10. For a discussion of the policy motivations behind the different conditions attached to each category of grantee, see ibid 10–20.
[65] 'Phillip's Additional Instructions' (20 August 1789) *HRNSW Vol 1(2)* (n 23) 256–7. At first Phillip was authorised to make grants to ex-officer only, meaning those officers who, had been discharged from official duties and who desired to settle in the colony: ibid 256. However, Phillip also requested that serving officers be permitted to receive grants. This request was agreed to by Secretary of State Henry Dundas in 1792: 'Dundas to Phillip' (14 July 1792) ibid 632. For further discussion on the dynamics between officers of the NSW Corps and the governors in relation to land, see: Fletcher (n 4) 10–3.

grants could be larger than those for ex-convicts and the governors were not required to include the same conditions and reservations. Specifically, Phillip was authorised to grant up to 100 acres in addition to that allowed for ex-convicts to non-commissioned officers, and any amount he 'thought proper' for free settlers. These grants were to be free of all taxes, quit rents and services for a period of ten years, after which the grantee was liable to pay a quit rent of one shilling per ten acres.[66] Relevantly, Phillip was not instructed to include reservations of timber on grants to settlers or officers, nor was he instructed to include on these grants conditions of cultivation and improvement.

The Crown continued to require the governors to exercise their authority over land grants differently, structured across the three categories of grantee: ex-convict, free settler and officer. For example, in 1793 Secretary of State Dundas instructed interim administrator Francis Grose to insert a new clause into grants to ex-convicts only: any purported sale of the land within five years of the date of the grant would be void.[67] Apparently, Dundas was motivated by an earlier report from Phillip that many of the convicts who had obtained free grants had done so with the 'sole object' of immediately selling the land and purchasing passage back to England.[68] However, this modification was not included in the Instructions issued to Hunter, Phillip's replacement, in 1794. Nor was it included in Instructions to King, Bligh, Macquarie or Brisbane.[69] Overall, however, the Instructions to the governors specified that land grants to ex-convicts were to include a reservation of timber to the Crown (as well as conditions of cultivation and improvement), but not those to land grants to settlers and officers. In this way, the governors' Instructions established and shaped the authority of the early governors to classify law's protected trees as timber; the governors were to do so through the institutional practice of making land grants, and this authority was shaped by categories that related to the personal status of the grantee.

The formal requirement that the governor include reservations of timber to the Crown on grants to ex-convicts came to an end in 1825. Although Darling's Commission conferred

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[66] 'Phillip's Additional Instructions' (20 August 1789) Bladen, *HRNSW Vol 1(2)* (n 23) 256 at 257.
[67] 'Dundas to Grose' (30 June 1793) *HRNSW Vol 3* (n 48) 49, 50–1.
[68] 'Dundas to Grose' (30 June 1793) *HRNSW Vol 1(2)* (n 23) See editorial note at 50.
[69] 'Hunter's Instructions' (23 June 1794) *HRNSW Vol 3* (n 48) 227, 231–3. 'King's Instructions' (23 February 1802) *HRNSW Vol 4* (n 48) 703, 707–9; 'Bligh's Instructions' (25 May 1805) *HRNSW Vol 5* (n 48) 634, 637–9; 'Macquarie's Instructions' (9 May 1809) *Historical Records of New South Wales*, vol 6 (Government Printer, 1898) 133, 136–8 ('*HRNSW Vol 6*'); 'Instructions to Sir Thomas Brisbane' (5 February 1821) vol 10 (Library Committee of the Commonwealth Parliament, 1917) 596, 598–601 ('*HRA s 1 Vol 10*').

upon him the same broad authority to dispose of land within the colony, his Instructions replaced the practice of making free grants with a new system of disposing of land in the colony by public sale. Brisbane had experimented with land sales prior to Darling's Instructions, but the experiment was short lived.[70] Under Darling's revised Instructions, only churches and schools were eligible for free grants of land, and there was no requirement that a reservation of timber be included on such grants.[71] In the event, the system of sales formally set out by Darling's Instructions proved unworkable in practice.[72] There were simply not enough surveyors within the colony to pre-survey and value land before it was put up for sale.[73] It was not until 1831 that a workable system of land sales was eventually established, pursuant to the imperial Ripon Regulations. Relevantly, the Ripon Regulations did not require the governors to reserve to the Crown timber from title to the purchased land. Instead, they instructed the Governors to reserve to the Crown the right of 'taking and removing' timber 'as may be required at any time for the Construction and Repair of Roads and Bridges, for Naval purposes and any other public works'.[74] Here timber was not a category of tree protection, because it did not offer lawful protection to trees from being down by the grantee. Rather, it simply reserved to the Crown the right to also enter the land and take timber as required. Darling's 1825 Instructions, then, marked the end of the early governors' authority to fabricate law's category of timber through the institutional practice of making free grants of land.[75]

III. FABRICATING 'TIMBER' BY GRANTING LAND

This part of the chapter considers the land grant records contained within the colonial *Land Grant Registers* that provide a record of the office of the governor's land-granting practices between 1788 and 1825.[76] It is important to recognise that the register provides only a partial record of these practices, especially given the extent of informal land grants

[70] Brisbane experimented with sale of lands to existing landholders who wished to expand their existing landholdings: Governor Brisbane, 'Government and General Order', *Sydney Gazette and New South Wales Advertiser* (Sydney, 31 March 1825) 1. For a detailed discussion of Brisbane's land policies, see Roberts (n 4) 36–42.
[71] 'Governor Darling's Commission' (16 July 1825) *Historical Records of Australia*, vol 12 (Library Committee of the Commonwealth Parliament, 1919) 99 at 106.
[72] Campbell, 'Conditional Land Grants by the Crown' (n 9) 48.
[73] Ibid.
[74] Colonial Secretary's Office, 'Government Notice – Land', *Sydney Gazette and New South Wales Advertiser* (Sydney, 7 July 1831) 1, s 8.
[75] Later legislation delegated authority to the governor to fabricate law's tree protection categories in other ways, for example through the proclamation of 'timber reserves'. The technique of making law's categories through writing proclamations in examined in Chapter 5.
[76] A complete list of the register entries surveyed is included in Appendix 1.

made by the governors in the early years (discussed further below). Nevertheless, these records can add to an understanding of 'who' was authorised to classify law's protected tree in the colony, by reminding us that the scope of the governor's authority cannot be determined solely from the formal documents that constituted their authority, nor from official correspondence that described the state of land grants and titling in the colony at the time.[77] The register records provide an important and additional source for better understanding the expression of the governors' authority to grant land in the colony, through records of how that authority was expressed as a matter of practice. Drawing on the conceptual framework outlined in Chapter 2, this part of the chapter offers an analysis of these archival records by treating 'timber' as a category fabricated by particular kinds of institutional practices, rather than as a reflection of a pre-existent, ontologically determined entity. The purpose, then, is not to offer a critique of law's categories for failing to live up on a particular ideal, nor for being complicit in the reproduction of particular economic or social relations. Instead, the aim is simply to examine what the archival records of this particular institutional practice – the making of land grants – might add to this description of the authority over protected tree classification exercised by early NSW governors.

There has been little research into the conditions and reservations attached to land grants executed by the early NSW governors. Existing scholarship includes Enid Campbell's important doctrinal analysis of the validity of conditions annexed to Crown grants of land and the conditions under which those grants might have been validly declared void for breach of condition.[78] As a preface to her doctrinal analysis, Campbell argues:

> At first, little attempt was made by the government to control the manner in which grantees made use of their land. Grantees received estates in fee simple which meant that they enjoyed considerable freedom in determining how the land should be exploited.[79]

Campbell suggests that it was only during Governor Macquarie's term of office that land grant conditions were included, as a matter of practice, in all grants.[80] A similar picture of the 'who' the early governors were, when exercising Crown prerogative to create

[77] Dorsett, 'The Court of Claims and the Resolution of Informal Land Claims in New South Wales 1833–1835' (n 8) 6.
[78] Campbell, 'Conditional Land Grants by the Crown' (n 9).
[79] Ibid 46.
[80] Ibid.

interest in land in the colony, is presented by Christensen et al.'s recent study of colonial land grant conditions.[81] This study examined colonial land grants from New South Wales and Queensland up until the 1890s. Regarding the early period (1788–1720), the authors draw on the example of James Ruse's deed (as discussed above).[82] They conclude that during this early period the governors' practice of granting land was 'ad hoc', and suggest that the 1820s saw an improvement in record-keeping in relation to land grants. [83] These two articles suggest that, in keeping with the more general picture of the NSW governors exercising broad and autocratic power, the way in which the governors exercised this specific practice of making land grants – and the insertion of timber reservation and other conditions upon those grants – was similarly exercised in a chaotic and haphazard manner.

The *Land Grant Registers* surveyed for this research, however, present quite a different picture of the way in which the governors oversaw the formal execution of land title documents within the colony. The register records suggest that the governors routinely included the timber reservation on all formal grants of land issued by their office. For example, Phillip issued a total of 99 grants within the colony, four of which were of leasehold title.[84] According to the *Register*, all of Phillip's grants of freehold title included a reservation of timber to the Crown. In other words, not once did Governor Phillip, inadvertently or intentionally, omit the timber reservation clause on a grant of freehold land in the colony. Similarly, all surveyed grants of freehold estate issued by Francis Grose (interim administrator after Phillip had departed the colony) also included the reservation of timber suitable for naval purposes.[85] So too did Governor Hunter routinely include the timber reservation on grants of freehold title.[86] The register records show that Hunter followed Dundas's earlier instruction to Grose (discussed above) by including a condition that the granted land could not be sold within five years of the date of the grant.[87] The pattern of inserting a reservation of timber to the Crown on all grants of free

[81] Christensen et al (n 10).
[82] Ibid 50–1.
[83] Ibid 51.
[84] Colonial Secretary, *Register of Land Grants and Pardons Vol. 1*, 1792–1795, SRNSW NRS 1215, SZ75, 1–49.
[85] Ibid 50, 61–70, 111–19, 126–33.
[86] Colonial Secretary, *Register of Land Grants and Pardons Vol. 2*, 1795–1800, SRNSW NRS 1215, SZ47, 61–70, 191–200, 281–90, 351–60, 411–20; Colonial Secretary, *Register of Land Grants and Pardons Vol. 3*, 1800–1809, SRNSW, NRS 1215, SZ76, 51–9.
[87] See discussion on the governors' changing Instructions above. Colonial Secretary, *Register of Land Grants and Pardons Vol. 2*, 1795–1800, SRNSW, NRS 1215 SZ47, 61–70, 191–200, 281–90, 351–60, 411–20.

hold title repeats throughout the *Registers*: from Phillip's first grant to Ruse to the end of Brisbane's term in the mid-1820s, the early governors of New South Wales all routinely included timber reservation clauses in Crown grants of freehold land.

The *Register* does reveal, however, a number of instances in which the governors chose to modify the wording of the timber reservation clause. For example, in 1805, King issued a General Order stating that he would modify the timber reservation to relinquish the Crown's right to exotic timber.[88] King was concerned that the timber reservation clause was a disincentive for landholders who may have otherwise planted non-native timber trees. The assumption was that exotic timber (from the northern hemisphere) was more valuable than indigenous timber, and it was in the colony's interest for such exotic timber to be grown locally. To encourage the planting of non-native timber King announced a change to the timber reservation, to clarify that that the Crown did not reserve to itself exotic timber planted by the grantee:

> In order to encourage the growth of such timber, the Governor has deemed it expedient to direct that on all former and future Grants of Land issued by him the following Clause may be inserted after the Words "for the Use of the Crown" viz. 'Excepting such exotic Timber Trees, planted either for Use or Ornament [of which comprehendeth those planted from seeds or Plants imported from any Part of the World, including the Norfolk Island Pine] the Cutting down and Disposal thereof to be at the Election of the Grantee or Proprietor: But in case of such Timber being hereafter cut … by the Grantee or Proprietor, and to be disposed of, Government is to have the first Offer at a fair Valuation, on due Notice being given by the Proprietor.[89]

It is uncertain how many people may have taken up King's offer to amend the timber reservation to exclude exotic timber trees. I came across only four examples of grants containing the modified timber clause, all issued by King on 1 January 1806.[90] It is also possible that these amendments were made on land title deeds already granted, without those modifications necessarily being entered into the *Register*.

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[88] Governor King, 'General Order', *Sydney Gazette and New South Wales Advertiser* (Sydney, 7 July 1805) 1, 1.
[89] Ibid.
[90] Colonial Secretary, *Register of Land Grants and Pardons Vol. 3*, 1800–1809, SRNSW NRS 1215, SZ76, 190, 195 Grants to: Garnham [?] Blaxcell (01/01/1806); Elizabeth King (01/01/1806); Maria King (01/01/1806); Mary King (10/01/1806).

In another example, Governor Macquarie also modified the timber category when granting land to his Secretary J. T. Campbell, similarly restricting the Crown reservation to indigenous timber only. The register entry reads that the Crown reservation was limited to

> all indigenous timber now growing … but for the better encouragement of valuable timber, the said growing of which may be imported from foreign countries relinquishing the rights or powers to appropriate the use of the govt. such exotic timber as may be planted or growing thereon.[91]

Otherwise, however, Macquarie's timber reservation remained consistent with his instructions, i.e. to reserve timber 'deemed fit for naval purposes'. These records indicate that both King and Macquarie drew on the flexibility of their authority to modify the substance of the protected tree category as they saw fit. There was, then, an element of personal discretion involved in the insertion of the timber reservation clause. Despite this potential for discretion, however, the *Register* records overwhelmingly point to the governors repeatedly and routinely exercising their authority in accordance with the terms of the reservation as set out in their Instructions.

The register records also demonstrate that governors experimented with conditions that aimed to ensure the land was sold to bona fide settlers who would improve and cultivate it, rather than immediately on-selling for financial gain. For example, despite not being formally required to do so, Hunter regularly included a five-year restriction on further sales of free grants.[92] In May 1799 a new condition appears in the register, this time requiring that if the land was 'unoccupied' after one year, the grant would revert to the Crown:

> As the design and intention of granting these lands is for the purpose of forwarding the agricultural and cultivation of the country should the ground above mentioned continue for more than one year unoccupied after the delivery of this deed, of that such steps have not been taken to forward the end for which it has been granted as the length of time might reasonably admit, in such case it shall revert to the Crown.[93]

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[91] Colonial Secretary, *Register of Land Grants and Leases Vol. 2*, 1810–1821, SRNSW NRS 13836, 7/447, Grant no. 10 to J.T. Campbell (01/10/1811).
[92] See, eg, Colonial Secretary, *Register of Land Grants and Pardons Vol. 2*, 1795–1800, SRNSW NRS 1215, SZ47, 61–70; 191–200; 351–60. See grants 61–70, 191–200.
[93] See, eg, Colonial Secretary, *Register of Land Grants and Pardons Vol. 2*, 1795–1800, SRNSW NRS 1215, SZ47, 286 Grant to Laycock (17/05/1799).

For several months both the five-year restriction on further sales and the occupation requirement were included on freehold grants. However, towards the end of the year the five-year restriction was sometimes dropped.[94] Governors King and Macquarie both included the five-year restriction on further sales to their freehold grants, and Macquarie also introduced a new innovation: a requirement that the grantee cultivate a nominated number of acres. For example, Macquarie's grant of 100 acres to Thomas Archer, made on 1 January 1817, includes the conditions that the land not be sold within five years from the date of the grant, and that twenty acres be cultivated.[95] The five-year restriction appears to have its origins in instructions from the Secretary of State (Dundas) to Grose (acting in Phillip's absence) in 1793, as discussed above. Overall, the changing conditions regarding timber and the bona fides of grantees demonstrate that the conditions and reservations on the grants were not simply copied verbatim from the formal expression of the governors' authority, per their Commissions and Instructions. Rather, the governors experimented with different conditions and reservations, responding to local conditions and challenges of land administration and policy.

During the mid-1820s, the practice of classifying protected trees by making land grants began to falter. As discussed above, between 1825 and 1831 land policy in NSW entered a state of flux and uncertainty. Demand for land continued to increase, as did land speculation. Public sale of land, rather than free grants, was increasingly seen by both the governors and the Colonial Office as the best solution.[96] Governor Brisbane was the first to experiment with land sales, offering free settlers who had maintained convicts for at least three years the option of purchasing 'extra land'.[97] As discussed above, however, the first formal system of public sales, as outlined in Darling's instructions, proved unworkable in practice and it was not until 1831 that a system of public sale was successfully implemented.[98] The register records for land grants made between 1823 and 1831 reflect this uncertainty in land policy. In the fourth volume of the *Colonial Land*

[94] See, eg, ibid 351–60; 411–20.
[95] Colonial Secretary, *Register of Land Grants and Leases Vol. 2*, 1810–1821, SRNSW NRS 13836, 7/447, Grant no. 1025 to Thomas Archer (01/01/1817).
[96] June Philipp, 'Wakefieldian Influence and New South Wales 1830–1832' [1960] (9) *Historical Studies: Australia and New Zealand* 173; 'Governor Macquarie to Earl Bathurst' (28 November 1821) *HRA s 1 Vol 10* (n 69) 568.
[97] CJ King (n 4) 39; 'Sir Thomas Brisbane to Earl Bathurst' (24 July 1824) *Historical Records of Australia*, vol 11 (Library Committee of the Commonwealth Parliament, 1917) 330–2 ('*HRA s 1 Vol 11*').
[98] For a discussion of the early attempts and eventual transition to land sales, see Roberts (n 4) 39–42, 102–19; DN Jeans, 'Crown Land Sales and the Accommodation of the Small Settler in N.S.W., 1825–1842' (1966) 12 *Historical Studies: Australia and New Zealand* 205.

Grants Register, the register entries jump back and forwards in date, with a variety of conditions attached to the grants. For example, Table 1 below lists ten consecutive grants from the *Colonial Secretary's Register of Land Grants and Leases Volume 2* (1822–1836). The dates of the grants jump forwards and backwards in time, from 1820 to 1825 and 1826 back to 1821. The conditions included on the grants also vary, including conditions of building flour mills or domestic dwellings, and clearing and cultivation. The timber reservation is included in some, but not all, grants, and on one grant the timber category was limited to 'native origin only', while also including timber suitable for building roads and bridges.

Table 1. Examples of Register Entries
Selection of grants in the *Colonial Secretary's Register of Land Grants and Leases*, Volume 4 1822–1836, NSWSR NRS 13836, 7/449.

Grant #	Date	Grantee	Acres	Governor	Conditions
388	27.05.1820	Simeon Lord	600	Brisbane	Illegible
389	30.06.1825	Edward Wollstonecraft	524	Brisbane	To clear and cultivate 50 acres, timber suitable for naval purposes reserved, no sale for 5 years.
390	29.03.1826	John Rhalve	20	Darling	To erect a steam flour mill, timber suitable for naval purposes reserved.
391	18.09.1821	Edward Edgar	Town grant	Macquarie	Build a good and sufficient dwelling house of brick or stone 50 ft long, 16 ft wide, and 2 stories high. No timber reservation.
392	19.10.1826	John Smith	?	Darling	To build a windmill of 16 Hp within 5 years, reserving right to make public roads and timber suitable for naval purposes.
393	03.9.1826	John McArthur	Town Grant	Darling	Conditions: 'as in register of town grants'.
394	18.11.1826	Trustees of Scots Church	Sydney	Darling	For purposes of erecting a Scots Church.
395	1.1.1827	James Flinn	Town Grant	Darling	Conditions: 'as in register of town grants'.
396	1.1.1827	St Matthew's Church	Sydney Town	Darling	No conditions – section left blank.
397	5.8.1828	Thomas Moore	1300	Darling	Reserving such timber of native origin as may be deemed fit for government naval use and the construction of roads and bridges and such part of land as may be required for highways.

By executing valid land title documents that included the reservation of timber, the early NSW governors fabricated 'timber' as law's category: a kind of tree that was to be drawn into a specific set of lawful relations as set out by the terms of the deed. Without land grants that included a reservation of timber clause, the category of timber found in the governors' Instructions would have sat lifeless, consigned to a mere measure of the

propriety of the governors' actions vis-à-vis the Crown. The execution of a land that included a timber reservation clause brought law's category to life, in the sense of making timber an operable legal category that established lawful relations of protection, between the trees and the person holding title to the underlying land. Each time a new grant was executed, a new category was brought into operation and a new set of lawful relations established between landholder and land, between landholder and trees that belonged to the category of timber. Through the institutional practice of making land grants, a particular category of lawful tree protection was fabricated, over and over, by the office of the governor.

This analysis of the institutional practices that fabricated law's category of timber offers insight into the way that the common law, through particular institutional practices, began to deepen its jurisdictional hold over entities found within the territorial boundaries of the colony of NSW. [99] What was once to the common law simply 'territory' was becoming increasingly enmeshed in common law authority. In other words, common law jurisdiction in the colony started to become layered.[100] Different entities become bound to law in different forms, and one way this happened was through the addition of new categories to NSW's common law system. As explained in Chapter 2, jurisdiction is much more than simply territory: it is also about the way in which particular entities come to belong to law and the form of that belonging.[101] It is about understanding who is authorised to join entities to law, the techniques they use to do so, and how we can best understand the effects of belonging to law. Each of the governors' grants of land transformed a small piece of 'territory' into 'land', itself another category that belongs to law. Each grant that included a timber reservation, carved a kind of lawful tree out of the category of 'land', and, pursuant to the terms of the Crown reservation, affirmed the Crown's authority to enter that land and cut down those trees. In this way, the institutional practice of making colonial land grants was something more than a routine administrative task of record-keeping. It was a productive and jurisdictional practice that fabricated law's

[99] For other examples of colonial practices that extended common law jurisdiction in NSW, see: Shaunnagh Dorsett, 'Mapping Territories' in Shaun McVeigh (ed), *Jurisprudence of Jurisdiction* (Routledge-Cavendish, 2007) 137; Olivia Barr, 'Walking with Empire' [2013] *Australian Feminist Law Journal* 59; Olivia Barr, 'A Jurisprudential Tale of a Road, an Office and A Triangle' (2015) 27(2) *Law & Literature* 199.

[100] For a discussion of the uneven and lumpy spread of common law jurisdiction within the British colonies of New South Wales and in New Zealand, see: Barr, 'Walking with Empire' (n 99) 60–1; Shaunnagh Dorsett, *Juridical Encounters* (Auckland University Press, 2017) 2–3.

[101] Dorsett and McVeigh (n 15).

categories, and, in so doing, began to layer common law jurisdiction more thickly within the territory of NSW.

IV. The shape and Expression of the Governors' Authority: Grantee Status and Standard Forms

This last part of the chapter addresses why it matters, or why it can be useful, to think about how institutional practices fabricate law's categories, as has just been described. Returning to the institutional insights into classification, as articulated by Mary Douglas and explained in Chapter 2, an institution's classification practices tell us something about the nature of that particular institution. In other words, by examining how different institutions classify things in different ways, we are offered insight not only into the entity being classified (for example, that the classification of 'timber' tells us that the wood produced from that tree is suitable for shipbuilding) but also into the nature of the classifying institution. Mary Douglas suggests that

> [a] classification of classificatory styles would be a good first step towards thinking systematically about distinctive styles of reasoning. It would be a challenge to the sovereignty of our own institutionalized thought style.[102]

Writing within the discipline of anthropology, Douglas directs her insights into the distinctive, and institutional, style of classification towards broad and general themes of 'reasoning' and 'society'.[103] However, her point is also helpful for thinking, in a more limited and jurisprudential sense, about law's categories as fabricated by authorised institutional practices. In other words, Douglas' classificatory styles are akin to Pottage's institutional practices: thinking about how different institutional practices fabricate law's categories in different ways can contribute to an understanding of the shape and expression of institutional authority.[104] In other words, these institutional practices tell reveal something about 'who' classifies, in addition to that which is revealed by the formal rules or documents that constitute and shape that authority. This final part of the chapter draws out two aspects of the governors' land-granting practices that tell us something about the expression of their authority to classify which were not evident from the Commissions or Instructions. First, I argue that, in practice, the governors exercised the authority to classify trees as 'timber' according to the location of the granted land,

[102] Mary Douglas, *How Institutions Think* (Routledge & Kegan Paul, 1987) 108.
[103] Ibid 108–9.
[104] Pottage (n 1).

rather than the personal status of the grantee. Second, I argue that a standard form of words for land title deeds had the capacity to shape the exercise of the governors' authority. Overall, this final part of the chapter demonstrates the value of a jurisprudence of classification that engages with the question of 'who' classifies by thinking about the source of the authority to classify, its formal scope and shape, and the way that authority is exercised as a matter of institutional practice.

A. *Grantee status or grant location?*

The practice of including the timber reservation on all grants of freehold title, regardless of the status of the grantee, was established early by Governor Phillip. To illustrate, Phillip's grants to Phillip Shaffer and Robert Watson, both officers, included the reservation of timber to the Crown.[105] Similarly, Governor King routinely included the timber reservation on grants of fee simple, even those for large acreages (upwards of 100 acres), which indicate grants to free settlers rather than to ex-convicts.[106] As the governors began to make larger grants to free settlers, and also to require free settlers to 'maintain' convicts as a condition of land ownership, it becomes easier to distinguish between grants to free settlers and ex-convicts. For example, the first ten grants recorded in the *Register of Land Grants and Leases* 1822–1836, Volume 4, all made by Governor Brisbane, include the timber reservation. These grants include a grant to Henry Antill for 2000 acres, which also required Antill to maintain twenty convicts.[107] Another was a grant to Brian Bagnell which required Bagnell to clear and cultivate the land.[108] Both grants included the timber reservation. As per his instructions, Brisbane was authorised to grant thirty acres to ex-convicts (with additional acreage permitted if the convict was married and for each child), but enjoyed discretion over the maximum acreage to be granted to free settlers. Assignment of convict 'servants' to free settlers was also at the governor's

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[105] Fletcher determined their status as officers by cross-referencing with other historical records: Fletcher (n 4) 63.

[106] See, eg, Colonial Secretary, *Register of Land Grants and Pardons* 1800–1809 [SZ76] 92–7, 192–6. I note however that there was one section of Register entries in which it was unclear whether the timber reservation was included on freehold grants made by Governor King: colonial Secretary, SZ76, pp 118–23. These records, which are summaries of grants rather than verbatim copies of the original deed, are difficult to read, due to their poor condition. These entries contained no reference to the timber reservation, however, aside from quit rents, none of the other conditions were included either. There may have been reference to other conditions through words to the effect of 'as per original for conditions', however, it is difficult to make a conclusive assessment due to the poor quality of the records.

[107] Colonial Secretary, *Register of Land Grants and Leases Vol. 4*, 1822–1836, SRNSW NRS 13836, 7/449, Grant no 1.

[108] Colonial Secretary, *Register of Land Grants and Leases Vol. 4*, 1822–1836, SRNSW NRS 13836, 7/449, grant no. 4

discretion. This pattern, of including the timber reservation on large and small grants (presumably to free settlers and convicts respectively) continues throughout the first part of the register.[109]

However, there was one category of land grant on which the timber reservation was not included. This was on grants of leasehold title. For example, and as noted above, none of Phillip's four leasehold grants included the timber reservation. What was also different about these leasehold grants was that all were for small parcels of land, all located within bounds of Sydney.[110] The decision not to include the timber reservation on leasehold grants was repeated by Phillip's successors. For example, Macquarie made a series of leasehold grants for land located in Sydney on 1 January 1810. These grants were much smaller than the average fee simple grants, and were measured in rods (approximately five metres) rather than acres. These leases contained conditions that the leaseholder build a house upon the leased land, and specified a yearly rent, but contained no timber reservation.[111] This practice of granting leasehold interests that did not contain the timber reservation is repeated throughout the register books. Throughout the *Register* records, leasehold grants in the early period of the colony were made for land located within a township (Sydney or Parramatta). The leased land therefore concerned smaller areas of land, leased for residential or commercial, rather than agricultural or pastoral, purposes. The implication is that, as a matter of practice, when granting leasehold interests to smaller blocks of land within the confines of a town, the early governors considered that a reservation of timber to the Crown was not necessary, perhaps because the land had already been cleared. As discussed above, the governors' Instructions specified that the governors were to exercise the authority to make land grants according to a modality of personal status. Different terms and conditions were attached to land grants to different categories of grantees: ex-convicts, settlers and officers respectively. In practice, what appears to have determined whether the timber reservation was included was the location of the granted land, not the personal status of the grantee.

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[109] Ibid, 1809–1810, SRNSW NRS 1215, [no item reference] See, eg, grants no. 1–10, 282–91.
[110] Colonial Secretary, *Register of Land Grants and Pardons Vol. 1*, 1792–1795, SRNSW NRS 1215, SZ75 See grants to Grose (p 45), Collins (p 49), Shaffer (p 49), Paterson (p 49).
[111] See, eg, Colonial Secretary, *Register of Land Grants and Pardons Vol. 2*, 1795–1800, SRNSW NRS 1215, SZ47 grants on pages 191–8 (includes one lease, no timber reservation); 281–90 (includes one lease with no timber reservation); 351–60 (includes one lease, with no timber reservation; Colonial Secretary, *Register of Land Grants and Pardons Vol. 3*, 1800–1809, SRNSW NRS 1215, SZ76 pages 51–9 [includes five leases with no timber reservation]; 201–3 [10 leases, all with no timber reservation].

In addition, while the Governor's Instructions regarding land grants were structured by the personal status of the grantee, none of the register books surveyed made particular note of the class of the grantee. For example, the form of the first register books consisted of verbatim copies of the words of the original deed.[112] These entries refer to the grantee by name and do not refer to the grantee's status as ex-convict, officer or free settler. Rather, the status of the grantee can only be inferred by cross-referencing with other sources, or from other information contained within the grant – for example, by the inclusion of military titles in the grantee's name or by the size of grant. Over time, the register records became more truncated. Around 1808, the entries become shorter, offering only a short prose summary of the details of each grant. For example, rather than reciting the full terms of the timber reservation, these register entries read: 'with the usual clause respecting timber to be reserved to the Crown for naval purposes'.[113] Later, the *Registers* took on a tabular form, in the form of series of columns with standard heading across the top of the page, referring to various elements of a land grant. For example, the first tabular Registers, commencing from 1810 under Governor Macquarie, were formatted according to standard column heading across each page: grant number, grantee name, acreage, whether granted or leased, district, who granted, when granted, quit rent, farm name, witnesses, description (boundaries) and remarks.[114] The remarks column contained details of non-financial obligations, such as to clear and cultivate, and any Crown reservations. In this tabular format, the register still did not record the status of the grantee.[115] While the Instructions structured land grant terms and conditions by the personal status of the grantee, in practice the timber tree reservation was included in all freehold grants. More generally, this finding points to the importance of institutional practices to understanding who can classify in the name of law, and how they exercise that authority. Working from a particular category – in this example, 'timber' to identify the institution authorised to make it, and then tracing how that category was fabricated through a particular institutional practice, a jurisprudence of classification offers a new way of thinking about who can classify in law's name. In this example, the first register

[112] Colonial Secretary, *Register of Land Grants and Pardons Vol. 1*, 1792–1795, SRNSW NRS 1215, SZ75, 1–49.
[113] Colonial Secretary, *Register of Land Grants and Pardons Vol. 3*, 1800–1809, SRNSW NRS 1215, SZ76, 190–6, 247–56.
[114] Colonial Secretary, *Register of Land Grants and Leases Vol. 2*, 1810–1821, SRNSW NRS 13836, 7/447, 1.
[115] Colonial Secretary, *Register of Land Grants and Pardons Vol. 3*, 1800–1809, SRNSW NRS 1215, SZ76, 190–6, 247–56.

of a jurisprudence of classification, which examines 'who can classify' in this way, reveals a possible disjunct between their authority as expressed by their Instructions from the Crown and its exercise in practice. In addition the shift to a tabular Register, with information about each grant organised under headings, is reflective of a broader change within the Colonial Office concerning the administration of the British Empire. This 'rational and bureaucratic revolution' resulted in a rejection of former colonial policies of autocratic rule and personal patronage, and instead oriented colonial policy in London towards the establishment of self-governing colonies.[116] One aspect of this shift was increasing demands by the Colonial Office for standardised returns of information from its colonial governors. Known as the 'Blue Books', annual returns of statistical information about the state of the colony, and colonial information, came to supplement or replace the informal networks of patronage that once ran through the British colonial administrative structures.[117] Macquarie's *Registers* indicate that a shift towards standardised and quantitative record-keeping was not just rolled out centrally from London, but was also occurring *in situ* through the governors' own initiative. It points to the active role of the governors, who continually adapted and modified institutional practices in response to changing local conditions as well as reacting to formal Instructions and requests from the Colonial Office.

B. *Standard forms*

As outlined above, the NSW office of governor was granted broad and autocratic powers over the administration of colony. In practice, however, governors were given only skeletal administrative resources through which that authority could be exercised. Arthur McMartin argues that although the Colonial Office granted Phillip formal authority to make land grants, 'little or no provision' was made for the practical arrangements necessary to execute land title documents.[118] For example, no provision was made for a secretary to assist the governor with administrative matters, such as the writing up of land title deeds. Phillip eventually decided to appoint a personal secretary, paid for out of his own pocket. Captain David Collins, who also occupied the office of Judge-Advocate, was appointed to the position and took on the responsibility of preparing the land title deeds for the governor's signature, as well as a range of other tasks.[119] In addition, the

[116] Laidlaw (n 35) 50.
[117] Ibid 171.
[118] McMartin (n 34) 106.
[119] Ibid 55.

Commissions required the governors to execute each grant with the seal of the territory and officially record each grant. However, no one was appointed to a position of Colonial Registrar and the seal of the territory did not physically arrive in Sydney until 22 September 1791.[120] Prior to this, Phillip had sealed all official documents using his own private seal. Concerned that land grants issued under his personal seal would not be valid, Phillip decided to recall all land grants issued under his own personal seal and reissued them under the seal of the territory.[121] In addition, the issue of land title deeds required that the land be officially surveyed, the lot approved by the governor, and execution of formal deed documents. This was a time-consuming process that placed a heavy demand on the limited resources of the colony's Surveyor-General and the office of the governor.[122]

One strategy adopted by the governors to cope with the ever-increasing demand for land was to make informal promises of land, without delivering formal title documents. Official correspondence between the governors and the Colonial Office gives some sense of the scale of this practice. For example, when Governor Hunter arrived in the colony in 1794, after the colony had come under the interim administration of Patterson and Grose, he conducted a muster of all 'settlers'. He reported back to London that

> [b]y these enquirys, I found that there were 150 settlers without any grant of land, or any authority whatever, but … [a slip of paper reading] "A.B. has my permission to settle", and sign'd by the commanding officer. Many who were here for life settled without any conditional emancipation or deed, and some who had several years to serve the public and been permitted to call themselves settlers.[123]

Hunter emphasised that

> [i]t will cost me some time and much labour to fix those settlers who have been left for so long a time in the uncertain manner above describ'd: they ought to have been so secur'd at first as to prevent their being liable to be remov'd from their farms at the will of any person, nor ought they to have been left in this state, which must be

[120] Ibid 35.
[121] Ibid 106.
[122] Fletcher (n 4) 123–4.
[123] 'Governor Hunter to the Duke of Portland' (10 June 1797) *HRNSW Vol 3* (n 48) 217.

> an additional embarrassment to those who have the various concerns of the colony to attend to.[124]

In addition, Brisbane reported that Macquarie had left behind some 340,000 acres of land which had been informally promised and was awaiting formal survey and issue of title deeds.[125] These informal promises of land caused considerable chaos and confusion later in the colony, as land was subsequently leased and transferred and disputes arose over who had better claim to particular lots.[126]

Given this background of the governors' broad and discretionary authority and the scant resources at their command, how then to explain the routine and repeated inclusion of the timber reservation on grants of freehold title? One possible answer lies in a standard form of words, developed by Phillips and Collins, for drafting the terms of the deeds.[127] Uncertain of the legal formalities required to effect a valid grant of land under the common law, Phillip worked with Collins to draft a standard form of words for land grants, partly as a means of gaining its implicit and retrospective approval from the Home Office.[128] On 18 November 1791, Phillip wrote to Under Secretary Nepean, enclosing a copy of the form of land grants:

> The form in which the grants of land are made out is inclosed [sic], and which probably may not be so regular as could have wished.[129]

The form of grant was sent to Under Secretary Nepean shortly after Phillip had completed his first official return of land grants, sent to Lord Grenville on 5 November that same year. Unfortunately, the *Historical Records of New South Wales* does not include a copy of the form of words. Instead, included is a copy of Phillip's original deed to Ruse, sourced from the Sydney land titles registry.[130] The point, however, is this: although Phillip had not produced a standard form in the modern sense of a pre-printed document into which particulars could be entered, he had produced a form of words as a template

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[124] 'Governor Hunter to the Duke of Portland' (10 June 1797) ibid 218.
[125] 'Sir Thomas Brisbane to Earl Bathurst' (10 April 1822) *HRA s 1 Vol 10* (n 69) 630. Earl Bathurst confirmed that Brisbane should 'not hesitate' to confirm these informal grants, as long as they conformed with Brisbane's own instructions: 'Earl Bathurst to Sir Thomas Brisbane' (30 May 1823) *HRA s 1 Vol 11* (n 97) 86.
[126] Kercher (n 4) 122–31; Dorsett, 'The Court of Claims and the Resolution of Informal Land Claims in New South Wales 1833–1835' (n 8).
[127] McMartin (n 34) 107.
[128] 'Governor Phillip to Under Secretary Nepean' (18 November 1791) *HRNSW Vol 1(2)* (n 23) 555.
[129] 'Governor Phillip to Under Secretary Nepean' (18 November 1791) ibid.
[130] Ibid 592.

or internal working document. The standard form of words crafted by Phillip and Collins would have provided an internal reference point for the governor's secretary to draw on when undertaking the task of writing out, by hand, the formal deeds that would create estates in land and perhaps (depending on the wording of the particular grant) fabricate a particular category of tree protection.

This early form of words may have contributed to the consistent fabrication of law's category of the timber tree in a number of ways. First by providing the Colonial Office with a copy of the standard form of words, the grant received implicit approval from London as an accepted enactment of Phillip's authority to grant land.[131] Having sent a copy of the form of words used for the grant to the Home Office, and receiving no Instructions in return that the terms of the grant were to be altered or changed in any way, the form of words became imbued with a sense of authority. These were the words sighted and approved by the governor's superiors in London. This retrospective and implicit approval of the first grants then provided an authorised template for future land title deeds, on which the office of the governor could draw by repeating the same form of words in each grant.

Second, the standard form may have been adopted by subsequent governors and administrators with the governor's office.[132] In this way, such a form can become embedded in the workings of a particular institution, rather than being an expression of an individual or idiosyncratic form of making grants on behalf of each individual governor. In other words, while not operating at the level of the formal articulation of the governor's authority to grant land, the standard form may have operated in the background as an aide to the governor's secretary, carrying the fabrication of the category across the appointment of various individual officers (governors and secretaries) into the practical work of drafting the words which would constitute and effect the fabrication of the timber tree reservation.

Lastly, the standard form can contribute to the routine and repeated inclusion of the timber in more pragmatic sense. By providing a template from which Collins would write up the deeds, by repeating the same structure and forms of words as set out by the template, it is conceivable that Collins would have included the timber reservation as a standard clause

[131] McMartin (n 34) 107.
[132] Ibid.

on all grants made, rather than limiting the clause to grants to emancipated convicts, as directed in Phillip's instructions. In other words, the standard form of words would have assisted in ensuring a measure of repetition across each of the land grants as they were written up: the same phrases, the same ordering of words, the same information in the deeds were repeated like a stamp, albeit in handwriting, by following the same form of words each time. Standard forms can then be understood as an important device that contributes to the fabrication of law's categories.[133] As Tim Murphy observes in a discussion of how legal techniques fabricate law's categories, standard forms mass produce law's 'things', but can also mass produce law's decisions.[134] The effect of the standard form becomes more than that an aide to memory; it becomes a device through which the institutional practice – and the exercise of authority that sits behind each grant of land – also becomes standardised. That is, it is not only the form of words that become standard, but also the exercise of authority that those words express. Through such practices, a standard form can also have the effect of shaping the exercise of the governors' authority in ways that cannot be disinterred from the formal constitution of the office of governor by the Commissions and Instructions.

The use of standard forms for land titles continued throughout the early years of the colony. Governor Macquarie made the decision to publicly announce a standard form of grant in June 1811. He issued a general order detailing a new grant condition which required that the grantee clear and cultivate a certain number of acres within the five-year period:

> …no part [of the land] thereof shall be Sold or Alienated directly or indirectly for the Space of Five Years from the Date of such Grants; and also that a certain Portion of such Land shall be cleared and cultivated within the said Period.[135]

Macquarie's restriction on subsequent sales echoed the restrictions implemented by Hunter. However, the specification of how much land was to be cleared was a new innovation. A failure of either of these conditions, according to the General Order, would render the original grant null and void. In addition, Macquarie also established a

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[133] Tim Murphy, 'Legal Fabrications and the Case of "Cultural Property"' in Alain Pottage and Martha Mundy (eds), *Law, Anthropology and the Constitution of the Social: Making Persons and Things* (Cambridge University Press, 2004) 125.
[134] Ibid.
[135] Governor Macquarie, 'General Order', *Sydney Gazette and New South Wales Advertiser* (Sydney, 8 June 1811) 1.

procedure whereby he requested the Surveyor-General to survey allotments of land in proportion to the amount of capital prospective grantees had brought with them to the colony.[136] Suspicious that settlers were not being completely forthcoming about the capital they held, Macquarie had also deemed it necessary

> to call on many Free Settlers, who have lately come out to the Colony, whom I had reason to suspect of exaggerating their Properties, to make an Affidavit to the Amount thereof, that the whole actually belonged to themselves, and that it was their intention to employ their Capitals, so brought out, to the Cultivation, Stocking and Improvement of their Lands.[137]

Macquarie justified this requirement by claiming it would prevent persons accumulating land with no intent or capacity to 'improve' it, sifting the mere speculators in land from the bona fide settlers. These revised conditions were implemented by Macquarie in practice and are reflected in the register entries.[138] This General Order and the register entries indicate how Macquarie instituted new practices as he navigated the complex problem of discerning the bona fides of prospective grantees. Within the general contours of authority established by the Commissions and Instructions, and between the lines of the regular and neatly entered records of land grants entered into the Colonial Secretary's land grant register, Macquarie was pragmatically instituting new practices and making publicly available a standard form of words to support those practices, to address some of the challenges of land administration in the colony.

When Brisbane took over from Macquarie in 1821, he was faced with two particular challenges regarding land policy. The first was Macquarie's legacy of informal grants, as discussed above. Second, Brisbane faced the same problem of discerning the difference between speculative and bona fide settlers seeking to cultivate and improve the land. Like Macquarie, one of the ways Brisbane addressed with these challenges was through the public announcement of two standard forms for land title deeds. The first standard form was published in the Sydney Gazette as a Government and General Order on 24 March 1825, which commenced as follows:

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[136] 'Governor Macquarie to Earl Bathurst' (28 November 1821) *HRA s 1 Vol 10* (n 69) 569; Campbell, 'Conditional Land Grants by the Crown' (n 9) 47.
[137] 'Governor Macquarie to Earl Bathurst' (28 November 1821) *HRA s 1 Vol 10* (n 69) 569.
[138] See, eg, Colonial Secretary, *Registers of Land Grants and Leases*, SRNSW NRS 13836, 7/448, 1–10, 267–73.

> His EXCELLENCY the GOVERNOR, having deemed it expedient to make certain Alterations to the Conditions heretofore inserted in the Grants of Land given to Settlers, is pleased to direct that the new Form of Grants, together with a Schedule of Conditions intended to be imposed applicable to all Grants, from Thirty Acres to Two Thousand, be published for Guidance and Information of those concerned.[139]

The General Order set out a standard form of words for land grants, in the form of prose text peppered with blank spaces, into which particulars (such as names, dates, locations) could be inserted. For example, part of the standard Grant of Land reads:

> ….I, the said Sir THOMAS BRISBANE, in Pursuance of the Powers vested in me as Governor of the said Colony, do hereby grant under the said his Heirs and Assigns, Acres of Land, situate in the Township of County of bounded with all the Appurtenances whatsoever, excepting such timber, of native Origin, as may be considered by on or behalf of His said Majesty, or any of His Successors, to be fit for Government Naval Use, or for the construction of Roads and Bridges'...[140]

In this manner, the standard form indicated Brisbane's intent to modify the protected category of timber. He expanded the category from timber 'suitable for naval purposes' to also include timber suitable for building roads and bridges, as well as incorporating King's earlier exemption of exotic timber. The proclamations placed the timber reservation squarely on the public record as an integral part of any Crown grant of freehold title to land.

The second standard form promulgated by Brisbane addressed the problem of informal promises made by Macquarie. After issuing formal title deeds to make good informal promises made by Macquarie, Brisbane had received complaints because the conditions attached were different to those under Macquarie. In particular, Brisbane had replaced Macquarie's cultivation condition with a condition requiring the grantee maintain a certain number of convicts:

> Whereas Grants have since been executed of some of the Lands so authorised to be received by the said certain Individuals, omitting the Clause requiring Cultivation in Five Years, in Proportion to the Extent of the Grant, and inserting in lieu thereof a

[139] Governor Brisbane, 'Government and General Order', *Sydney Gazette and New South Wales Advertiser* (Sydney, 24 March 1825) 1.
[140] Ibid.

> Condition to maintain One assigned Servant [i.e. convict] for each Hundred Acres so granted; NOW, THEREFORE, it having been represented to me that the said Individuals suffer unforeseen circumstances in Consequence of the above Change of Conditions… [141]

Brisbane's solution was to offer to grantees the opportunity to amend their grants, or to have their grants reissued, 'pursuant to the Form in Use when the said Portions of Ground were given'.[142] Brisbane also took the opportunity to amend the timber reservation, restricting it to indigenous timber, but expanding it to also include timber suitable for the construction of highways and bridges.

The publication of standard forms of words by Macquarie and Brisbane offers further insight into who was authorised to make law's categories, and the shape and expression of that authority. As discussed above, at the time the NSW colony was established British colonial policy was on the cusp of a significant shift, away from autocratic rule by the colonial governors towards increased control of colonial activity by the Colonial Office, and then to colonial self-government. One measure of this increased restraint of the governor's authority over the colony is the establishment of new constitutional institutions within the colony, such as the establishment of the Supreme Court, the legislature and the Executive Council.[143] Another indicator, as detailed by Zoe Laidlaw, was the increased imperial executive and legislative oversight of the colonial governor's actions during the 1820s and 1830s, and by the introduction of standard and official reporting by the governors on the state of each colony.[144] The archival records and publication of standard forms of land grants provide additional insight into the nature of the authority exercised by the early NSW governors. In particular, it suggests that as well as the Colonial Office asserting increased control over the governors, the Governors themselves developed devices – such as the standard form – which shaped the exercise of their authority.

V. CONCLUSION

This chapter has outlined what the authority of the Office of the Governor might offer a to jurisprudence of classification. It has done so by attending to the question of who can

[141] Governor Brisbane, 'Proclamation', *Sydney Gazette and New South Wales Advertiser* (Sydney, 12 May 1825) 1.
[142] Ibid.
[143] Laidlaw (n 35) 43–8.
[144] Ibid 170–5.

classify in law's name, working from one example of a protected tree category ('timber') to identify the source of law that underpins the category; the institution authorised to exercise that authority to classify in law's name; and the institutional practice that fabricated the category. Such analysis has offered insight into the shape and expression of the early NSW governors' authority to fabricate law's categories in the context of protected 'timber' inserted into Crown land grants. In doing so, this chapter has demonstrated how a jurisprudence of classification that addresses questions of *who classifies* can offer additional insight into the formal structures and institutional practices that sit behind the making of law's categories.

In particular, the chapter has highlighted the importance of institutional practices, both to the making of law's categories and to our understanding of how law's institutions exercise their authority. Through analysis of the Commissions and Instructions, the chapter identified who was first authorised to classify law's protected trees in the colony: the office of the governor. The Commissions and Instructions both constituted the office of the governor and shaped the scope of the governors' authority to create interest in land on behalf of the Crown. Importantly, this authority was to be exercised through the practice of making land grants, sealed with the seal of the territory and entered onto an official register. In addition the Instructions directed the governors to exercise this authority according to the personal status of the grantee. Different conditions and reservations were to be inserted onto Crown grants of land, depending on whether the grantee was an ex-convict, free settler or colonial officer.

The analysis of the Colonial Secretary's *Land Grant Register* records traced how the governor's exercised this authority in practice. It revealed that, although many other aspects of the governor's management of land titles within the colony were certainly chaotic and ad hoc, their classification of protected trees as timber was not. The register records reveal that the governors routinely included the reservation of timber on grants of freehold land. In addition, although the governors' Instructions articulated the authority to classify protected trees through a modality of personal status, in practice, it was the location of the land – whether rural or within a town – that determined whether or not the timber reservation clause was included. It was suggested that the use of a standard form of words, and the publication of standard forms of words, for land title documents, may have contributed to the routine exercise of the governor's authority to classify protected trees. Through the repetition of the mundane administrative task of writing out land grants

that included timber reservations to the Crown, the office of the governor layered common law jurisdiction more deeply over the NSW colony: as each new category was added, entities within the territory came to belong to law in the form offered by the category.

As noted in the introduction to this chapter, the practice of making law's categories by issuing grants of freehold title ended relatively early in the life of the colony. By 1825, the governors were no longer required to include the timber reservation in initial grants of freehold land. However, the early governors also fabricated law's categories through a different institutional practice: the making of proclamations. In contrast to the making of freehold grants, fabricating law's categories by making proclamations is an institutional practice that NSW governors continue to this day. Chapter 5 remains with the office of the governor in order to consider how NSW governors' exercise their authority to make law's categories by making proclamations. It does so, however, through the second register of the jurisprudence of classification proposed by this thesis, which focuses on *techniques* of classification. Rather than focusing on sources of authority to classify (Chapter 3) or who can classify (Chapter 4), Chapter 5 considers how the authority to classify is exercised as a matter of technique. In particular, it explores how the governors exercise their authority to make law's categories through the technique of writing.

CHAPTER 5. MAKING LAW'S CATEGORIES BY WRITING PROCLAMATIONS

I. INTRODUCTION

This chapter turns to the second register of a proposed jurisprudence of classification: how law classifies. The activity of classifying is here understood as comprising two inter-related steps (as explained in Chapter 2). The first is the making of categories and the second is the sorting of entities into those categories. This chapter considers techniques of category-making and Chapter 6 considers techniques of entity sorting. The techniques through which these two steps take place are important because they tell us what belongs to law – which *categories* belong to law and which *entities* belong to law by belonging to law's categories. The previous chapter began to address how law makes its categories through the example of the early NSW governors, who fabricated law's tree protection categories by granting land. The focus of that chapter, however, was on what institutional practices can tell us about who can classify and the shape and expression of that authority. In contrast, this chapter focuses on institutional practices as *techniques of category-making*. By techniques, I mean the practices, devices and strategies through which the authority to classify is exercised. In other words, once the authority to classify is established, and we understand who can classify, how is that authority expressed and exercised?

This chapter considers techniques of category-making through analysis of protected tree proclamations in NSW's colonial and contemporary history. I argue that NSW governors exercise the authority to make law's categories by making proclamations, a practice which takes place through writing. Writing (specifically in the form of proclamations) can, then, be thought of as a legal technique of classification. However, it is not just any kind of writing that inaugurates law's authority. Rather, it is writing as an institutional practice, an established way of doing things, that authorises law and thereby makes law's categories. In order to make this argument, this chapter focuses on two key moments in the history of NSW's protected tree proclamations. The first is Governor King's decision to publish proclamations in the *Sydney Gazette and New South Wales Advertiser* ('*Sydney Gazette*'); the second is the proclamation's recent transition to a digital form. Both these moments demonstrate the significance of institutional practices to writing as a technique

of category-making. The chapter demonstrates the value of thinking about how law makes its categories by revealing the productive capacity of institutional practices, such as proclamation-writing, to tell us which categories belong to law. The next chapter will examine how entities come to be sorted into and out of law's categories.

The chapter focuses on proclamation-making for two reasons. The first is that many of law's tree protection categories in New South Wales' legal history were brought into force by proclamation. For present purposes, a proclamation is defined as a formal instrument that publicly announces a Crown decision.[1] As discussed in Chapter 4, from the 1830s, many of law's new tree protection categories were sourced in legislative and statutory instruments.[2] For example, new categories for tree protection were promulgated in the *Crown Lands Unauthorised Occupation Act 1838* (NSW), the *Crown Lands Occupation Act 1861* (NSW), the *Ringbarking Act 1881* (NSW), the *Wild Flowers and Native Plants Protection Act 1927* (NSW) and the *Forestry, Soil Conservation and Other Acts (Amendment) Act 1972* (NSW).[3] Additionally, contemporary categories for tree protection are increasingly found in regulations and other statutory instruments, made by the executive arm of government, pursuant to a delegation of legislative authority. Typically, regulations provide additional detail on how particular aspects of the principal legislation will work in practice. For example, under *The Local Land Services Act*, which contains NSW's current laws concerning protection of native vegetation, the governor is authorised to:

[1] John Burke (ed), *Jowitt's Dictionary of English Law* (Street & Maxwell, 2nd ed, 1977) 'proclamation'. This broad definition includes a number of instruments made by the governor throughout NSW's legal history, including government and general orders, regulations, environmental and planning policies and commencement proclamations. Cf Harrington's narrower definition of contemporary proclamations: Michael Harrington, *The Guide to Government Publications in Australia* (Australian Government Printing Service, 1990) 57.

[2] However, granting land did continue as a technique of making law's protected tree categories, albeit to a lesser extent than previously. For example, restrictions on the cutting of timber by lessees were introduced as standard clauses in Crown pastoral leases from 1861: *Crown Lands Occupation Act 1861* (NSW) s 20. Further, landholders can also make tree protection categories by granting interests in land that restrict the person in possession from cutting down or destroying trees – for example, by granting a conservation agreement or carbon sequestration rights: *Biodiversity Conservation Act 2016* (NSW) Division 3, ss 5.20–5.25; *Conveyancing Act 1919* (NSW) ss 87A, 88AB, 88EA.

[3] For a comprehensive history of protections for native vegetation found in NSW legislation and statutory instruments from 1881 onwards, see Alec Bombell and Daniel Montoya, *Native Vegetation Clearing in NSW: A Regulatory History* (Briefing Paper No 05/2014, NSW Parliamentary Research Service, 2014).

> make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or is necessary or convenient to be prescribed for carrying out of giving effect to this act.[4]

Pursuant to principles of constitutional law, the governor's authority to make such statutory instruments is exercised on the advice of the executive council or relevant minister.[5] Accordingly, the governor's role in 'making' statutory instruments, such as the *Local Land Services Regulations,* is typically treated as a passive act of formality that rubber-stamps policy decisions made by the executive.[6] From a constitutional law perspective, an important question is the extent to which a governor can lawfully act independently of such executive advice.[7] In contrast, this chapter focuses on day-to-day, routine and unexceptional acts of proclamation-making by the governor, as illustrated by protected tree proclamations. I do this to highlight the productive work of proclamation-making, a practice that takes place through writing, as an institutional practice and technique that fabricates law's categories.

The second reason this chapter focuses on proclamations is because proclamation-making occupies an important place within common law history of law-making. The proclamation, as an instrument of public announcement issued by the Crown, dates back to the medieval period.[8] As will be discussed further, NSW's colonial governors also made new laws by making proclamations. Further, in contemporary NSW, the proclamation remains firmly a part of the law-making landscape, including in the areas of environmental law and tree protection. Despite the proclamation's longevity and ubiquity, however, legal scholarship has largely overlooked the colonial and contemporary proclamation as a site of jurisprudential engagement.[9] Rather, legal

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[4] *Local Land Services Act 2013* (NSW) s 206(1).

[5] Pursuant to s 14 of the *Interpretation Act 1987* (NSW), a reference to 'the Governor' in any NSW Act or instrument means 'the Governor with advice of the Executive Council'. See generally Anne Twomey, *The Constitution of New South Wales* (The Federation Press, 2004) 628–30.

[6] See, eg, ibid 622.

[7] For example, in *FAI Insurance v Winneke* (1982) 151 CLR 342, the High Court considered the nature of decisions made by the Victorian Governor in Council, specifically whether those decisions were subject to requirements of natural justice under administrative law. For an important discussion, see ibid 630–1.

[8] For an introduction to the role of the proclamation in medieval England, see James Doig, 'Political Propaganda and Royal Proclamations in Late Medieval England' (1998) 71(176) *Historical Research* 253.

[9] The lack of contemporary scholarship on the proclamation sits in contrast to scholarly attention devoted to other jural acts and associated instruments. For example, consider the extensive literature on changing techniques for conveying interests in land, such as Alain Pottage, 'The Measure of Land' (1994) 57 *Modern Law Review* 361; Alain Pottage, 'The Originality of Registration' (1995) 15 *Oxford Journal of Legal Studies* 371; Heather McNeil, 'From the Memory of the Act to the Act Itself: The Evolution of Written Records as Proof of Jural Acts in England, 11th to 17th Century' (2006) 6(3) *Archival Science* 313; Greg

scholarship on the proclamation has tended to focus on the rise and fall of the royal proclamation as part of the broader constitutional history of the constraint of prerogative power during the sixteenth and seventeenth centuries.[10] One recent exception is a study of colonial proclamations in Malta, issued between 1804 and 1805, during Samuel L Coleridge's time as secretary to the Civil Commissioner.[11] The aim of this work, titled *Coleridge's Laws*, is to evaluate how much the proclamations issued by Coleridge reflect what is known of his personal views concerning the rule of law and the role of legislator. The focus is on the substantive values and meanings expressed by the proclamations. By way of contrast, the focus of this chapter is on understanding, as a matter of technique and practice, how Crown authority can be exercised through the making of proclamations. The Coleridge study nevertheless raises important and relevant questions about the extent to which proclamations were adopted as techniques of prerogative law-making throughout the British Empire. These questions, while beyond the scope of this thesis, present opportunities for further study. In a more contemporary context, it is also worth noting emerging scholarship on the use of Twitter by the President of United States of America, Donald Trump, to make presidential announcements.[12] This scholarship perhaps indicates a renewed critical interest in contemporary instruments and technologies taken up in the exercise of executive authority.

There is, however, a small amount of legal scholarship on the NSW proclamation.[13] The main focus of this scholarship is on the constitutional validity of the early governors' proclamations (discussed further below). More recently, Desmond Manderson has also

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Taylor, 'The Torrens System: Definitely Not German' (2009) 30(2) *Adelaide Law Review* 195; Brenna Bhandar, 'Title by Registration: Instituting Modern Property Law and Creating Racial Value in the Settler Colony' (2015) 42(2) *Journal of Law and Society* 253; Sarah Keenan, 'Smoke, Curtains and Mirrors: The Production of Race Through Time and Title Registration' (2017) 28(1) *Law and Critique* 87.

[10] See, eg, William Holdsworth, *A History of English Law*, vol 4 (Methuen & Co, 3rd ed, 1945) 99–104; RW Heinz, *The Proclamations of the Tudor Kings* (Cambridge University Press, 1976); Esther S Cope, 'Sir Edward Coke and Proclamations, 1610' (1971) 15(3) *American Journal of Legal History* 215; ML Bush, 'The Act of Proclamations: A Reinterpretation' (1987) 27(1) *American Journal of Legal History* 33.

[11] Barry Hough and Howard Davis, *Coleridge's Laws: A Study of Coleridge in Malta* (Open Book Publishers, 2010).

[12] See, eg, Douglas B McKechne, '@POTUS: Rethinking Presidential Immunity in the Time of Twitter' (2017) 72(1) *University of Miami Law Review* 1; Kristina Bodnar, 'Sheer Force of Tweet: Testing the Limits of Executive Power on Twitter' (2019) 10(1) *Journal of Law, Technology and the Internet* 1.

[13] HV Evatt, 'The Legal Foundations of New South Wales' (1938) 11 *Australian Law Journal* 409; ACV Melbourne, *Early Constitutional Development in Australia* (University of Queensland Press, 1963) 10–1; Enid Campbell, 'Prerogative Rule in New South Wales, 1788–1823' (1964) 50(3) *Journal of the Royal Australian Historical Society* 161; Alex Castles, *An Australian Legal History* (The Law Book Co, 1982) 35–9; Bruce Kercher, *Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict New South Wales* (The Federation Press, 1996) 6–9.

written about Tasmania's colonial proclamation boards.[14] These proclamation boards are particularly interesting for present purposes because they took the form of drawings, rather than written texts. Lieutenant-Governor Arthur ordered the production and display of the proclamations boards during the 1830s. Displayed on the boards were comic-strip-like drawings that depicted hanging as the punishment for murder, regardless of whether the perpetrator was black or white. Manderson argues that the boards embody contradiction. He describes the boards as 'a picture that is also law', but also observes that the boards were 'not really proclamations', implying that they were also not law.[15] Occupying this ambiguous status as law/not-law, the boards expressed an ideal of the rule of law while simultaneously justifying a state of its exception. Manderson details how, at the same time as the boards were on display, Arthur proceeded to extend martial law throughout the colony, contributing to the murder of Tasmanian Aboriginal people. Manderson interrogates the meaning of the images to reveal the inherent contradiction contained within the proclamation boards as an expression of the rule of law. He also suggests that drawing is inherently different to writing, capable of a qualitatively different expression of ideas and meaning.[16] This chapter focuses on proclamation-writing as an institutional practice and technique of category-making, rather than focusing on the content or meaning of particular proclamations. As such, the relevance of the Tasmanian proclamation boards to the present discussion is that they took the form of drawings rather than writing, a point to which I return later in the chapter.

The chapter begins with a discussion of 'writing' and 'technique' as two key concepts underpinning my argument that the governors made law's categories through the technique of writing. The chapter then offers a brief account of the proclamation in the common law tradition. Examples of protected tree proclamations in New South Wales during the early- and mid-nineteenth century are then explored, with a focus on Governor King's decision in 1803 to make proclamations by publishing them in the *Sydney Gazette.* Lastly, the chapter considers the proclamation's recent shift to the digital. I do this to examine whether this digital shift has disrupted proclamation-writing as one of the governor's techniques of category-making. Although writing technologies have changed (from text printed with ink on paper to text displayed as pixels on digital device) and

[14] Desmond Manderson, 'The Law of the Image and the Image of the Law: Colonial Representations of the Rule of Law' (2012) 57 *New York Law School Law Review* 153.
[15] Ibid 157.
[16] Ibid 155.

although the site of publication has changed (from a paper gazette to a website) I argue that New South Wales governors continue to exercise their authority to make law's categories by writing proclamations.

II. Writing as a Technique of Classification

Two key concepts underpin the argument put forward in this chapter: technique and writing. For present purposes this chapter makes a distinction between techniques and technologies (as explained in Chapter 2). Technique is understood as a mode or style of enactment that crafts or produces something anew (as discussed in Chapter 2), while a technology is understood as having a material or physical component.[17] The focus here is on jurisdictional techniques, meaning a mode or style of enactment that can establish relations of belonging to law. This second register of my proposed jurisprudence of classification – how – is concerned with understanding the jurisdictional techniques that enact law's classification practices. This chapter explores the modes or styles of enactment through which law's institutions enact the authority to make law's categories (by joining the categories to law). The next chapter considers how law's institutions sort entities into and out of those categories. These two techniques matter because, once an entity is found to come within the category, it belongs to the category and also to law. Through these techniques of category-making and entity-sorting, entities become bound to the body of the law in the particular form offered by the category. Each category offers a different form and quality of belong to law (as will be discussed further in Chapter 6), thereby drawing the entity into particular set/s of lawful relations (as will be discussed further in Chapter 7). The aim of this chapter, then, is to explain how law makes its categories, meaning how law makes categories that carry the force of law and are duly authorised to sort entities with lawful effect.

This chapter proposes that *writing* is a technique that makes law's categories. Here I draw on Shaunnagh Dorsett and Shaun McVeigh's insight that writing is a technology of jurisdiction because of its capacity to inaugurate law's authority.[18] Within the tradition of

[17] Don Ihde, *Philosophy of Technology* (Paragon House, 1993) 47.
[18] Dorsett and McVeigh, *Jurisdiction* (n 1) 59–62.

the common law, writing is bound up in law's memorial and record-keeping practices.[19] In addition, as Dorsett and McVeigh observe, jurisprudential questions about writing have traditionally been concerned with questions about meaning, interpretation and the relationship between written and unwritten sources of authority within the common law tradition.[20] Dorsett and McVeigh add to this extensive jurisprudential literature by arguing that writing is also a productive technique of jurisdiction that binds persons, places, events and objects to law's authority.[21] The example of writing out a parking ticket illustrates this productive, jurisdictional capacity of writing. By writing the ticket, a government official inaugurates law's authority, binding the event of a car parked in a particular place to the order and authority of law.[22] As Goodrich articulates, the common law has developed its own peculiar writing practices, alongside the authority of the unwritten common law, in which specific forms of inscription are imbued with, and enact, law's authority.[23]

Writing is treated here as a verb: a practice and a technique that makes language material.[24] This chapter extends Dorsett and McVeigh's argument by considering the relationship between *writing as a technique* (of jurisdiction and classification) and changing *writing technologies*. I do so because the NSW proclamation has recently made a transition to the digital: proclamations are now published on a government website rather than in a paper publication.[25] This transition raises important questions about the effect of digital writing technologies on law's jurisdictional and classificatory practices. To interrogate this question in the context of how New South Wales governors enact the authority to make law's categories, this chapter makes a distinction between writing as a jurisdictional technique (as discussed above) and writing technologies, meaning the material devices – such as pens, paper, computers or PDF files – that are mobilised in the act of writing.[26]

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[19] For a general discussion, see MT Clanchy, *From Memory to Written Record* (Edward Arnold, 1979); Pottage, 'The Measure of Land' (n 9); Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (Weidenfeld & Nicolson, 1990).
[20] Dorsett and McVeigh (n 18) 59.
[21] Ibid 54–62.
[22] Ibid 60.
[23] Goodrich (n 19) 113.
[24] Christina Haas, *Writing Technology* (Routledge, 2009) 1.
[25] Here, digital writing refers to the making of texts in the form of pixels on the screen of an electronic device, rather than in the form of ink on paper: Peter Tiersma, *Parchment Paper Pixels: Law and the Technologies of Communication* (University of Chicago Press, 2010) 1–2.
[26] Haas (n 24) 1.

Digital writing technologies pervade law's contemporary institutions. Not only do judges, lawyers, legal scholars and students write about law using digital technology, but law's authorised texts, such as legislation and judicial decisions, are increasingly written, stored, transferred, accessed and read on digital devices.[27] How (and how much) this digital transition has already affected, and will continue to affect, common law legal systems is an important issue.[28] For example, digital writing technologies raise questions about the rules concerning discovery of electronic documents (such as emails) in litigation.[29] Another issue is how digital writing technologies might influence particular aspects of legal doctrine, or categories and concepts. Jean-Francois Blanchette argues that the digitisation of law's paper instruments (from contracts, to birth certificates, land title documents etc)

> inevitably entails the renegotiation of their power to testify truthfully, to apportion liability, to enforce accountability, to constitute memory.[30]

This renegotiation, Blanchette continues, is inevitable, because digital writing technologies are inherently different to paper writing technologies. Digital writing enables documents to be copied, altered, stored and shared with 'unthinkable' ease and speed in comparison to paper writing.[31] More specifically, the relationship between digital writing technologies and law-making has been addressed by Peter Tiersma, who offers a history of the relationship between the history of writing technologies and statute-making in the common law tradition.[32] He suggests that, in the future, digital writing technologies will offer opportunities for dynamic statutory text (easily modifiable), dynamic authorship (for example, during the legislative drafting process) and increased access to legislative histories. However, he cautions against the risks of digital impermanence and suggests that traditional writing in fixed, paper, formats that cannot

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[27] See, eg, David McGrath, 'The New Federal Court Practice Note on E-Discovery: Implications for Records Managers' (2009) 25(2) *IQ The Rim Quarterly* 24; Jean-Francois Blanchette, *Burdens of Proof: Cryptographic Culture and Evidence Law in the Age of Electronic Documents* (MIT Press, 2012); Diccon Loxton, 'Not Worth the Paper They're Written On? Executing Documents (Including Deeds) under Electronic Document Platforms Part A' (2017) 91 *Australian Law Journal* 133; David Hodgson, 'The Role, Benefits and Concerns of Digital Technology in the Family Justice System' (2019) 57 *Family Court Review* 425.

[28] Tiersma (n 25) 5–7.

[29] McGrath (n 27); Jonathan Ealy and Aaron M Schutt, 'What - If Anything - Is an Email? Applying Alaska's Civil Discovery Rules to E-Mail Production' (2002) 19 *Alaska Law Review* 119.

[30] Blanchette (n 27) 4.

[31] Ibid; see also Chris Reed, 'Authenticating Electronic Mail Messages: Some Evidential Problems' (1989) 52(5) *Modern Law Review* 649, 650.

[32] Tiersma (n 25) 133–68.

be easily altered 'lend[s] a great deal of stability and predictability to the legal system'.[33] As Annelise Riles observes, the issue of how digital writing technologies become a part of law's institutional practices circulates around the issue of whether, and to what extent, digital documents are 'like' paper documents.[34] In different ways, these lines of argument emphasise the agency of material technologies, pointing to the potential for digital writing to disrupt established legal practice and/or doctrine.

In contrast to the arguments outlined above, I argue that the shift to digital proclamation-writing has not disrupted the NSW governors' techniques of category-making. Although what counts as proclamation-writing has changed considerably between 1788 and the present, proclamation-writing remains a jurisdictional technique of classification. Rather than telling a story of digital disruption, the history of protected tree proclamations instead tells a story of continuity. In making this argument, I draw on the scholarship of Adrian Johns whose history of the book poses challenges to Elizabeth Eisenstein's scholarship on the printing press as an agent of change.[35] Eisenstein argues the case for essential qualities of printed as compared to handwritten text, including qualities such as accuracy, fixity/stability, ease of dissemination and rationalised formatting. Against this, Johns argues that

> what we often regard as essential elements and necessary concomitants of print are in fact rather more contingent than generally acknowledged.[36]

To illustrate, Johns details the early history of the printed book; the numerous errors and mistakes and the deleterious effect that printing had on the quality and accuracy of the text. For example, he finds that 'textual corruption' of closely monitored texts, such as the Bible, actually increased with the advent of printing, due to combinations of piracy and careless printing.[37] Johns argues that it is not only the technology of printing that endows writing with particular qualities, but print technologies 'put to use in particular ways'.[38] In this sense, he suggests that qualities such as fixity and textual stability are as

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[33] Ibid 171.
[34] Annelise Riles, 'Introduction: In Response' in Annelise Riles, (ed), *Documents: Artifacts of Modern Knowledge* (University of Michigan Press, 2006) 6.
[35] Adrian Johns, *The Nature of the Book: Print and Knowledge in the Making* (University of Chicago Press, 1998); Elizabeth Eisenstein, *The Printing Press as an Agent of Change: Communications and Cultural Transformations in Early-Modern Europe* (Cambridge University Press, 1979).
[36] Johns (n 35) 2.
[37] Ibid 31.
[38] Ibid 5.

much products of particular kinds of printing practices as they are of the printing press itself.[39] More specifically in relation to law, and in the context of the transition from oral traditions to written records, M. T. Clanchy and Alain Pottage remind us that written documents at first inspired very little trust. It took time for law's institutions to develop practices through which 'the document' was increasingly relied upon and trusted as a repository of official legal memory.[40] This scholarship by Johns, Clanchy and Pottage points to the importance of understanding how writing technologies are adopted by, and incorporated into, law's institutional practices and this work informs the following analysis of the history of the NSW proclamation.

III. PROCLAMATIONS IN THE COMMON LAW TRADITION

The proclamation has its origins in English medieval administrative practices.[41] The medieval proclamation essentially comprised a royal writ which ordered a nominated official to proclaim its contents.[42] These early proclamations were decrees of the monarch, an exercise of their authority to legislate.[43] Proclamations included notifications concerning new legislation but also covered a range of other topics, including attendance notices (information concerning requirements that certain people were to be present at a particular time and location), prohibitions on various activities, or notifications concerning appointments or pardons.[44] The proclamation writ would also include instructions as to where the notices were to be published – for example, throughout London or in specific counties only. During the sixteenth century, the broad and vague power of the monarch to make proclamations come under increasing scrutiny.[45] In 1610, the House of Commons complained that the monarch was making proclamations too frequently and was concerned that proclamations 'will by degree grow up and increase to the strength and nature of laws'.[46] The advice of Lord Coke, then Chief Justice of the Court of Common Pleas, was sought. His view, expressed as an advisory opinion, was that without the authority of Parliament the King could not, by proclamation, alter any

[39] Ibid.
[40] Clanchy (n 19); Pottage, 'The Measure of Land' (n 9).
[41] Doig (n 8).
[42] Ibid 255.
[43] Heinz (n 10) 22.
[44] Doig (n 8) 254.
[45] Holdsworth (n 10) 101.
[46] Ibid 2.

part of the common law nor create any new offences.[47] However, Esther Cope suggests that Coke's opinion did relatively little, in the short-term, to curtail the Crown from making proclamations that changed the law.[48] Rather, it was the abolition of the Star Chamber, in 1641, that deprived the Crown of the power to enforce proclamations which went beyond the limits laid down by the *Case of Proclamations*.[49] Under modern English law, proclamations are ordered into two categories: royal and statutory proclamations.[50] Royal proclamations are valid by virtue of royal prerogative, while statutory proclamations were issued under authority delegated to the Crown by statute.[51] This distinction between royal and statutory proclamations is helpful for understanding the history of the source of the authority to make proclamations in New South Wales, discussed below.

In medieval England, proclamations were made through a combination of oral and documentary techniques. The final text of a proclamation was inscribed on parchment and passed under the great seal.[52] Royal messengers were responsible for delivering the proclamations to the relevant counties and/or towns.[53] The proclamation writs, however, were generally written in Latin as the formal language of law and administration introduced by the Normans (as discussed in Chapter 3). Once delivered, usually to the sheriff in the relevant county, the proclamations were read aloud by town criers who presumably translated the Latin into the local vernacular.[54] After the emergence of printing press technology in the mid-fifteenth century, most proclamations were printed, although not all. For example, Heinz's study of royal proclamations during the Tudor Period (1485–1603), found that the usual practice was for proclamations to be printed and posted to the relevant districts.[55] In this way, the monarchs of England exercised their

[47] *Case of Proclamations* (1611) 77 ER 1352. For a discussion, see Campbell (n 13) 163–70; Holdsworth (n 10) 269.
[48] Cope (n 10) 220.
[49] William Holdsworth, *A History of English Law*, vol 5 (Methuen & Co) 31; FW Maitland, *The Constitutional History of England* (Cambridge University Press, 1948) 302. The Star Chamber was one of the residual courts of 'the king's justice', in which petitioners could directly petition the king. By the seventeenth century, the Star Chamber was increasingly used by officers of the Crown to bring prosecutions and came to be associated with unpopular summary prosecutions and 'vindictive punishments': J. H. Baker, *An Introduction to English Legal History* (Butterworths, 1990) 136–8.
[50] Burke (n 1) 1439–40.
[51] Burke (n 1); Brian Thompson, *Textbook on Constitutional and Administrative Law* (Blackstone Press, 2nd ed, 1993) 22.
[52] Doig (n 8) 255; Heinz (n 10) 20.
[53] Heinz (n 10) 20.
[54] Clanchy (n 19) 172.
[55] Heinz (n 10) 22.

relatively broad authority to make proclamations by writing and disseminating information about their decision to the general public.

By the late eighteenth century, however, the Crown's authority to make new laws was bound by constitutional conventions that vested supreme law-making power in Parliament.[56] Within this constitutional framework, royal assent was required to bring bills into force that had been passed by the two houses of parliament.[57] Blackstone explains that there were two available techniques of giving royal assent: in person or by execution of letters patent.[58] It was the act of giving assent that brought the new rules (and the categories contained therein) into force as authorised law: 'when the bill has received the royal assent in either of these ways, it is then, and not before, a statute or act of parliament'.[59] There was no requirement that the new rules and categories be published or proclaimed to bring them into force:

> [T]here needing no formal promulgation to give it the force of law … because every man in England is, in judgement of the law, party to the making of an act of parliament being present thereat by his representatives.[60]

However, it was common practice for new legislation to be printed by the King's Press 'for the information of the whole land'.[61] Prior to invention of the printing press, it was common practice to publicise newly assented legislation by proclamation. According to Blackstone, prior to the printing press, new legislation was

> published by the sheriff of every county; the king's writ being send to him…commanding him "ut statuta illa, et omnes articulos, in eisdem contentos, in singulis locis ubi expedire viderit, publice proclamari et firmiter teneri et observari faciat." [that he cause these statutes, and all articles therein contained, to be publicly proclaimed and strictly observed and kept in every place where it shall seem expedient].[62]

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[56] William Blackstone, *Commentaries on the Laws of England: Book the First* (Clarendon Press, 1765) 156.
[57] Ibid 177.
[58] Ibid 177–8.
[59] Ibid 178.
[60] Ibid.
[61] Ibid.
[62] Ibid. The translation comes from a later edition of Blackstone's *Commentaries*: William Blackstone, *Commentaries on the Laws of England in Four Books, Book 1*, ed James De Witt, vols 1 (containing Books I and II) (Callaghan and Company, 1899) 166.

Blackstone asserts that this practice of proclaiming new legislation continued until the end of the reign of Henry VII (in the early sixteenth century).[63] Indeed, the first printed statutes in England were published in 1484, produced through commercial printers, and were not necessarily accurate copies of the original.[64] Overall, the common law proclamation is associated with early forms of law-making, in which the monarch, through various techniques of communication (writing and oral), publicly announced decisions. A proclamation can, then, be thought of as 'publication by authority: a notice publicly given of anything whereof the sovereign thinks fit to advertise his subjects'.[65] In the common law tradition, proclamation-making involves an element of public address and reception by an audience.

IV. PROTECTED TREE PROCLAMATIONS IN COLONIAL NEW SOUTH WALES: WRITING LAW'S CATEGORIES

NSW governors have held the authority to create law's protected tree categories since the earliest days of colony (as explained in Chapter 4) and continue to hold such authority today (as this chapter will demonstrate). However, the source and scope of that authority has changed considerably since 1788. As explained in Chapter 4, it was the colony's first governors who exercised the authority to classify law's protected trees as 'timber'. However, the first governors also fabricated law's categories by making new rules (and hence new categories) for the colony through the issuing of government and general orders and proclamations.[66] But while the early governors' commissions and instructions explicitly granted the governors the authority to make grants of land, and specified techniques of land granting (in writing, executed by the Seal of the Territory), the governors' commissions and instructions were silent on the more general issue of law-making.[67] As a matter of practice, however, the early governors did issue orders and proclamations that applied to the inhabitants of the colony. These included, for example,

[63] Blackstone (n 56) 178.
[64] Tiersma (n 25) 155.
[65] Burke (n 1) 1439.
[66] Campbell (n 13) 161. As Campbell notes, general orders were instruments associated with British military command. Military commanders were authorised to make regulations in the form of general orders regarding military matters and personnel.
For a general discussion of the extent of the early governors' legislative authority, see Castles (n 13) 35–7; Melbourne (n 13) 10–1; RD Lumb, *The Constitutions of the Australian States* (University of Queensland Press, 5th ed, 1991) 3–7.
[67] Campbell (n 13) 61; Castles (n 13) 35.

Governor King's proclamation regarding tree ownership in the colony, as discussed in Chapter 3.[68]

In 1803, Jeremy Bentham argued that any legislative act by the governors of New South Wales, including the making of proclamations and general orders, was unconstitutional.

> The displaceable instruments of the Crown–the successive Governors of New South Wales-have, for these fourteen years past, been exceeding legislative power, without any authority from the Parliament: and either without authority at all from any body, or at most without any authority but from the King: and all along they have been, as it was most fit they should be, placed and displaced at his Majesty's pleasure.[69]

The constitutional validity of these orders was also raised in the colony by John McArthur, in discussions with Governor King, who observed that it was 'the first time I ever heard of such an objection'.[70] King's response reflects a more general sense in which 'the constitutional nature of the proposed settlement had not received detailed attention' during preliminary discussions in London concerning the founding of the new colony.[71] Bentham's arguments, however, initially went unheeded, and the early governors continued to make orders and proclamations, regularly sending copies by return to the Colonial Office.[72] Indeed, as A. C. V. Melbourne pragmatically observes, when executive and legislative authority are vested in one individual, such as in the early NSW governors, it becomes difficult to distinguish between executive and legislative acts.[73] As Kercher helpfully summarises, legal historians generally now agree that so long as the early governor's proclamations did not depart from English law, they were constitutionally valid exercises of delegated prerogative.[74]

Towards the end of Governor Macquarie's term (1809–1822), however, imperial authorities in London conceded that constitutional reform was required to establish a

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[68] Governor King, 'Proclamation', *Sydney Gazette and New South Wales Advertiser* (Sydney, 26 June 1803) 1.
[69] Jeremy Bentham, 'Writings on Australia, VI. A Plea for the Constitution' in Tim Causer and Philip Schofield (eds), *The Bentham Project, Prepublication Version* (2018) 54.
[70] 'King Papers' (2 Jan 1806) FM Bladen, *Historical Records of New South Wales*, vol 6 (Government Printer, 1898) 1 ('*HRNSW Vol 6*').
[71] Arthur McMartin, *Public Servants and Patronage: The Foundation and Rise of the New South Wales Public Service, 1786–1859* (Sydney University Press, 1983) 30.
[72] Kercher (n 13) 7.
[73] Melbourne (n 13) 11.
[74] Kercher (n 13) 9. For detailed discussions, see Evatt (n 13); Campbell (n 13); Castles (n 13) 35–9; Kercher (n 13) 6–9.

legislative body in the colony, which was increasingly populated by free settlers as well as convicts.[75] Accordingly, NSW's first legislative and executive bodies were established by imperial instruments in 1823 and 1825 respectively. [76] What followed over the next thirty years was a series of constitutional reforms enacted by imperial instruments, which progressively assigned increasing authority to legislative and executive bodies. These reforms culminated in the passage of the *New South Wales Constitution Act 1855* (Imp), which established the colony as self-governing, founded on the principles of representative and responsible government.[77] At this point, the way in which the governors were authorised to make law's categories changed. By legislative grant, the governor could (and still can) be authorised to bring into force new rules and categories in accordance with the specific provisions of the relevant legislation. In addition, the constitutional reforms imposed upon the governor an obligation to exercise that authority only on the advice of the executive.[78] These constitutional changes altered the way in which the governor exercised the authority to fabricate law's category; however, as this chapter will demonstrate, as a matter of technique the institutional practice of fabricating law's categories by writing proclamations continues to this day.

As a matter of technique and institutional practice, the precise manner in which the first governors exercised the authority to fabricate laws categories of tree protection, other than by land grant, is a little unclear. There are reports that Phillip ordered the protection of trees and vegetation growing along the banks of the Tank Stream, the settlement's first source of fresh water.[79] However, I have found no official record of the order and am unable to determine whether Phillip issued the order in writing or otherwise. The earliest records of proclamations and orders are log-book style books maintained by the Colonial

[75] Melbourne (n 13) 27.
[76] The colony's first legislative council was established by imperial statute: *New South Wales Act 1823* (Imp) (4 Geo. 4 c. 96). An executive council to advise the governor was established in 1825 by Governor Darling's Commission: 'Governor Darling's Commission' (16 July 1825) *Historical Records of Australia*, vol 12 (Library Committee of the Commonwealth Parliament, 1919) 101. For a discussion of both institutions, see Castles (n 13) 131–2; Tim Castle, 'Time to Reflect: Earl Bathurst and the Origins of the New South Wales Executive Council' (2014) 16 *Journal of Australian Colonial History* 73.
[77] Twomey (n 5) 628–9.
[78] Ibid.
[79] Sydney Water, *Tank Stream*, p 2, accessed at http://www.sydneywater.com.au/web/groups/publicwebcontent/documents/document/zgrf/mdq0/~edisp/dd_044108.pdf on 14 January 2018.

Secretary from 1795, after Phillip's departure.[80] These records contain routine, yet obscure, daily entries. For example, a typical entry, dated 21 October 1795, reads:

> 21st October
>
> Parole: Stormy
>
> Counter-Sign: Weather.[81]

Other entries contain details of specific orders made by the governors. For example, Hunter also made an order concerning the Tank Stream shortly after his arrival in the colony. On 22 October 1975, he ordered that persons, huts or pigs found within the fenced area protecting the banks of the water-source would be removed. This order is recorded in the General Order book.[82] Later that year, Hunter issued an order concerning tree protection, ordering that no timber be cut down on the banks or creeks of the Hawkesbury River.[83] Concerned about the waste of timber occurring in the colony, Hunter ordered:

> The quantity of useful timber which has for some time past been indiscriminately cut down upon the Banks of the Hawksbury, and the Creeks running from it, and which has been wasted, or applied to purposes for which timber of less value might have answered, it is hereby strictly ordered that no timber what-ever be cut down on ground which is not marked out, or allotted to individuals, on either of the Banks or Creeks of the aforementioned River...[84]

In this proclamation, we find the first record of a NSW governor making a category of lawful tree protection through the making of a general order. Exercising delegated prerogative authority to administer the colony, and in particular the authority to protect

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[80] Colonial Secretary, *Government and General Order (General Order Books)*, 1795–1797, SRNSW, NRS 1045, ML Safe 1/18a.

[81] Colonial Secretary, *Government and General Order (General Order Books)*, 1795–1797, SRNSW, NRS 1045, ML Safe 1/18a. These entries in the General Order books related to military matters, and reflect the governors' status as military commander and associated authority to make military orders: see: Campbell (n 13) 162.

[82] Colonial Secretary, *Government and General Order (General Order Books)*, 1795–1797, SRNSW, NRS 1045, ML Safe 1/18a.

[83] Colonial Secretary, *Government and General Order (General Order Books)*, 1795–1797, SRNSW, NRS 1045, ML Safe 1/18a, '8 December 1795'.

[84] Colonial Secretary, *Government and General Order (General Order Books)*, 1795–1797, SRNSW, NRS 1045, ML Safe 1/18a; *New South Wales General Standing Orders: Selected from the General Orders Issued by Former Governors, From the 16th of February 1791 to the 6th of December 1800, Also General Orders Issued by Governor King from the 28th of September 1800 to the 30th of September 1802* (Government Press, 1802) 2.

timber, Governor Hunter declared that a particular category of tree – timber growing on the banks of the Hawkesbury river – be protected from clearing.

According to Governor Bligh, the General Order books were kept at Government House and were available for public inspection.[85] It appears that copies of the general orders were also dispatched from the governor's office to the magistrates and other civil and military offices.[86] From the little information available, and the form of the General Order books themselves, it appears that the General Order books constituted something of an internal register of the governor's orders. The entries in the log-book are handwritten and the early general order dispatches would have been handwritten too, because although the First Fleet cargo included a screw press, no one was found with the skills to operate it until the early 1790s.[87] While the general order books were open for public inspection, the military nature of many of the entries suggests a book intended as an internal system of record-keeping, rather than a technique of public announcement.

In the early 1800s, however, Governor King turned to the printing press to disseminate government orders and proclamations more widely. In 1801, King ordered that a printed abridgement of selected general orders made by previous governors be 'displayed in some conspicuous part of the houses' of the individuals to whom the abridgement was issued.[88] Next, he arranged for the printing of the first book in the colony. The auspicious title of 'first book published in the colony' fell neither to a literary work, nor a political manifesto, but rather to a compilation of proclamations and government and general orders compiled by Governor King and published in 1802.[89] As Melbourne writes, King's intention in publishing the book was to 'deprive offenders of the excuse of ignorance'.[90] King also established the colony's first newspaper. King justified this decision in a letter to his superior in London, Lord Hobart, in which he wrote:

> It being desirable that the settlers and inhabitants at large should be benefitted by useful information being dispersed among them, I considered that a weekly

[85] McMartin (n 71) 59.
[86] Ibid.
[87] A note in the *Historical Records of Australia* puts the date of the first printed orders at 1791: *Historical Records of Australia*, vol 25 (Library Committee of the Commonwealth Parliament, 1925) 782. According to Walker, the first printed government order was issued in 1795: RB Walker, *The Newspaper Press in New South Wales 1803–1920* (Sydney University Press, 1976) 3.
[88] 'General Order' (9 October 1801) *Historical Records of Australia*, vol 3 (Library Committee of the Commonwealth Parliament, 1915) 465.
[89] Walker (n 87) 3.
[90] Melbourne (n 13) 28.

> publication would greatly facilitate that design, for which purpose I gave permission to an ingenious man, who manages the Government printing press, to collect materials weekly, which, being inspected by an officer, is published in the form of a weekly newspaper.[91]

As is evident from King's description, the colony's first newspaper, the *Sydney Gazette and New South Wales Advertiser*, was run as a private commercial enterprise, not purely as a publication of official government notices.[92] The newspaper included articles on shipping news, agriculture, personal notices and advertisements and law reports.[93] All were subject to the censorship of the office of the governor, and accordingly the newspaper carried the descriptor published 'by authority' on its front cover.[94]

Having authorised the colony's first newspaper, King initiated a practice of publishing proclamations, notices and government and general orders on the newspaper's front cover. For example, King also issued proclamation protecting timber trees growing on the banks of the Hawkesbury, echoing Hunter's earlier order. The proclamation was printed on page one of the *Sydney Gazette* on 9 October 1803, the first year of the newspaper's publication.[95] It was at this time that Governor King instituted a practice of category-making that was new to the colony, but one which returned to earlier common law techniques of law-making by proclamation. By publishing proclamations in the *Sydney Gazette*, decisions by the governor were disseminated to a public audience, as well as being distributed internally within the colonial administration. It is also important to note that the writing technology of the printing press had existed in the colony for some time before King's decision to establish the newspaper. At first, the letter press had been used to print documents for a rather small, and official, readership. Now, however, the printing press was being drawn into a 'new' kind of institutional practice. The *Sydney Gazette* proved a success. George Howe, the newspaper's proprietor and printing press operator, produced a weekly newspaper in which the governor's proclamations and

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[91] King to Hobart (9 May 1803) FM Bladen, *Historical Records of New South Wales*, vol 5 (Government Printer, 1897) 112 at 118 ('*HRNSW Vol 5*').
[92] Greg Tillotson, 'Government Gazettes in Australia: Notes on Their History and Role' (1982) 9 *Government Publications* 407, 408.
[93] Walker (n 87) 3.
[94] Ibid 5.
[95] Philip King, 'General Order', *Sydney Gazette and New South Wales Advertiser* (Sydney, 9 October 1803) 1.

general orders were published.[96] In addition, the governors began to include copies of the *Gazette* in their regular dispatches to the Colonial Office in London. By 1824, the Colonial Office had come to rely on these regular returns of the *Sydney Gazette* as an important source of information about what was occurring in the colony. For example, Under-Secretary Horton reprimanded Governor Brisbane for failing to include the *Sydney Gazette* in his regular dispatches:

> My dear sir,
> The exceeding great inconvenience, to which we are daily put by being obliged to have recourse to private Individuals for any information connected with the Colony of New South Wales contained in the Sydney Gazette, induces me to press upon you, in addition to Lord Bathurst's Official Dispatch, dated the 31st May, the necessity of your transmitting to us by every opportunity a regular series of that paper.[97]

The Colonial Office's preoccupation with regular, official returns of information and statistics about the colony was in keeping with a wider trend towards standardised and increased forms of communication between London and the colonies, as discussed in Chapter 4.[98]

During the 1830s, however, Howe's widow, now the owner of the *Sydney Gazette*, came into conflict with Governor Bourke.[99] This conflict was not about issues of editorial freedom but, rather, about more mundane issues of cost. Bourke's opinion was that it would be financially beneficial for the colonial administration to operate its own newspaper, an official gazette, rather than paying the *Gazette* proprietors to publish official notices on the governor's behalf. Accordingly, in 1832, Governor Bourke established the first government gazette proper in the colony: The *New South Wales Government Gazette* ('the *Gazette*'). This was an official publication that contained only official notices.[100] At first the *Gazette* was printed by private contractors, but, in 1840,

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[96] According to records contained in Trove, the National Library of Australia's archive of colonial newspaper and government gazettes, the first time a weekly publication of the *Sydney Gazette* was *missed* was the last week of January 1806. Later, in 1807, the colony faced a paper shortage, which prevented the *Gazette* from being published for some weeks; see 'Governor Bligh to the Right Hon. William Windham' (31 October 1807) *Historical Records of Australia*, vol 6 (Library Committee of the Commonwealth Parliament, 1916) 191 and accompanying editorial note on 718.
[97] *Historical Records of Australia*, vol 13 (The Library Committee of the Commonwealth Parliament, 1922) 301.
[98] Zoe Laidlaw, *Colonial Connections, 1815–45: Patronage, the Information Revolution and Colonial Government* (Oxford University Press, 2005).
[99] Sandra Blair, 'The Convict Press: William Watt and the Sydney Gazette in the 1830s', *The Push from the Bush* (1979) 98, 101; Tillotson (n 92) 408.
[100] Walker (n 87) 11.

Governor Bourke established a government printing office, responsible for the in-house publication of the government gazette.[101] Once Governor Bourke had established the *Gazette* it became increasingly common for legislation to require 'gazettal', or publication of the governor's notices in the *Gazette*, when authorising the governor to undertake particular activities. For example, the *Roads and Streets Act 1833* (NSW) required the governor to publish several notices in the *Gazette* when enacting his authority to establish the location of new roads and streets.[102] Similarly, the *Prisons Regulations Act 1840* (NSW) authorised the governor to appoint locations for prisons by proclamation in the *Gazette*.[103] By the 1870s, publication in the *Gazette* was increasingly recognised as the act that would enact the governor's authority to bring categories into force, thereby creating law's categories.[104]

Proclamations of timber reserves under the *Crown Lands Alienation Act 1861* illustrate how the governor's authority to fabricate law's categories was exercised through the institutional practice of writing of proclamations published in the *Gazette*. The second half of the nineteenth century was a period of rapid agricultural expansion in the colony, during which the colonial government attempted to strike a balance between colonists seeking small land grants for cultivation and agriculture and a squattocracy seeking secure rights to large tracts of land over which to run stock.[105] The *Crown Lands Alienation Act 1861* (NSW) and the *Crown Lands Occupation Act 1861* (NSW) (otherwise known together as the Robertson Land Acts) set out the procedures for public sale and lease of Crown land (land that had not been disposed of in fee simple). These procedures included a process for reserving portions of land from public sale for public purposes, including as timber reserves.[106] Under the provisions of the *Crown Lands Alienation Act 1861*, land reserved for public purposes could not be offered up for private sale. The pronouncement

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[101] Tillotson (n 92) 408.
[102] *Roads and Streets Act 1833* (NSW) s 1.
[103] *Prisons Regulations Act 1840* (NSW) s 2.
[104] Another example includes the *Cattle Sale Yards Act* 1870 (NSW), which provided that by-laws produced by the Municipal Council of Sydney regarding the maintenance of cattle yards would only come into force once approved by the Governor and the Executive Council, and once those by-laws had been published in a conspicuous place and published in the government gazette: *Cattle Sale Yards Act 1870* (NSW) s. 7.
[105] For an introduction to this topic see, eg,: Stephen Roberts, *History of Australian Land Settlement* (MacMillan, 1924) 187–204; RB Walker, 'Squatter and Selector in New England, 1862–95' [1957] (8) *Historical Studies: Australia and New Zealand* 66.
[106] *Crown Lands Alienation Act 1861* (NSW) s 4. The original Act did not expressly provide for 'timber reserves' as an allowable public purpose; however, the *Crown Lands Act Amendment Act* 1875 (NSW) explicitly provided for timber reserves, and many reserves proclaimed under the original legislation were renotified after the 1875 amendment: TC Grant, *History of Forestry in New South Wales 1788 to 1988* (Star Printery, 1989) 41.

of public reserves had the effect of rendering 'absolutely void' any purported sale of that land by the colonial government.[107] Unlike the earlier Crown reservations of timber inserted into individual grants, the timber reserves protected trees by preventing particular locations from being disposed of by the Crown as freehold title.

On 27 July 1875, Governor Robinson created a forest reserve in the locality of the Tuross River. The proclamation is typical of other timber and forest reserves made at the time, and reads as follows.

> TUROSS FOREST RESERVE
>
> His Excellency the Governor, with the advice of the Executive Council, directs it to be notified, that in the pursuance of the provisions of the 4th section of the Crown Lands Alienation Act of 1861, the land specified in the Schedule appended hereto shall be reserved from sale for the preservation of timber, and specially exempted from the operation of timber licences issued under chapter 6 of the regulations of the Crown Lands Operation Act.
>
> THOMAS GARRETT
>
> ___
>
> Monaro District
>
> No. 249. County of Dampier, parish of Bodalla, the village reserve at the South Head, Tuross, 380 acres: Commencing on the sea, at the south-east corner of the village reserve aforementioned, being the north-east corner of a conditional purchase of 40 acres by A. Hawdon, and numbered 359 on the map of Dampier, Surveyor-General's Office; and bounded thence on the south boundary of that village reserve bearing west 11/4 mile; on the west by the west boundary of that village reserve bearing north to a small inlet of the Tuross River; on the north by that inlet and the Tuross River to the sea; and on the east by the sea southerly, to the point of commencement.[108]

Governor Robinson's proclamation created a new category of tree protection: a forest reserve called the Tuross Forest Reserve. Through the act of proclaiming the notice of reservation, through its publication in the *Government Gazette*, the category of the Tuross

[107] Unless the sale was made for the purposes of the reservation: *Crown Lands Alienation Act 1861* (NSW), s 6.
[108] 'Tuross Forest Reserve', *New South Wales Government Gazette* (27 July 1875) 2232.

Forest Reserve was brought into force as law's category; it was now a category that belonged to law and trees that came within the category would belong to the category, and thus also to law.

This example of a protected tree proclamation demonstrates how writing proclamations for publication in the *Gazette* had become established as an institutional practice, through which the governors' exercised their authority. The *Crown Lands Alienation Act 1861* (NSW) confirmed and repeated the practice that Governor King had initiated.

> The Governor with the advice of the Executive Council *may by notice in the Gazette declare what portions of Crown Land shall be set apart* as sites for new cities or towns or villages…and what lands shall be reserved from sale for the preservation of water supply … or other public purpose.[109] (my emphasis)

Importantly, it was publication of the notice in the *Gazette* that would bring those categories into force.

> And upon such notice being published in the Gazette, such lands shall become and be set apart attached dedicated or reserved accordingly.[110]

The confluence of making and publishing suggests that making the proclamation had now become synonymous with the publication of the proclamation in the *Gazette*. A practice initiated by King, in the pragmatic interests of communicating with the colony's general population, had coalesced into a formal requirement that writing a proclamation, which took the form of a notice published in the *Gazette,* would imbue the proclaimed categories with the force of law, thereby creating law's categories. By the 1860s, the repeated, day-to-day, administrative practice of writing proclamations as publications in the government gazette had calcified as a formal rule of law-making in New South Wales.

At the end of the nineteenth century, the New South Wales legislature passed legislation that further cemented the significance of publishing the governors' orders and proclamations in the *Government Gazette*. Pursuant to the *Interpretation Act 1897* (NSW):

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[109] *Crown Lands Alienation Act* (n 106) s 4.
[110] Ibid.

> Judicial notice shall be taken of every Proclamation or Order by the Governor with the advice of the Executive Council made or purporting to be made in pursuance of any Act or Imperial Act and published in the Gazette.[111]

The 'Gazette' was defined to mean the "New South Wales Government Gazette".[112] According to the rules of evidence, judicial notice allows for the court to accept certain propositions of law without formal proof. The effect of the judicial notice provision in the *Interpretation Act* was to formalise and reaffirm existing practice.

In the colony's first century, the governors of NSW established a particular technique of category-making: by writing proclamations in the *Government Gazette*. Proclamations published in the *Gazette* returned to earlier common law traditions of law-making by announcing Crown decisions to a public audience. This technique of enacting Crown authority was not something that had been authorised by the governors' formal commissions or instructions. Rather, it was through an institutional practice – an established way of doing things – that governors exercised their authority to make law's categories. The history of colonial protected tree proclamations reflects the broader notion (as discussed in Chapter 2) that institutions operate on a spectrum between emergent practice and formalised rules.[113] It will be remembered from Chapter 2 that institutions can be thought of as cultivating authority or legitimacy by 'doing things ritually'. This insight of 6 and Richards is supported by the history of the colonial protected tree proclamation. King's decision to allow the publication of a newspaper in the colony coalesced into an institutional practice – an established way of doing things – and then into an accepted principle of law-making in the colony. This practice echoed an earlier common law tradition of making proclamations by widely proclaiming Crown decisions. In this way, proclamation-writing can be understood as a technique, a mode or style of enacting the governor's authority to make law's categories. More specifically, proclamation-writing – first as a matter of established practice and then as a matter of formalised rules – was established as the practice of writing notices for publication in the *Government Gazette*.

V. THE DIGITAL TRANSITION: WRITING PROCLAMATIONS AS PDFS

[111] *Interpretation Act 1897* (NSW) s 34.
[112] Ibid s 21(h).
[113] Perri 6 and Paul Richards, *Mary Douglas: Understanding Social Thought and Conflict* (Berghahn, 2017) 116.

This section of the chapter considers the effect of digital writing technologies on writing as a technique through which the governors exercise the authority to make law's categories. I do so by tracing a history of protected tree proclamations made by the governor during the late twentieth and early twenty-first centuries. During this time the proclamation underwent a digital transformation, as digital writing technologies were gradually introduced into government printing practices. I focus on this period both to demonstrate the longevity of writing proclamations as a jurisdictional technique of classification in New South Wales, and in order to examine how, in this current era of digital disruption, new writing technologies might influence or change law's classificatory techniques. Overall, I find that, despite changing technologies, the governors of New South Wales continue to enact their authority to make law's categories through the writing of proclamations. Although those proclamations are now written digitally – meaning that they are published as pixels on the screen of a digital device rather than as ink on paper – it is not any kind of digital writing that will enact the governor's authority. Rather, the governors enact their authority to make law's categories by writing proclamations in accordance with an established way of doings things; by writing proclamations as PDF documents available for download from a New South Wales government website. While writing technologies have changed, the technique of making law's categories is still one that relies on proclaiming in writing, in accordance with an established practice.

Before discussing the proclamations' transition to the digital, I offer two points by way of background in order to demonstrate the continuity of proclamation-making throughout the twentieth century. First, following federation, a new government gazette was established: *The Government Gazette of the State of New South Wales*.[114] Post-federation, New South Wales governors continued to make protected tree categories by making proclamations in the new gazette. For example, pursuant to the provisions of the *Wild Flowers and Native Plants Protection Act 1927* (NSW) ('*Wild Flowers Act*'), successive governors of New South Wales proclaimed categories of plants and trees as protected from being 'picked' (meaning to gather, pluck, cut, pull up, destroy, dig up, remove, or injure).[115] As a matter of practice, these proclamations, like their nineteenth-century counterparts, were made by writing notices published in the government gazette. This

[114] *Government Gazette of the State of New South Wales* (Sydney, NSW, 1 January 1901).
[115] *Wild Flowers and Native Plants Protection Act 1927* (NSW) s 2 (definition of 'pick').

technique of making law's categories was also specified by s 3(1) of Act, which provided that:

> [t]he governor may notify by proclamation published in the Gazette that any wild flower or native plant specified in the proclamation is protected under this Act throughout the whole State or in any part of thereof specified in the proclamation.[116]

The governors' wild flower proclamations brought into force particular categories of trees and plants that were protected from being harmed or damaged, in accordance with the substantive provisions of the *Wild Flowers Act*.[117] In this respect, the *Government Gazette of the State of New South Wales* replaced the old *Government Gazette* as the site of publication. As a matter of practice, details of the wild flower proclamations were also reported in general interest newspapers throughout the state.[118]

Second, the New South Wales parliament reaffirmed the authority of the governor to make law's categories by writing proclamations when it passed an updated and revised *Interpretation Act* in 1987.[119] Pursuant to s 21, the new *Interpretation Act* provided a general definition of a proclamation as 'a proclamation of the Governor published in the Gazette'. This formal definition of the proclamation reflected the governors' now very well-established practice of proclaiming by writing notices for publication in the gazette. In addition, the new *Interpretation Act* repeated the judicial notice rules contained in the previous act, providing that judicial notice was to be taken of 'every instrument made by the Governor that has been published in the Gazette'.[120] The new *Interpretation Act* provided that statutory rules (statutory instruments) were to also be made by publication in the *Government Gazette*, and shall come into force on the day on which the rule was published, or if some other date specified in the rule, on that later date.[121] Taken together, these three provisions demonstrate how proclamation-writing continued as formal rule of law-making throughout the twentieth century in NSW. It was through the writing of notices published in in the *Government Gazette* that the governor exercised the authority,

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[116] Ibid s 3(1).
[117] Ibid ss 4–5.
[118] See, eg, 'Wild Flower Pickers: Police Will Act', *Dugong Chronicle* (NSW, 26 July 1927) 3; 'Protected Flowers', *Evening News* (Sydney, NSW, 13 July 1928) 13; 'Protecting Our Bush', *Illawarra Mercury* (Wollongong, NSW, 29 June 1928) 3; 'Wild Flowers: Bags of Boronia Seized', *Sydney Morning Herald* (Sydney, 25 July 1930) 10.
[119] *Interpretation Act 1987* (NSW).
[120] Ibid s 44.
[121] Ibid ss 39(1)-(2).

delegated to him or her by statute, to bring into force categories contained in proclamations and other formal instruments, such as statutory rules.

In 2006, however, the formal rules regarding techniques of proclamation-making were amended to incorporate digital writing technologies. In particular, an official government website was introduced into the formal rules of law-making as a new site for the formal publication of proclamations. These changes are evident throughout a number of legislative provisions. First, the formal definition of a proclamation was amended to mean 'a proclamation of the Governor published in the Gazette or on the NSW legislation website'.[122] Similarly, amendments were made to provisions regarding the making of statutory instruments. All references to the 'gazette' were removed. Instead, statutory instruments were to be 'made' by publication on the NSW legislation website and would come into effect on that day (or a later day if so specified).[123] A general definition of the 'NSW legislation website' was also inserted into the Act in the following terms.

> NSW legislation website means the website with the URL of www.legislation.nsw.gov.au or any other website, used by the Parliamentary Counsel to provide public access to the legislation of New South Wales.[124]

Finally, the amendments granted authority to the Parliamentary Counsel to digitally publish authorised versions of legislation and statutory instruments.[125] This provision made it clear that the digital versions of New South Wales' written laws, accessed via the NSW legislation website 'had the same weight as the traditional paper versions'.[126] Overall, the amendments to the *Interpretation Act* 1987 (NSW) changed the rules about how proclamations were written: a new site for official publications – the NSW legislation website – had been formally brought into existence.

As matter of practice, however, the proclamation's transition to digital publication can be traced back to changes in government printing practices that occurred in the 1980s. The Government Printing Office, established by Bourke in 1840, had continued to expand

[122] Ibid s 21 (definition of 'proclamation').
[123] Ibid s 39(1).
[124] Ibid s 21 (definition of 'NSW legislation website').
[125] Ibid s 45C. However, these provisions did not come into effect until 2008: Don Colagiuri and Michael Rubacki, *The Long March: Pen and Paper Drafting to E-Publishing Law* (Conference Paper presented at the Commonwealth Association of Legislative Counsel Conference, April 2009) 12.
[126] Colagiuri and Rubacki (n 125) 13.

during the nineteenth century.[127] By the 1980s, the Government Printing Office was well-established as a large-scale print factory, employing some 800 people.[128] At this point, the *Government Gazette* was published using letter-press and print-on-paper technologies, although the scale, automation and speed of letter-press printing had greatly increased.[129] In the 1980s, however, mechanical printing processes in the Government Printing Office started to be replaced with digital technologies, such as electronic typesetting and word processing systems. Specifically in relation to the printing of new laws, a fax machine was installed to facilitate proofs of legislation between legislative drafters in the Parliamentary Counsel's Office and the Government Printer.[130] The transition to digital writing technologies continued into the 1990s, as Don Colagiuri and Michael Rubaki write:

> [t]he arrival of desktop personal computers and word processing software marked the rapid decline in typesetting and printing. Legislative documents could now be created, stored and reused on the one site. Bulk printing was still a challenge as laser printers and high-speed copiers remained cumbersome and costly.[131]

In 1989, the New South Wales Government Printing Office was closed down. Responsibility for publishing authorised copies of legislation was transferred to the Parliamentary Counsel's Office.[132] For some years, responsibility for compiling and printing the *Gazette* was allocated to various government departments, including the Department of Premier and Cabinet. However, in 2013 responsibility for the Gazette was also transferred to the Parliamentary Counsel's Office.[133] Throughout this period, digital writing technologies were increasingly incorporated into the New South Wales government's institutional practices involved in the writing of legislation and statutory instruments.

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[127] Other significant changes to writing technologies in New South Wales between the mid-nineteenth and late twentieth century include the emergence of the typewriter and the shift to lithographic (rather than letter press) printing techniques. On changing printing technologies within the NSW Government Printing Office, see Jesse Adams Stein, 'Masculinity and Material Culture in Technological Transitions: From Letterpress to Offset Lithography 1960s-1980s' (2016) 57(1) *Technology and Culture* 24. On the influence of the typewriter on writing practices more broadly in the Australian context, see, eg, Martyn Lyons, 'QWERTYUIOP: How the Typewriter Influenced Writing Practices' (2014) 44(4) *Quaerendo* 219.
[128] Colagiuri and Rubacki (n 125) 2.
[129] Stein (n 127).
[130] Colagiuri and Rubacki (n 125) 2.
[131] Ibid.
[132] Ibid.
[133] Michael Rubacki, *Online Legislation from Australian Governments: Achievements and Issues* (AustLII Research Seminar Paper, AustLII, 7 May 2013) 16 <classic.austlii.edu.au/austlii/seminars/2013/1.html>.

Prior to 2001, electronic writing technologies were incorporated only into the pre-publication stages of proclamation-writing. The governor continued to enact the authority to make law's protected tree categories by making proclamations and those proclamations were drafted and laid out for publication on digital writing devices. However, the official and published form of the proclamations was still published in a paper-based *Government Gazette*. For example, on 10 August 1995, and pursuant to authority under the *Environmental Planning and Assessment Act 1975*, Governor Sinclair proclaimed *State Environmental Planning Policy No 46 – Protection and Management of Native Vegetation*.[134] This proclamation was particularly significant from a policy perspective, because it implemented New South Wales' first state-wide ban on broad-scale clearing of native vegetation.[135] Crucial to the policy's operation was the category of 'native vegetation'.[136] Clearing of native vegetation was prohibited unless prior approved was received by the Directors-General of Land and Water Conservation and National Parks and Wildlife.[137] The gazettal of this proclamation then fabricated the category of 'native vegetation' as a new category of tree protection that applied throughout most areas in the state.[138] As a matter of technique, the proclamation, and the categories it contained, was brought into force by the authority of the governor, specifically by the technique of publishing the proclamation in the *Government Gazette*. We know this because the preamble to the proclamation makes these two points explicit:

> HIS Excellency the Governor, with the advice of the Executive Council, and in pursuance of the Environmental Planning and Assessment Act 1979, has been pleased to make the State environmental planning policy set forth hereunder in accordance with the recommendation made by the Minister of Urban Affairs and Planning.[139]

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[134] *State Environmental Planning Policy No. 46 – Protection and Management of Native Vegetation 1995* (NSW).
[135] Ibid r 6; Robyn Bartel, 'Compliance and Complicity: An Assessment of the Success of Land Clearance Legislation in New South Wales' (2003) 20(2) *Environment and Planning Law Journal* 116, 117.
[136] *State Environmental Planning Policy No. 4 –-Protection and Management of Native Vegetation* (n 134) r 5. An important critique of the category of 'native vegetation' as a category for environmental protection of plants and trees is offered by Lesley Head, 'Decentering 1788: Beyond Biotic Nativeness' (2012) 50(2) *Geographical Research* 166.
[137] *State Environmental Planning Policy No. 46 – Protection and Management of Native Vegetation* (n 134) r 6(1)(a).
[138] The policy applied to local government areas listed in a Schedule to the policy, with some exceptions, for example for land zoned as 'residential': ibid r 3.
[139] New South Wales, *Government Gazette of the State of New South Wales* (No 96, 10 August 1995) 4107.

As with the earlier proclamations, the protected tree category contained within SEPP-46 was brought into force by writing, and, specifically, by writing published in the *Government Gazette*.

The next milestones in the proclamation's shift to the digital occurred in the early 2000s. First, was the publication of the *Government Gazette* online.[140] Copies of the latest edition of the gazette were available to download, in Portable Document Format (PDF), from a link on the homepage of the Department of Public Works and Services website.[141] This mode of publication was made possible by the widespread introduction of personal computers, internet connectivity and email communications across the New South Wales public service during the mid-1990s.[142]

Second, in 2001 the Parliamentary Counsel's Office (PCO) launched its own website which provided public access to a digital database of legislation. Although the PCO was not yet responsible for publishing the government gazette, it eventually took over this responsibility from the Government Printing Service. Significantly, the practice of digitally publishing the gazette and legislative instruments pre-dated the 2006 amendments to the *Interpretation Act* discussed above. In other words, the practice of digitally writing legislation had commenced well prior to the formal changes contained in the *Interpretation Amendment Act 2006* (NSW). As Rubacki and Colagiuri observe, in practice the online database was increasingly relied upon by the staff for purposes of legislative drafting.

> The use of online source material by New South Wales legislative counsel removed the need for the PCO to keep paste-up master sets of all items of principal legislation. The online consolidated versions were accepted as correct for the purposes of amending legislation. With the launch by the PCO of the official legislation website in 2001, the legislative counsel were provided with a download facility to be able to directly re-use source data from the website into their documents using SGML-based legislative drafting and publishing system, without reformatting.[143]

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[140] History Council of New South Wales, 'Over 150 Years of NSW Government Gazettes Now Online', *Announcements* (7 November 2016) <https://historycouncilnsw.org.au/150-years-government-gazettes-online/>.
[141] See, eg,: NSW Department of Public Works and Services, 'Home Page', *NSW Department of Public Works and Services Website* (3 October 2002) <https://webarchive.nla.gov.au/awa/2002100230532/hhtp://www.dpws.nsw.gov.au/Home.htm>.
[142] Colagiuri and Rubacki (n 125) 4.
[143] Ibid 9.

The point is that by the time the 2006 digital amendments to the *Interpretation Act* were passed by parliament, digital versions of legislation were already considered authoritative in practice: '[s]ince its launch in 2001, the [official website's] content has been considered authoritative (even though it had no legislative basis)'.[144] In other words, the 2006 *Interpretation Act* amendments codified and formalised existing institutional practices of law-making.

Between 2001 and 2008, New South Wales governors exercised the authority to make law's categories for tree protection by writing both paper and digital proclamations. Proclamations still took the form of written notices published in the *Government Gazette*, and the gazette was published digitally via the government website. This period of concurrent writing technologies is significant. It illustrates how the governors' authority was exercised through paper and digital writing technologies in much the same way. For example, on 1 August 2007, Governor Marie Bashir proclaimed new regulations under the *Native Vegetation Act* 2005 (NSW). These regulations fabricated a new category of unprotected tree clearing. Clearing conducted for purposes of 'private native forestry' was established by the proclamation as an exception to the principal Act's general protection of native vegetation. Figures 1 and 2 below demonstrate the similarity between the digital and paper versions of this proclamation. The first image is of an authorised paper republication of the proclamation, found in the authorised, paper-based, compilation of the *Rules, Regulations, By-Laws, Ordinances etc. of New South Wales*.[145] The original reference to the proclamations publication in the *Government Gazette* is noted in the footer. The second image is of the first page of the proclamation, downloaded as a PDF document from the New South Wales legislation website. Despite the different writing technologies used to produce the two versions of the same proclamation, through

[144] Ibid 12.
[145] 'Native Vegetation Amendment (Private Native Forestry) Regulation' in *Rules, Regulations, By-Laws, Ordinances Etc. of New South Wales* (By Authority, 2007) No 372.

both sets of proclamation-writing practices, the governor exercised the authority to make law's categories.

Proclamations made by the NSW governor are no longer officially published on paper. From 2 March 2009, all instruments drafted by the PCO and 'made' by the governor (including regulations and commencement proclamations for legislation) were, as a matter of practice, published on the NSW government's legislation website.[146] In 2013, when the number of subscribers to the paper copy of the *Government Gazette* had fallen to 60, a decision was made to cease paper publication.[147] The current structure of the NSW legislation website creates a joint space of publication for the notification of instruments and the gazette, called 'Notification-Gazette', as shown in Figure 3. In this part of the website, the public may freely access proclamations – whether found as stand-alone notifications, or as published in digital copies of the government gazette – dating back to 2001. Each gazette and instrument takes the form of a downloadable PDF document, which can be read and printed on paper.

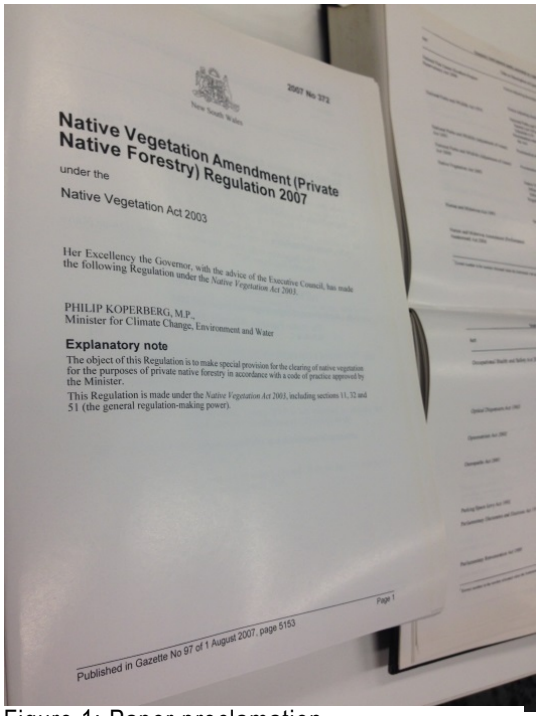

Figure 1: Paper proclamation
Native Vegetation Amendment (Private Native Forestry) Regulation 2007 (NSW). Photo by author.

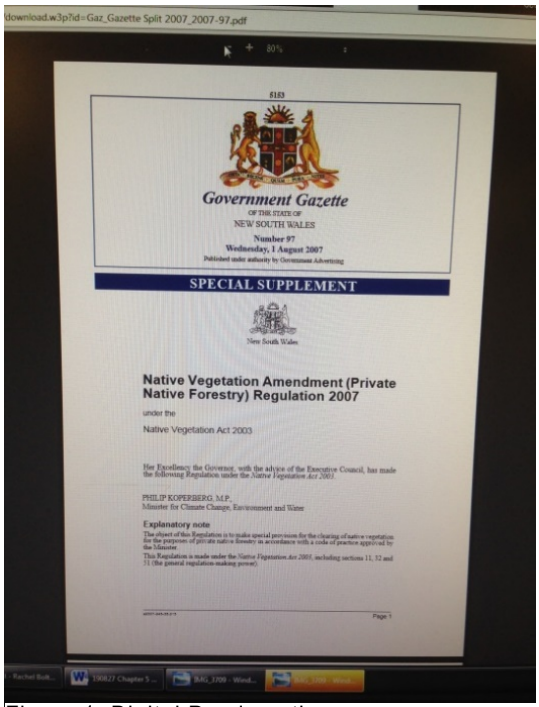

Figure 1: Digital Proclamations
Native Vegetation Amendment (Private Native Forestry) Regulation 2007 (NSW), on screen. Downloaded from <www.legislation.nsw.gov.au> Photo by author.

[146] Colagiuri and Rubacki (n 125) 16.
[147] Rubacki (n 133) 16.

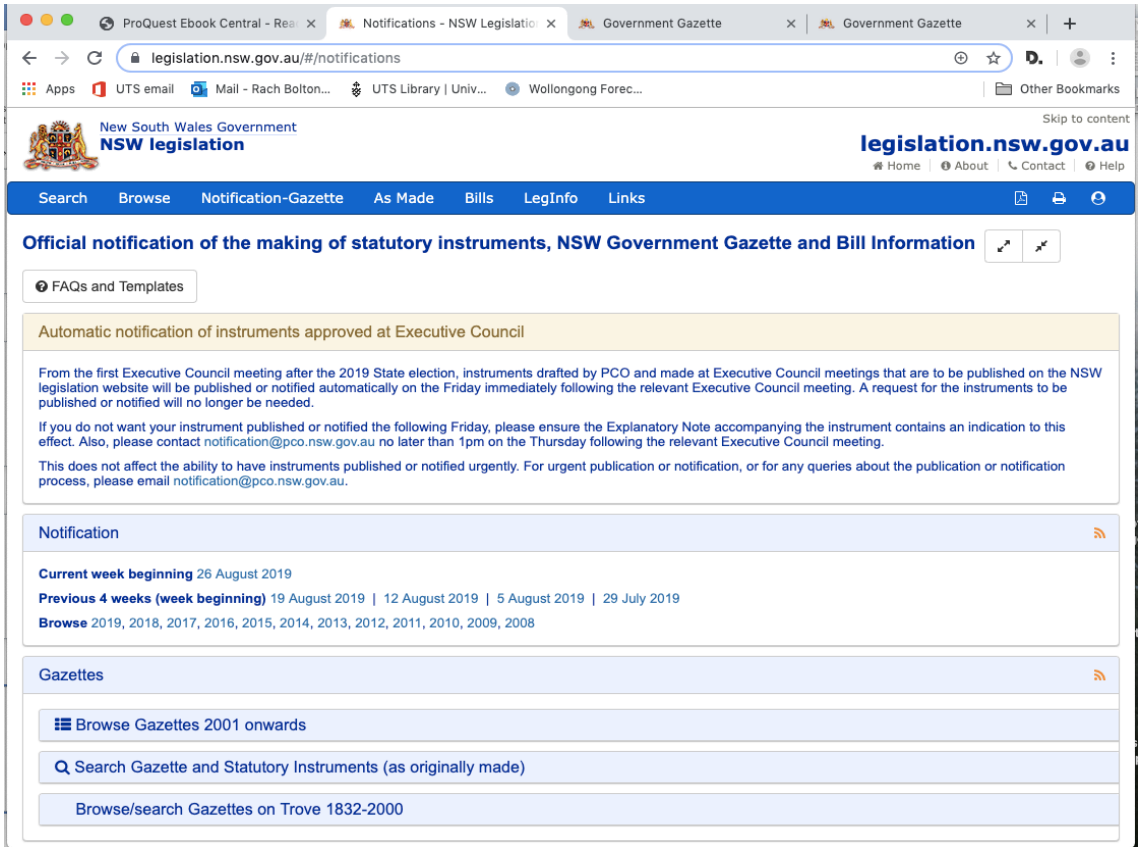

Figure 3: Digital proclamations online

New South Wales Government, 'Official Notifications', NSW Legislation Website (accessed August 2019) <www.legislation.nsw.gov.au/#/notifications>. Screen shot by author.

One final example of a protected tree proclamation demonstrates the continuity of digital writing as a technique of making law's protected tree categories. In 2016, the New South Wales government overhauled legislation relating to the protection of plants and animals within the state. Legislation concerning native vegetation was repealed, and new provisions were inserted into the *Local Land Services Act 2013* (NSW) to establish new arrangements for protecting native vegetation within the state. The Act defines native vegetation as

> a plant that was established in New South Wales before European settlement.[148]

The Land Services Act 2013 (NSW) also provides that conclusive presumptions regarding whether particular species were not native to New South Wales could be established by regulation.

[148] *Local Land Services Act* (n 4) s 60B(1). The definition echoed previous definitions of native vegetation under the *Native Vegetation Conservation Act 1997* (NSW) s 6, *Native Vegetation Act 2005*, (NSW) s 6.

> The regulations may authorise conclusive presumptions to be made of the species native to New South Wales by adopting any relevant classification in an official database of plants that is publicly accessible.[149]

On 25 August 2017, Governor Hurley proclaimed the *Local Land Services Amendment (Land Management-Native Vegetation) Regulation 2017* (NSW), pursuant to his authority under the principal Act.[150] The regulation contains key provisions necessary for the implementation of native vegetation protection laws contained in the *Local Land Services Act 2013*, specifically concerning the category 'native vegetation'. The regulations established a 'conclusive presumption' as to what would constitute 'native vegetation' for the purposes of the principal Act. The revised *Local Land Services Regulation 2014* now provided, pursuant to regulation 106, that:

> (1) [f]or the purposes of Part 5A of the Act, a species of plant may be conclusively presumed to be native to New South Wales if it is listed on the official database, unless it is identified on that database as an introduced species only.
> (2) In this clause:
> **the official database** means the database of flora known as 'New South Wales Flora Online', maintained by the Royal Botanical Gardens and Domain Trust and published on the website of the Trust.[151]

The proclaimed regulation makes law's categories by transforming the categories of plant species found in the Flora Online database into law's categories. By proclaiming the *Local Land Services Regulation*, the governor imbued the entries of the Flora Online database with the force of law, pursuant to authority delegated to the executive under the principal Act.

As discussed in the introduction to this chapter, digital writing technologies are increasingly embedded in law's institutional practices. As Blanchette observes, digital writing technologies make it increasingly simple to scan, alter, copy, store and distribute law's documents, as compared to documents written with ink on paper technologies.[152] The same point, about the inherent flexibility of digital writing as compared to paper writing, is made more generally by Jay David Bolter.

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[149] Ibid s. 60B(2).
[150] Ibid s 206.
[151] *Local Land Services Regulation 2014* (NSW) reg 106.
[152] Blanchette (n 27) 2.

> Word processors do demonstrate the flexibility of electronic writing in allowing writers to copy, compare, and discard text with the touch of a few buttons. Words in the computer are ultimately embodied in the collective behaviour of billions of electrons, which fly around in the machine at unimaginable speed. Change is the rule in the computer, stability is the exception, and it is the rule of change that makes the word processor so useful.[153]

Bolter also demonstrates that, compared to ink on paper writing, digital writing has the potential to be increasingly networked. Unlike the 'static pages of the printed book, the electronic book maintains text as a fluid network of elements'.[154] Using the example of online databases of court decisions, Bolter describes electronic texts as being 'of vast proportion and complexity'.[155] When we think of digital texts such as Wikipedia, or documents written and read on digital word processors, or of writing on social media, Blanchette and Bolter's insights ring true. There are many ways in which digital writing technologies can produce written texts that are qualitatively different from their printed counterparts: fluid, networked, texts that tend to blur a binary division between author and reader.[156] In areas of legal doctrine and practice such as evidence law, digital writing technologies do disrupt, causing change to existing rules and established ways of doing. However, the proclamation's digital transition in NSW, evidenced through protected tree proclamations, demonstrates that digital writing technologies do not always lead to disruption. Digital writing, as a jurisdictional technique of category-making, continue to enact the governor's authority to make law's categories. Whether writing a proclamation for publication on a paper gazette or as a PDF document available for download from an official government website, the governors of New South Wales continue to fabricate law's categories of tree protection by writing, and particularly by writing proclamations that carry an element of public notification, of announcement to the world-at-large.

In particular, New South Wales governors continue to make law's categories through institutional practices of writing, meaning established ways of doing things that are repeated over and over. Adapted here, changed there, the governors' institutional writing practices are sustained and modified through the day-to-day activities of drafting

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[153] Jay David Bolter, *Writing Space: The Computer, Hypertext and the History of Writing* (Lawrence Erlbaum Associates, 1991) 5.
[154] Ibid 4–5.
[155] Ibid 6.
[156] Tiersma (n 25) 168–73.

documents on paper or word processors, of mechanical typesetting or electronic desktop publishing. In the case of the digital proclamation, one such practice is the use of the *.pdf file format to publish government gazettes via government website. As Lisa Gitelman observes, reading a Portable Document File (PDF) is like 'looking at an image and/or a text, a text that is somehow also an image of itself'.[157] Indeed, the PDF file format was designed to facilitate the digital sharing of digital documents destined for printing onto paper and they replicate the 'feel' of the printed page on the electronic screen.[158] Unlike digital documents written in *.doc or *.txt format, PDFs generally cannot be edited by the reader and 'look as if they work like print', mirroring the look of printed pages through images that separate the text into page-like sections, complete with page numbers etc.[159] For Gitelman, PDF documents

> variously partake of the form and fixity of print that other digital text formats frequently do not. PDFs aren't print in the absolute sense that they aren't printed onto the screen, of course, but they look like print when they are open on a PDF-reader application. Better, they look as if they work like print.[160]

It is tempting here to argue that the PDF writing technologies are here emulating qualities of print. But, following John's insights on the early history of the printed book discussed above, it is perhaps more accurate to say that the qualities (such as fixity, stability, fluidity or change) that we tend to associate with particular technologies of writing (whether paper or digital), are produced by the way in which those writing technologies are taken up and embedded in particular institutional practices. As Johns argues:

> We may consider fixity not as an inherent quality [of print] … We may adopt the principle that fixity exists only as much as it is recognized and acted upon by people – and not otherwise. The consequence of this change in perspective is that print culture itself is immediately laid open to analysis. It becomes a result of manifold representations, practices and conflicts, rather than just a monolithic cause with which we are often presented.[161]

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[157] Lisa Gitelman, *Paper Knowledge: Toward a Media History of Documents* (Duke University Press, 2014) 114.
[158] Adobe, 'What Is PDF?' (27 November 2019) <https://acrobat.adobe.com/au/en/acrobat/about-adobe-pdf.html>.
[159] Gitelman (n 157) 114.
[160] Ibid.
[161] Johns (n 35) 19–20.

This history of the protected tree proclamation reveals how, in one particular institutional context, digital writing technologies have been worked into and taken up by the governor's practices of proclamation writing. The PDF document, a particular type of digital writing technology, has been mobilised and adopted into the day-to-day practices of publishing proclamations. Similarly, and by increments, an official website of the New South Wales Government has come to replace the paper gazette as the established site for the proclamation's publication.

VI. CONCLUSION

This chapter turned to the second register of a jurisprudence of classification proposed by this thesis: how law classifies as a matter of technique. Tracing a history of protected tree proclamations in New South Wales legal history, this chapter has demonstrated that writing is a technique of category-making. By writing proclamations, the governors of New South Wales enact the authority to make law's categories. The writing of the proclamation joins the category to law and, in so doing, tells us which categories are law's categories. Once a category belongs to law, it is authorised to sort and order entities with lawful effect, such that entities that come within the category belong to that category and also to law. Techniques for enacting this second step of classification will be discussed in the next chapter; the aim of this chapter has been to demonstrate one way in which categories come to belong to law: through writing.

This history of protected tree proclamations also reveals the significance of institutional practices to inaugurating law's authority. At two crucial points in the history of the New South Wales proclamation, it was through institutional practices – established ways of doing things – that the governors adapted the technique of writing to new technologies or modes of publication. The practice of printing proclamations in a government gazette, instituted by Governor King in 1803, was not founded on a formal delegation of prerogative power to the governors. The governors at that time were not formally required to exercise their authority to administer the colony by adopting any one particular technique of rule-making. It was, rather, a pragmatic decision made by King in an attempt to increase general knowledge of the content of proclamations throughout the colony. Over time, the practice of publishing proclamations in the gazette coalesced into a formal rule of law-making in New South Wales, codified in legislation. This transition, from emergent practices to formal rules, supports the idea that institutions operate on a spectrum between informal practices and formally articulated rules. It further points to

the way that institutions cultivate 'by doing', as 6 and Richards put it (as discussed in Chapter 2). In this way, we can understand how institutional practices of writing are formed and or undone by repeatedly making proclamations in one way or another.

The Tasmania proclamation boards, which took the form of drawings, might then be thought of as an emergent practice that never became established. Like King's decision to publish proclamations in the gazette, Arthur's decision to publish a proclamation as a drawing can be understood as a decision to try to disseminate the contents of a proclamation to a particular audience in the Tasmanian colony. We know that the lieutenant-governors of Tasmania had previously issued at least two proclamations, published in writing in the *Hobart Town Courier*, stating that the rule of law should be equally applied to both Indigenous and non-Indigenous inhabitants.[162] It might be argued that the proclamation boards were an attempt to make available the content of those written proclamations to an audience that could not read in English. The practice of drawing proclamations was not repeated; proclamations by drawing never became an established practice, recognised as technique of law-making within the colony. Manderson is indeed correct to argue that the boards 'were not really proclamations'; as drawings, the proclamation boards did not conform to established practices of proclamation-making. Nevertheless, the recent history of NSW's proclamations transition to the digital reminds us that new technologies, and new forms of proclaiming, can and do become incorporated into law's techniques of category-making. In other words, there was nothing inherent in the technology of 'drawing' that precluded the boards from enacting the governor's authority. It was, rather, the failure of that technique to be taken up and repeatedly adopted into the day-to-day practices of law-making in the Tasmanian colony that meant drawing ultimately failed as a jurisdictional technique for making law's categories.

In contrast to the Tasmanian proclamation boards, the PDF file format has become an established technology of proclamation-making in New South Wales. The PDF document has become the new writing technology of the proclamation and the NSW legislation website has become the new site of the proclamation's publication. These changes, however, have not displaced writing as a technique for making law's categories. By publishing proclamations on the NSW legislation website, categories are brought into life

[162] Arthur refers to these earlier proclamations in his own proclamation of April 1828: Lieutenant Governor Arthur, 'Proclamation', *Hobart Town Courier* (Tasmania, 19 April 1828) 1.

as law's categories, authorised to sort and order entities with legal effect. In this way, the New South Wales digital proclamation continues a centuries-old common law tradition of making new laws and categories by proclaiming them; by announcing a decision of the Crown to a public audience. Once the category is established as law's category, the next step in law's classification practice is to determine which entities belong to that category, and therefore to law. As will be discussed at length in the next chapter, law's categories then offer a specific form of belonging to law, found in the shape of the category, which draws entities into lawful relations with other entities, who have also been captured by law's categories.

CHAPTER 6. TECHNIQUES OF CLASSIFICATION: SORTING TREES BY NAMING

I. INTRODUCTION

While the last chapter considered how *categories* come to belong to law, this chapter considers how *entities* come to belong to law's categories. If classification is understood as a practice comprising the two activities of making categories and sorting entities, this chapter focuses on the second activity. Once a category has come to belong to law, how are entities found to come within a category, to properly belong to one of law's categories and so to law? This is a matter of sorting – the systematic arrangement of entities into groups according to an established pattern – that lies at the heart of classification. As explained in Chapter 2, classification is treated, throughout this thesis, as a productive and institutional practice, rather than a passive act that simply reflect or reproduces a pre-existent order of things. One way to address law's naming practices would be through post-structuralist conceptual frameworks concerned with language, interpretation and meaning.[1] The focus of this chapter, however, is on understanding how naming, as a legal technique and institutional practice, establishes a relation of belonging between category and entity (discussed further below).

The institutional focus of this chapter is on the courts. As the pre-eminent institution of common law authority, the courts are a particularly important institution for understanding law's jurisdictional practices, including classification.[2] When questions or disputes arise about whether a particular entity belongs a particular category, the authority to resolve that question generally rests with the courts. The courts provide the institutional site from which law speaks and relations of belonging to law are pronounced and affirmed. [3]

[1] There is a wealth of scholarship in this area. For an incisive introduction, see Margaret Davies, *Asking the Law Question* (Lawbook, 3rd ed, 2008) esp Ch 8 Postmodernism and Deconstruction. For exemplary works, see eg: Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* (Duke University Press, 1989); Peter Goodrich, *Languages of Law: From Logic of Memory to Nomadic Masks* (Weidenfeld and Nicolson, 1990); Peter Fitzpatrick, 'The Abstracts and Brief Chronicles of Time' in Peter Fitzpatrick (ed) *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (Pluto, 1991).
[2] Dorsett and McVeigh, *Jurisdiction* (n 1) 14.
[3] Shaunnagh Dorsett, *Juridical Encounters* (Auckland University Press, 2017) 280.

This chapter extends Dorsett and McVeigh's argument that naming is a technique of jurisdiction. As they write, 'we identify legal relations by giving them names', thereby designating that relation as one that belongs to law in a particular form.[4] The activity of naming is here understood as the practice of giving something or someone a name. One of the aims of this chapter is contribute to this jurisdictional understanding of naming as an active and productive practice. To name a tree as 'timber', for example, does not passively reflect inherent and self-evident qualities of that particular tree. Rather, by naming a tree as 'timber', relationships of belonging between entity and category, are actively produced by institutional practices of classification. This chapter builds on Dorsett and McVeigh's insights by showing how the courts name entities in accordance with an established practice. It does so in order to consider whether, at the level of technique, the naming practises associated with different kinds of categories – old and new, sourced in common law and in statute – are different or similar. I argue that for both old and new categories, whether sourced in the common law or in statute, the courts adopt similar naming practices: they name entities by first looking to law's definition of the category and then to the evidence adduced by the parties. Based on the definition and the evidence, the courts then name (or decline to name, as the case may be) the entity as coming within law's category. Once named, the entity comes to belong to law's category, and so to law.

Understanding naming as a technique of classification is important because different naming practices produce different qualities of belonging to law. Here, I draw on Peter Rush's insight that category definitions shape the way in which particular entities come to belong to law (discussed further below).[5] In other words, changing a category's definition can result in changes to the way in which entities are named as belonging to the category. Overall, the chapter aims to build on the existing jurisprudence of jurisdiction literature on naming in order to demonstrate the value of holding apart, for the purposes of argument, three different elements involved in the naming process: the category, its definition, and the entity being named. Such an approach allows the jurisprudence of classification to slow down the move between entity and category in order to consider the contribution of law's naming practices to the quality of lawful relations produced by law's categories. This chapter explores these questions through an

[4] Dorsett and McVeigh (n 2) 58.
[5] Peter D Rush, 'Jurisdictions of Sexual Assault: Reforming the Texts and Testimony of Rape in Australia' (2011) 19 *Feminist Legal Studies* 47.

account of the sorting techniques adopted by the NSW courts in relation to two different tree protection categories: timber and native vegetation.

Law's categories of 'timber' and 'native vegetation' were chosen as examples for this chapter for a number of reasons. First and foremost, both are categories of tree protection. One way in which 'timber' provided lawful protection for trees, as discussed in Chapter 3, was through timber trespass cases brought before the colonial courts. A second way, as considered in Chapter 4, was through Crown reservations of timber on freehold land grants made by the early governors. This chapter considers a third example, in which landlords resorted to the courts in attempts to prevent their tenants from cutting down trees on the leased land. Law's category of 'native vegetation' is also a category of lawful tree protection.[6] As discussed in Chapter 5, 'native plants' appeared as a category of lawful tree protection in the *Wild Flowers and Native Plants Act 1927* (NSW).[7] This chapter, however, focuses on native vegetation as a category of lawful tree protection in contemporary NSW environmental law, pursuant to the *Native Vegetation Act 2003* (NSW).[8] The Act created a summary offence of clearing of native vegetation, which, broadly, applied to trees growing in rural NSW.[9] Although this legislation was recently repealed, no prosecutions of illegal clearing pursuant to NSW's current native vegetation laws have yet been heard by the NSW courts.[10] The cases considered in this chapter are the most recent decisions in which NSW courts have had to determine whether particular entities (cleared trees) belonged to law's category of native vegetation.

Second, a comparison between the sorting techniques associated with the two categories of native vegetation and timber is useful because the two categories are different. The

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[6] New South Wales previous native vegetation laws, first introduced in 1995 and now repealed, are found in: *State Environmental Planning Policy No. 46 – Protection and Management of Native Vegetation 1995* (NSW); *Native Vegetation Conservation Act 1997* (NSW); *Native Vegetation Act 2003* (NSW).

[7] *Wild Flowers and Native Plants Protection Act 1927* (NSW) s 2.

[8] The *Native Vegetation Act* 2003 (NSW) replaced the earlier *Native Vegetation Conservation Act* 1997 (NSW), which, in turn, replaced *State Environment and Planning Policy 46 – Native Vegetation*. For important analysis regarding this regulatory history, see David Farrier, 'Regulation of Rural Land Use: Coersion or Consensus?' (1990) 2(1) *Current Issues in Criminal Justice* 95; Robyn Bartel, 'Compliance and Complicity: An Assessment of the Success of Land Clearance Legislation in New South Wales' (2003) 20(2) *Environment and Planning Law Journal* 116; Robyn Bartel and Nicole Graham, 'Property and Place Attachment: A Legal Geographical Analysis of Biodiversity Law Reform in New South Wales' (2016) 54(3) *Geographical Research* 267.

[9] *Native Vegetation Act* (n 6) s 12(2); Clearing of native vegetation in accordance with a development consent granted under the Act, or an approved property vegetation plan, was not an offence: ibid s 12(1). Pursuant to s 5, certain parts of NSW were excluded from the operation of the Act, including urban areas.

[10] Audit Office of New South Wales, *Managing Native Vegetation* (Auditor-General's Performance Audit, 2019) 2. NSW's current native vegetation protection laws were enacted in 2016 by amendments made to the *Local Land Services Act 2013* (NSW): see *Local Land Services Amendment Act 2016* (NSW).

category of timber is older, sourced in the common law and dating back to medieval England.[11] In contrast, the category of native vegetation is sourced in contemporary environmental legislation. Through the following analysis, naming emerges as the technique adopted by the courts to determine whether the disputed trees belonged to the relevant category. This is so regardless of whether the category was sourced in modern statute or in the common law. However, the naming practices associated with each category are found to produce different qualities of belonging to law. Naming trees as timber is found to produce a quality of belonging to law based on lay evidence of customary building practices, while naming trees as native vegetation is found to produce a quality of belonging to law based on expert evidence of botanical taxonomy. As examples of the how the courts, in practice, sort entities into law's categories, the cases that follow demonstrate how a jurisprudence of classification contributes to a jurisprudential understanding of classification as a technique of jurisdiction. Relations of belonging to law are found to be produced by institutional practices of naming that tell us what belongs to law and the quality of that belonging.

The chapter proceeds as follows. It begins with a discussion of naming as an institutional practice and technique of jurisdiction. Next, the chapter considers, as a matter of technique, how the NSW courts have sorted trees into the category of timber, presented as a doctrinal history of 'timber' in the NSW common law. These cases reveal how the courts have sorted trees into the category of 'timber' through the institutional practice of naming. The quality of belonging to law produced by the naming trees as timber is then discussed. Next, the chapter considers how the courts sort trees into the category of 'native vegetation' in contemporary cases of illegal clearing of native vegetation. These cases also reveal naming as the technique that sorts entities into law's categories. By giving the trees a species name, courts establish relations of belonging between the cleared trees and law's category of native vegetation. The quality of belonging to law produced by naming trees as 'native vegetation' is then discussed. The chapter concludes by reiterating the productive quality of naming as an institutional practice and technique of classification, demonstrating the value of a jurisprudence of classification that considers how law sorts entities by establishing relations of belonging to its categories.

[11] William Holdsworth, *A History of English Law*, vol 7 (Methuen & Co, 1973) 275–6.

II. NAMING AS A SORTING TECHNIQUE

In this chapter, I argue that one way that entities come to belong to law's categories is through the practice of naming. A name is defined here as 'any word or phrase' that refers to, or identifies, an individual.[12] While names identify entities, it is important to note that not all names identify entities as belonging to a category. Proper names, such as those for people and places – for example, 'Rowena', or 'Pittsburgh' – are names that identify an entity without joining that entity to a category.[13] An entity named Rowena may belong, for example to categories of human, or cat, or doll, although we might presume that the name refers to an entity that belongs to the category of female. Similarly, the name Pittsburgh does not necessary tell us to which particular category an entity might belong, although we may presume that the name refers to a place. It may identify a particular city, or a particular pet, etc. In other words, the act of parents naming their child, or an owner naming their cat, is a different kind of naming to that of a court naming a particular entity as belonging to the law's category of contract or timber. 'In naming, the thing is categorised'.[14] However, as anthropologist Mary Douglas points out, naming sits 'on the surface' of a classificatory process. It signals the point at which an entity becomes 'classified', yet naming is only element in of classification:

> Naming is only one set of inputs: it is on the surface of the classification process. The interaction … goes round, from people making institutions, to institutions making classifications, to classifications entailing actions, to actions calling for names, and to people and other living creatures responding to the naming, positively and negatively.[15]

Naming, then, marks an important moment in the practices of classification, but it is not the only moment, nor an endpoint. Rather, as Douglas explains, the action of naming entities brings together an institution's entire classificatory process: of making categories, deploying categories and the effects of classification. Following Douglas, the jurisprudence of classification proposed by this thesis attends to naming as but one register of classification, which also attends to the sources of the authority to classify (Chapter 3), who can classify (Chapter 4) and how categories come to be law's categories

[12] Ingrid Piller and Siobhan Chapman, 'Names' in Siobhan Chapman and Christopher Routledge (eds), *Key Ideas in Linguistics and Philosophy of Language* (Edinburgh University Press, 2009) 142, 142.
[13] For more on proper names, see Saul Kripke, *Naming and Necessity* (Basil Blackwell, 1980).
[14] Roger Brown, 'How Shall A Thing Be Called?' [1958] (1) *Psychological Review* 14, 18.
[15] Mary Douglas, *How Institutions Think* (Routledge & Kegan Paul, 1987) 101–2.

(Chapter 5). The focus of this chapter is on naming as a particularly important moment in the classificatory cycle: the moment at which an entity is named as belonging to a particular one of law's categories and so comes to belong to law.

Naming, however, is only one technique for sorting entities and thereby establishing relations of belonging to law's categories. An example from NSW's legal history of tree protection illustrates this point. As discussed in Chapter 3, in 1795 Governor Hunter proclaimed that timber trees growing on the banks of the Hawkesbury were to be protected from being cleared. The proclamation also stated that trees which belonged to law's category of timber would be identified by a physical mark. Hunter proclaimed that the

> King's Mark would be forthwith put on all such timber, after which, any person or persons offending against this Order will be prosecuted.[16]

The King's Mark, or broad arrow, constituted of a series of cuts made by an axe into the trunk of the tree: an accepted practice used by the Royal Navy to identify trees as designated for naval use.[17] The use of the King's Mark provides one example of the different ways in which entities can be sorted and found to come within law's categories. Importantly, whether sorted by naming or by physical mark, belonging to law's categories is not self-evident but, instead, is the product of particular institutional practices.[18] In this example, Hunter had decided to sort trees into law's category of timber through the branding the trees with a distinctive visual mark. In other words, it was the practice of branding the trees that sorted the trees, by establishing a relationship of belonging between particular situated trees (entities) and law's protected tree category (timber). In the examples considered in this chapter however, the courts do not sort trees through branding but, rather, by giving the trees a name.

To make this argument, I draw on Dorsett and McVeigh's understanding of naming as a technique of jurisdiction.[19] It will be remembered from Chapter 2 that a technique of jurisdiction is a practice or a strategy that is designed to, or is capable of, establishing

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[16] Governor Hunter, 'December 8, 1795' *New South Wales General Standing Orders: Selected from the General Orders Issued by Former Governors, From the 16th of February 1791 to the 6th of December 1800, Also General Orders Issued by Governor King from the 28th of September 1800 to the 30th of September 1802* (Government Press, 1802) 2.
[17] EH Fairbrother, 'The Broad Arrow' (1914) II *Notes and Queries* 481, 481.
[18] Reflecting the choice not to adopt a classical theory of classification as explained in Chapter 2.
[19] Dorsett and McVeigh (n 2) 58.

relations of belonging to law.[20] By giving relations names, such as 'native title', 'marriage' or 'contract', those relations are identified as lawful relations and are brought within the realm of law's authority. Additionally, as Peter Goodrich observes, law's names do not refer to a 'thing' outside the law, but rather to a construction within it.[21] In other words, naming, as a jurisdictional technique, establishes relations of belonging between particular entities and particular categories, categories which themselves also belong to law (as discussed in Chapter 5).

The chapter investigates in particular the relationship between institutional practices of naming and category definitions. It does so by building on Dorsett and McVeigh's argument that particular definitions of law's categories have an operational quality that goes beyond mere description of reflection of a pre-existent entity. Dorsett and McVeigh make this argument through an analysis of s 223 of the *Native Title Act 1993* (Cth), in which they demonstrate how the courts, through 'the continual tightening of the interpretation' of the definition of native title, have crafted a 'fragmented' or highly individuated view of Indigenous law.[22] They show how the definition of native title determines what can count as native title rights recognised by the common law. As a result, the definition has become a pivotal 'point of engagement' between the common law and Indigenous laws in Australia.[23] In this way, the statutory definition of native title, and in the way it has been interpreted and applied by the courts to make native title determinations, shapes the quality of the meeting between these systems of laws. In a different context, Peter Rush has also demonstrated how law's category definitions shape qualities of belonging to law. In an article that engages with questions about the adequacy of the laws of sexual assault in Australia, Rush offers a jurisdictional account of the definition of the crime of rape.[24] Rush's argument is that existing definitions of rape join the event of a sexual assault to law as a crime of *circumstance,* based on the issue of consent.[25] He proposes an alternative definition, which joins the event of a sexual assault to law as a crime of *consequence.* He does this by changing the elements of the offence contained within the definition, to thereby drawing out the physical acts of penetration,

[20] Ibid 14.
[21] Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (Weidenfeld & Nicolson, 1990) 280–1.
[22] Dorsett and McVeigh, 'Conduct of Laws: Native Title, Responsibility and Some Limits of Jurisdictional Thinking' (2012) 36 *Melbourne University Law Review* 470, 480–1.
[23] Ibid 472.
[24] Rush (n 5).
[25] Ibid 67.

injury to the victim, and intent of the perpetrator.[26] By proposing a new definition of law's category, Rush demonstrates how a particular event can come to belong to law in different ways. Although Rush and Dorsett and McVeigh address different areas of substantive law, for present purposes, common to both is the way in which the definition of law's categories is recognised as a productive and jurisdictional device that shapes the quality of lawful relations. This chapter builds on and extends this scholarship, suggesting that definitions of law's categories shape law's naming practices associated with that category: it is through this shaping that different qualities of belonging to law's categories are produced.

III. NAMING TREES AS TIMBER

The New South Wales Supreme Court's most recent decision to name trees as belonging to law's category of timber is found in the case of *Crocombe v Pine Forests of Australia*.[27] The facts of the case were these. In the early 1980s, two hopeful investors purchased small shares, as tenants in common, in land located near Oberon in NSW. The land was to be managed as a pine plantation by Ausforest Ltd ('Ausforest'), which also held a majority interest in the land. Ausforest's interest in the land was also subject to registered mortgage, in favour of Arrow Custodians Pty Ltd ('Arrow'). By 2005, the investor plaintiffs were unhappy. They had received a total return of $243 on their 20-year investment and Ausforest had gone into receivership. The shareholders applied to the court to have the scheme wound up, the land sold and for payment of their share in the sale proceeds.[28] This, in turn, raised questions about the respective parties' rights to the pine trees growing on the land. The court was asked whether Ausforest and the plaintiffs were entitled to cut down and sell the existing pine trees prior to sale of the land, or whether this would unlawfully diminish Arrow's security as mortgagee. To answer this question, the court turned to the common law doctrine of waste. The court held that until a mortgagee entered into possession of the mortgaged land, the mortgagor may use the land as he or she wishes, so long as he or she does not commit waste.[29] The court also held that to fell or to cut down 'timber' was to commit waste.[30] In other words, the court held that the question about the parties' respective rights to the trees was to be determined

[26] Ibid 28.
[27] *Crocombe v Pine Forests of Australia* (2005) 219 ALR 692.
[28] Ibid.
[29] Ibid 701.
[30] Ibid.

by whether or not the pine trees belonged to law's category of timber. If the pine trees did belong to law's category of timber, Ausforest and the plaintiffs would be prevented from cutting them down: to do so was to commit waste and diminish Arrow's interest in the land as mortgagee. If the pine trees did not belong to law's category of timber, Ausforest was entitled to cut them down.

This part of the chapter considers the doctrinal history of the common law definition of timber in New South Wales, which informed the court's decision in *Crocombe*. This doctrinal history provides a particularly useful context for thinking about the relationship between law's categories, category definitions and how the courts name entities as belonging to law's categories. In particular, this doctrinal history tells us two things. The first is that the courts sort entities into law's categories through an established practice of naming. That establishes practice involves a number of interrelated steps, including determining that the relevant category belongs to law (by identifying the sources of its authority); considering law's definition of that category; and then turning to the evidence adduced by the parties. These naming practices reveal that entities do not belong to law's categories self-evidently. Rather, belonging is established through an established practice of naming that is repeated throughout the doctrinal history of law's category of 'timber' in NSW. Second, this doctrinal history demonstrates how a category's definition shapes the naming practices associated with that category. In this way, we can understand different naming practices as producing different qualities of belonging to law.

As discussed in Chapters 3 and 4, timber as a common law category dates back to at least twelfth-century England. In this chapter, the focus is on timber as defined in common law actions of waste, as compared to law's categories of timber sourced in delegated Crown prerogative (Chapter 4) or timber trespass cases (Chapter 3). The doctrine of waste, like its concomitant category of timber, emerged in common law rules about rights to land during England's medieval and feudal history.[31] To avoid delving too far into the complexity of England's feudal land laws, for present purposes the relevant point is that the common law allowed (and still allows) for the separation of rights of possession from underlying title to land. Forms of landholding that separated land possession from land ownership were integral to the functioning of England's feudal society. Land was held in complex webs of reciprocal obligations owned by tenants to their lords and barons, and

[31] Frederick Pollock and Frederic Maitland, *The History of English Law*, vol 2 (Cambridge University Press, 2nd ed, 1968) 9.

by lords and barons to the monarch.[32] For example, a common form of landholding in this feudal system was the life estate.[33] A person holding a life estate, called a tenant for life, generally represented that land for all purposes of law and litigation.[34] Yet they could not alienate that land freely nor pass it to their heirs; on the death of a life tenant, the land reverted back to the person (the relevant lord or baron) holding underlying title.[35] It was in this context that the common law doctrine of waste arose. The basic principle is that someone with the current right to possess land should not be able to permanently alter, or fundamentally change, the land.[36] To commit waste is to do 'lasting damage' to the freehold estate or inheritance.[37]

Contemporary recourse to the doctrine of waste is rare for two reasons. First, many of the forms of land holding that gave rise to obligations under the doctrine of waste are themselves now obsolete.[38] Second, the rise of comprehensive lease agreements setting out the obligations of landlord and tenant means that lease disputes are dealt with according to the terms of the lease rather than by reference to the 'default' rules of the doctrine of waste.[39] There are still, however, instances where there is disagreement about the lawful actions of someone with a temporally limited possessory interest in land, such as in the case of *Crocombe*. This chapter aims to show that, despite the doctrine's relative unimportance in contemporary property and environmental law practice, its category of timber may yet offer important insights into the common law's own classificatory practices.

One of the earliest forms of waste recognised by the common law courts was the act of cutting timber.[40] As articulated by Blackstone:

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[32] J. H. Baker, *An Introduction to English Legal History* (Butterworths, 1990) 194–5.
[33] William Holdsworth, *A History of English Law*, vol 3 (Methuen & Co, 5th ed, 1942) 120.
[34] Ibid 129.
[35] Ibid 120.
[36] Peter Butt, *Land Law* (Thomson Reuters, 6th ed, 2010) 154.
[37] William Blackstone, *Commentaries on the Laws of England: Book the Second* (Clarendon Press, 1766) 281.
[38] Such as tenant-in-dower, tenant-by-courtesy and guardian-in-chivalry. Other limited freehold estates, such as life tenancies, occur infrequently in Australia. Life tenancies arise when land is demised to someone 'for life', and to someone else upon the death of that person.
[39] R Epstein, 'Past and Future: The Temporal Dimension in the Law of Property' (1986) 64 *Washington University Law Quarterly* 667, 708; A Bradbrook, 'The Repair Obligations of Landlords and Tenants: A Plea for Reform' (1975) 12 *University of Western Australia Law Review* 437.
[40] William Holdsworth, *A History of English Law*, vol 2 (Methuen & Co, 4th ed, 1936) 276.

> Timber is also part of the inheritance … and to cut down such trees, or top them, or do any other act whereby the timber may decay, is waste.[41]

However, the restriction on cutting timber did not prevent the person in possession from cutting other types of trees or vegetation, such as underwood.[42] There were also exceptions to the general rule. For example, tenants were entitled to *estovers*, meaning wood taken to maintain existing structures on the land (such as houses or fences).[43] In addition, it was not waste to cut timber grown as part of a timber estate. Timber estates comprised land that was 'cultivated merely for the produce of saleable timber, and where the timber is cut periodically'. [44] In these cases it was not considered waste to cut timber because the trees were considered to be part of the profits of land, not part of the inheritance.

Under the English common law relating to waste, timber is given a very particular meaning. It refers to only three types of tree – oak, ash and elm – which are considered timber trees throughout all of England.[45] However, in places where oak, ash and elm are scarce, other kinds of tree can also be deemed timber if they are, by local custom, used for building.[46] For example, by local custom beech trees are recognised by the common law as timber in Buckinghamshire, Hampshire, Gloucestershire, Surrey and Bedfordshire, but not in Oxfordshire.[47] Relevantly, local custom here refers specifically to a particular source of common law rules. As Dorsett explains, by the seventeenth century the unwritten law of England had been ordered into general custom (the common law throughout England) and particular, local customs, whose authority and application were confined to particular locations.[48] To prove the existence of a local custom meant providing evidence of the custom stretching back to 'time immemorial', or time out of mind. Overall, however, the existence of such a local custom was determined as a question of fact by the common law courts.[49] According to the common law definition,

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[41] Blackstone (n 37) 281.
[42] Charles Mynors, *The Law of Trees, Forests and Hedges* (Sweet & Maxwell, 2nd ed, 2011) 42–3.
[43] Ibid 48.
[44] *Honywood v Honywood* [1874] LR 18 Eq 306, 309–10.
[45] *Systematic Arrangement of Lord Coke's First Institutes of the Laws of England on the Plan of Sir Matthew Hale's Analysis* (Alexander Towar, 1836) 188.
[46] Ibid 188–9.
[47] Mynors (n 42) 42.
[48] Shaunnagh Dorsett, 'Since Time Immemorial: A Story of Common Law Jurisdiction, Native Title and the Case of Tanistry' (2002) 26 *Melbourne University Law Review* 32, 39.
[49] Ibid 39–40.

oak, ash and elm trees could properly be named as timber, as could other kinds of trees if there was evidence of local customs that commonly used such trees for building.[50]

The earliest waste case between landlord and tenant over the cutting of timber in NSW was heard by the Supreme Court in 1856.[51] In this case a landlord plaintiff, Moore, sought an injunction to prevent his tenant, Devine, 'from cutting down and felling timber or in anywise [sic] selling, disposing of or injuring the same on the land leased to him by the plaintiff'.[52] The plaintiff had leased a one-hundred-acre farm to the defendant by parole agreement. Conflicting evidence was put before the court as to the terms of the lease that concerned the tenant's rights to the trees. The court held that unless the lease expressly granted a tenant the right to cut down timber, it would be waste for a tenant to cut timber:

> [Y]et such a lease does not confer a right to sell and dispose of the timber on the land: for the tenant to do so is to commit waste … If a tenant from year to year can cut timber it must be by virtue of a grant, or at all events by a license in writing which the defendant has not here. I refuse the motion to dissolve this injunction.[53]

Unfortunately (for present purposes), however, the report of this case in the *Sydney Morning Herald* contains no discussion of law's definition of timber, nor of the evidence adduced by the parties about the disputed trees. Instead, the reported decision rests on the court having found that because the tenant had no written agreement to cut timber, he had no right to cut down the trees in question. One explanation is that the trees were regarded by the court as self-evidently belonging to the category of timber. However, the lack of discussion on the question of timber is perhaps better understood as a reflection of the way in which the case was put before the court (this point is discussed further below, in relation to native vegetation). In other words, the dispute in this case was framed as one over whether or not the tenants had the right to cut timber, not whether the trees on the land properly belonged to the category.

While the NSW Supreme Court drew on the English doctrine of waste to decide the timber case above, the Victorian Supreme court expressed some ambivalence about whether the doctrine applied in the colony. For example, in a similar dispute over timber between landlord and tenant heard in 1856 by the Victorian Supreme Court, Molesworth

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[50] Blackstone (n 37) 281.
[51] 'Moore v Devine', *Sydney Morning Herald* (NSW: 1842–1954, 20 July 1854) 2.
[52] Ibid.
[53] Ibid 2.

J suggested that the English laws of landlord and tenant may not necessarily apply in Victoria, as

> there is a very great difference in the state of things in Victoria and England, timber here being superabundant and not of value, as at home.[54]

It was certainly open to the courts to question the applicability of the doctrine of waste to the colonies. As noted in Chapter 3, under the common law rules regarding the acquisition of new territory by 'settlement', the 'colonists carr[ied] with them only so much of the English law as [was] applicable to their own situation and the condition of the infant colony'.[55] However, in this case Molesworth J avoided the general question of whether the doctrine of waste applied by treating the dispute as one about the terms of a specific lease agreement.[56] In this case, the plaintiff had leased 170 acres to the defendant. The plaintiff complained that the defendant had cut and sold a large quantity of valuable timber on the leased land, contrary to the terms of the lease. However, the only evidence as to the terms of the lease was oral evidence adduced by the plaintiff, contested by the defendant.

Because of the scarcity of evidence pertaining to the details of the lease agreement, the court did not strictly resolve the dispute by sorting the fallen trees into law's category of timber. Instead, the court determined the meaning of the terms of the lease by looking to evidence of the 'system of cultivation usual in the country at that time'.[57] Molesworth J concluded that the defendant had 'treated the farm in the usual manner, and followed the system of cultivation usual in the country at that time, at that distance from Melbourne, and adopted on adjoining farms'.[58] As a result, the court held that the tenant was entitled to cut down the trees. Although Molesworth J stated that he did not apply the doctrine of waste, it can be argued that he nevertheless resolved the dispute by relying on evidence of customary use of trees in a particular location, a naming practices associated with common law timber.

In the later case of *Bruce v Atkins*, Molesworth J decided that the English rules of waste *should* apply to landlord/tenant relationships in the colony. In this case, he made his

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[54] *Brooks v Bedford* (1856) 1 VLT 101, 102.
[55] William Blackstone, *Commentaries on the Laws of England: In Four Books*, vol I (Harper & Brothers Publishers, 21st ed, 1854) 107.
[56] *Brooks v Bedford* (n 54) 102.
[57] Ibid.
[58] Ibid.

decision by first referring to the English rules concerning waste, timber and landlord/tenant relationships, stating that 'in the mother country … a tenant would have a right to cut down and remove *all wood which did not come under the denomination of timber*, but no right to cut down anything that did' [my emphasis].[59] Molesworth J then undertook to determine whether the trees in the instant did 'come under the denomination of timber':

> The expression 'timber' is used very vaguely in the affidavits, but I think I am to construe it according to its strict meaning as including all trees used for building purposes in the place where they are growing.[60]

This strict definition of timber came from the English common law, as evident from Molesworth's statement that

> [s]ome trees are timber in England everywhere; some are timber nowhere; others are of a mixed nature, according to custom of the locality, being timber in some parts and not timber in other party, of the country.[61]

In conclusion, Molesworth held that unless otherwise plainly stated by the parties, the word timber in a lease should be constructed by the courts to mean 'wood which is used for building purposes'.[62] Trees whose wood was used for other kinds of construction, for fencing or for shelters for animals for example, did not properly belong to law's category of timber. Molesworth J next turned to the evidence adduced by the parties and found that there was only one kind of tree growing on the land that was commonly used for building purposes: 'stringybark trees'. Named as stringybark trees, and based on evidence that stringybark trees were useful for building purposes, the disputed trees had come to belong to law's category of timber. Accordingly, Molesworth J granted an injunction to restrain the defendants from cutting down 'stringybark trees only'. In so doing, Molesworth J relied upon and applied the common law definition of timber to the emerging body of common law in colonial Victoria.

However, in 1886 the Victorian Supreme Court decided that the English definition of timber had no place in Victorian law. The case of *Campbell v Kerr* concerned an action for breach of a leasehold covenant. The tenant had covenanted not to 'cut down, destroy

[59] *Bruce v Atkins* (1861) 1 W&W (Eq) 141, 144.
[60] Ibid.
[61] Ibid.
[62] Ibid.

or injure, or remove, or use, any of the live or dead timber growing or being upon the land, except dead timber for firewood to be consumed upon the said land'.[63] The plaintiff argued that timber in the lease meant 'trees generally'. To decide upon the legal definition of the category, the court in *Campbell v Kerr* looked to the authority of previous decisions. Specifically it considered Molesworth J's definition of timber in *Bruce v Atkinson*, as discussed above. However, the court held that, due to the passing of recent statutes in the colony that had defined timber as trees generally, the legal definition of timber had changed.[64] In addition, Williams J held that the definition of timber pursuant to the English common law could not apply in Victoria, because there were no oak, ash or elm trees in the colony:

> [A]t the time the common law was introduced here, that rule could not apply, because we had not in this country the oak, the ash, or the elm trees; and 'timber' according to that common law, was restricted, in its legal sense, to these three kinds of trees, unless by particular custom the word is extended to other trees. We have no such custom here.[65]

In this case, the court implicitly treated local custom as meaning 'immemorial custom', meaning, broadly, a local custom that the common law has recognised as dating back to 'time out of mind'.[66] Such immemorial custom was clearly an impossibility for British landholders in the colony of Victoria. Instead, the court modified the common law's definition of timber to mean tree generally. Despite the court making a substantive change to the category's definition, at the level of technique the court still sorted the trees through an institutional practice of naming. The court first determined the relevant definition of the category, and then looked to the evidence adduced by the parties. Based on the definition and the evidence, the court named the disputed trees as timber, and thereby established relations of belonging between the disputed trees and law's protected tree category.

In the case of *Chapman v Strawbridge*, heard before the South Australian Supreme Court in 1910, Way CJ instead chose to apply the English common law definition.[67] The dispute in *Chapman v Strawbridge* concerned mallee growing on Kangaroo Island. Mallee is a type of eucalypt with a relatively low growth habit which springs up from the ground on multiple

[63] *Campbell v Kerr* (1886) 12 VLR 384.
[64] Ibid 388.
[65] Ibid 389.
[66] Dorsett (n 48) 40.
[67] *Chapman v Strawbridge* [1910] SALR 118.

stems, rather than from a single trunk.[68] In this case, the mallee grew on land held by the plaintiff under Crown lease. Pursuant to the lease conditions, rights to 'timber' were reserved to the Crown, but the plaintiff was granted permission to cut timber for the *bona fide* purpose of clearing the land for cultivation or for the building of improvements.[69] The plaintiff sought an injunction to restrain his sub-tenant, the defendant, from cutting mallee.[70] The court found that, under the terms of the Crown lease, the plaintiff held an exclusive right to cut timber. If the mallee belonged to law's category of timber, the plaintiff would succeed in his application for an injunction. If the mallee did not belong to law's category of timber, the plaintiff had no legal grounds for restraining the defendant, who would then be free to cut and sell the mallee as he saw fit.[71]

Way CJ sorted the trees according to the same institutional practice of naming adopted by courts in the cases discussed above. First, he established law's definition of timber.[72] Way CJ relied on Blackstone for an authoritative definition of common law timber:

> This definition is thus re-stated by Blackstone: – 'Timber also is part of the inheritance. Such are oak, ash and elm, in all places; and in some particular countries, by local custom, where other trees are generally used for building, they are for that reason considered as timber'.[73]

While the Victorian Supreme Court found that no such 'local custom' existed in Victoria, Way CJ found that, in cases concerning agricultural practices, 'local custom' need not mean immemorial custom. Rather, modern usage was sufficient:

> [W]e brought with us to Australia so much of the law of England as to real property as was appropriate to the condition of a newly settled country, and we also brought with us the English language and its legal terminology. Trees other than oak, elm and ash are accounted timber in various parts of England, not necessarily because of ancient custom, but because of the reason underlying local usage, namely, that they are fitted for and used in constructing the habitations of man.[74]

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[68] James C Noble and Richard G. Kimber, 'On the Entho-Ecology of Mallee Root-Water' (1997) 21 *Aboriginal History* 170.
[69] *Chapman v Strawbridge* (n 67) 120.
[70] Ibid 121.
[71] The court found that the relevant provision of the Crown lease which permitted the tenant to cut timber for particular purposes had the effect of granting the plaintiff an interest in those timber trees, subject to the Crown's right to enter and take timber as it required: ibid 123.
[72] Ibid 124–30.
[73] Ibid 125.
[74] Ibid 129–30.

On the point that local usage was sufficient to demonstrate local custom, Way CJ relied on the English case of *Dashwood v Magniac*, in which the court had recognised a tenant's right to pick up flint turned over in the course of ploughing the land, a practice which had sprung up over the past thirty to forty years, as a right deriving from local custom.[75] Accordingly, Way CJ stated:

> I cannot see why Australian trees, fitted and used for building purposes should not be regarded as timber on Kangaroo Island in the same way as birch trees in Yorkshire and Buckingham, or why the word 'timber' occurring in an Act of Parliament, or in a lease, should not here have the same meaning in Australia as England. [76]

Way CJ therefore adopted the English common law definition of timber, meaning trees whose wood is suitable for building based on evidence of local building customs.

Next, Way CJ looked to the evidence adduced by the parties as to whether mallee was commonly 'converted to the building for the habitation of man or the like'.[77] Although there was evidence that mallee was used for fencing, and also for building shelters for animals, there was insufficient evidence before the court to call the mallee timber. Accordingly, the mallee of Kangaroo Island was not named by the court as timber, and the plaintiff, having no interest in it, could not restrain his sub-tenant from cutting it down. In this part of the judgment, Way CJ also noted that the definition of timber put forward by the court in *Campbell v Kerr* would have referred the court to different kind of evidence about the disputed trees:

> If we were to adopt the Victorian definition in *Campbell v Kerr* … of timber as a tree, mallee would not be timber as neither in habit nor in height is it a tree. According to Brown's 'Forest Flora' … it invariably has more than one stem to each trunk, varying in number from 5 to 6, sometimes over 10 and 12. If this description be correct, mallee, botanically speaking, is not a tree but a shrub.[78]

This contrast between the two definitions of timber illustrates how a category's definition shapes the way in which the courts name entities as belonging to that category. Pursuant to the English definition, the court looked to evidence of customary building practices when deciding whether or not to name entities as timber. Pursuant to the Victorian

[75] *Dashwood v Magniac* (1891) 3 Ch 306, cited in *Chapman v Strawbridge* (n 67) 125–6.
[76] *Chapman v Strawbridge* (n 67) 130.
[77] Ibid 132.
[78] Ibid 131.

definition, the court would have been required to look to botanical evidence of an entity's growth height and habit when deciding whether or not to name that entity as timber. In both examples, however, the belonging of particular trees (entities) to the category was not self-evident. The disputed trees did not come to law already named as timber. Both category definitions required the courts to look at different types of evidence before reaching a decision as to whether particular entities could be named as timber.

In 1954, the South Australian Supreme Court affirmed Way CJ's definition of timber in the case of *Re Hart*.[79] In this case, pine trees had been cut and sold by the life tenant. The court found that the trees did not belong to law's category of timber.[80] To reach this decision, the court first gave the trees with a botanical name: *Pinus radiata*. It then turned to the authority of *Chapman v Strawbridge* to determine the legal definition of timber as trees 'commonly converted to building for the habitation of man of the like' in that part of the country.[81] Next, the court turned to the evidence. In this case, there was no evidence to suggest that *P. radiata* was commonly used for building. As a result:

> On the authority of *Chapman v Strawbridge*, I am bound to hold that *pinus radiata* is not 'timber' as that word is legally understood in this State, apart from any statutory definition.[82]

Having declined to name the pine trees as timber, a relationship of belonging between law's category of protected timber and the disputed trees was not established. The tenant was therefore entitled to cut the pine trees and retain the proceeds of sale. The decision in *Re: Hart* brings the doctrinal history back full circle: the next decision to consider the common law definition of timber was the NSW Supreme Court Case of *Crocombe,* as introduced above.

In *Crocombe*, the court found that the disputed trees *did* belong to law's category of timber and again it did through the established practice of naming. First, the court considered law's own definition of timber, pursuant to the common law doctrine of waste. It did so by looking to the cases of *Re: Hart* and *Chapman v Strawbridge* and affirming the definition of timber in those cases – namely, as trees that were 'commonly converted

[79] *Re Hart* [1954] SASR 1.
[80] Ibid 5.
[81] Ibid.
[82] Ibid.

to building for the habitation of man or the like'.[83] Next, the court gave the disputed trees a botanical name 'pinus radiata'.[84] Then the court looked to the evidence in the present case, too see whether pinus radiata was an introduced species of tree, grown 'for the purpose of being logged and used a structural timber'. Based on that evidence, the court named the court as timber, concluding that according to that definition the disputed trees were timber:

> Applying it [the definition of timber] to the evidence in this case, the purpose of producing pinus radiata was to have millable timber for structural building. Under the test that would be timber.[85]

That the effect of naming the trees as timber was to draw the trees into a lawful relation of protection vis-à-vis the person in possession of land was then affirmed by the court:

> If *trees are timber strictly so called,* then as Jessel MR said in *Honeywood v Honeywood* (1874) LR 18 Eq 306 at 309, that once a court arrives at the determination that the trees in question are timber, a person liable for waste cannot cut it down. [My emphasis][86]

By naming the disputed trees as timber, the court sorted the trees into law's category of 'timber'. The trees now belonged to the category, and to law, as timber, protected by the common law doctrine of waste that prevented the mortgagor from cutting them down. However, on the facts of the case, the court also found that the disputed trees were part of timber estate, and therefore fell into the general exception that cutting timber was waste, as noted above.[87]

These cases reveal that the common law definition of timber, as received into New South Wales, offers a particular quality of belonging to law for protected trees, shaped by the category's definition. That quality is shaped by lay evidence as to the customary use of trees growing in a particular location, rather than evidence as to, for example, whether the tree can be called a 'tree' botanically speaking, or whether it belongs to a particular species. In the case of *Re Hart*, tree found to belong to the species of pinus radiata was

[83] *Crocombe v Pine Forests of Australia* (n 27) 701–2.
[84] Ibid 702. I note here that in this case the court did not adopt botanical naming conventions for species names, in which the name is italicised and the first word in the name is capitalised.
[85] Ibid.
[86] Ibid.
[87] Ibid.

not named by the court as timber, and so the trees did not come to belong to law as protected timber. In the case of *Crocombe*, however, trees belonging to the same species category were named by the court as timber, and would have come to belong to law as protected timber had they not also come within the timber estate exception. These cases reveal that the common law has its own history and institutional practices of naming plants that has long operated separately to other to other institutions, such as botany. The definition of timber as trees whose wood is commonly used for construction in a particular locality establishes a particular quality of belonging to law that is based on the kinds of trees that grow in a particular area and on customary use concerning those trees. Although the doctrine of waste itself may be now rarely called upon to resolve disputes about trees, a jurisprudence of classification directs our attention to the classificatory resources, in particular the naming practices shaped by evidence of local custom, offered by the law's category of timber, an old category sourced in the common law. The next part of the chapter considers the sorting techniques adopted by the courts in relation to a newer tree protection category sourced in contemporary environmental law legislation.

IV. Naming Trees as Native Vegetation

In August 2010, the Director-General of the NSW Department of Environment, Climate Change and Water initiated criminal proceedings against the Walker Corporation ('Walker') concerning clearing of native vegetation contrary to s 12 of the *Native Vegetation Act 2003* (NSW).[88] Walker owned land near Appin and had contracted a third party to undertake clearing on the property. Walker pleaded not guilty and argued that the proceedings be dismissed on a number of grounds. Relevantly, the defence argued that the prosecution had not proved that that the cleared plants were 'native vegetation'.[89] This aspect of the defendant's argument turned on the meaning of native vegetation, as defined in s 6 of the *Native Vegetation Act 2003* (NSW). The Land and Environment Court had found the defendant guilty in the first instance and, in so doing, determined that the cleared vegetation (including trees) belonged to law's category of 'native vegetation'. Walker appealed the decision, arguing that the definition of 'native vegetation' under the Act required that the prosecution identify each specimen of cleared vegetation and to demonstrate that each specimen belonged to the category of 'native vegetation'.[90]

[88] *Director-General, Dept of Environment and Climate Change v Walker Corp Pty Ltd* [2011] NSWLEC 299.
[89] Ibid.
[90] *Walker v Director-General, Dept of Environment, Climate Change and Water* (2012) 82 NSWLR 12.

Walker's appeal was rejected and the finding of guilt upheld. As in the timber cases discussed above, the outcome in this case rested (at least in part) on whether the disputed entities (the cleared trees) belonged to the relevant category. If the trees belonged to law's category of 'native vegetation', the provisions of the *Native Vegetation Act* applied to the cleared trees. If the trees did not belong to law's category of 'native vegetation', the provisions of the Act did not apply and the clearing was not an offence. Through the following account of the sorting practices of the NSW courts in relation to prosecution for illegal clearing of native vegetation, I argue that the courts have sorted trees through institutional naming practices.

Native vegetation emerged as a general category for tree protection category in NSW in the mid-1990s.[91] These contemporary native vegetation laws have proved contentious, as evidenced by public protests against the laws and numerous public inquiries into their effectiveness[92] One argument put forward by landholders against the legislation is that it impinges on private property rights and unfairly forces land owners to bear the cost of protecting collective environmental goods.[93] As Robyn Bartel observes, a more substantive critique is that the laws are simply too blunt; the category of native vegetation, it is argued, does not adequately take into account how landholders manage the vegetation on their land according to local conditions and variation in the distribution of vegetation across the state.[94] A particularly complicated issue concerns plants considered to be both 'native' and environmentally harmful, known as woody weeds or 'invasive native species' (INS).[95] Overall, the repeated reviews, repeals and reforms of native vegetation protection laws have progressively weakened those protections.[96] The New South Wales Audit Office has recently expressed a similarly poor view of the effectiveness of current native vegetation laws, which are now contained within the *Local Land Services Act 2013*

[91] For a discussion of this legislative history, see Bartel and Graham (n 8).
[92] Robyn Bartel, 'Vernacular Knowledge and Environmental Law: Cause and Cure for Regulatory Failure' [2013] (8) *Journal of Justice and Sustainability* 891; Justine Bell, 'Tree Clearing, Hunger Strikes and Kyoto Targets - The Need for Middle Ground' [2011] *Environment and Planning Law Journal* 201; Samantha Maiden, 'Peter Spencer Ends Hunger Strike Protest', *The Australian* (13 January 2010).
[93] Bartel (n 92) 897; JA Sinden, 'Do the Public Gains from Vegetation Protection in North-Western New South Wales Exceed the Landholders' Loss of Land Value?' (2004) 26(2) *Rangeland Journal* 204.
[94] Bartel (n 92) 897.
[95] Ibid; Alex Blucher, 'NSW Farmer Becomes Lawyer to Find Land Clearing Restrictions', *ABC Rural* (online at 1 April 2014) <www.abc.net.au/news/rural/2014-04-01/native-veg-lawyer-rural-farmer/5358832>.
[96] Bartel and Graham (n 8) 268.

(NSW).[97] Despite the controversy, and numerous legislative reforms, the category of 'native vegetation' has remained central to the protections offered by these laws to trees and plants.[98] Native vegetation legislation, past and present, has made it a summary criminal offence to clear particular 'native vegetation' in particular sets of circumstances.[99]

Cases of alleged illegal clearing are prosecuted by the relevant government department of the environment in proceedings heard, in the first instance, by NSW's Land and Environment Court. Established in 1980, the Land and Environment Court is a specialist court of record that deals specifically with environmental and planning law matters.[100] While, many cases of illegal clearing of native vegetation proceed straight to sentencing on the basis of a guilty plea, this chapter considers only cases in which the defendant has pled not guilty. By entering a plea of guilty, the defendant admits to all the essential elements of the offence, including that the cleared trees belonged to the category of native vegetation.[101] The guilty plea obviates the need for the court to explicitly sort the trees into the category, because the trees' status of belonging the category of native vegetation is not under dispute. In addition, even if a defendant pleads not guilty, the court may not necessarily sort the trees into or out of the category because the substantive issues raised may relate to other elements of the offence, or to defences. The cases considered in this case were chosen because, in each one, the court specifically addressed whether the cleared trees and plants came within law's category of native vegetation.[102] Each case

[97] 'The clearing of native vegetation is not effectively regulated and managed because the processes in place to support the regulatory framework are weak': Audit Office of New South Wales (n 10) 2.
[98] *State Environmental Planning Policy No. 46 – Protection and Management of Native Vegetation* (n 6) s 5; *Native Vegetation Conservation Act* (n 6) s. 6; *Native Vegetation Act* (n 6) s 6; *Local Land Services Act 2013* (NSW) s. 60B.
[99] *Native Vegetation Conservation Act* (n 6) s 17; *Native Vegetation Act* (n 6) s 12; *Local Land Services Act* (n 98) s 60N.
[100] *Land and Environment Court Act 1979* (NSW) ss 5, 21; see generally: Mahla L Pearlman, '20 Years of the Land and Environment Court of New South Wales' (2001) 38(1) *Australian Planner* 45.
[101] See, eg, *Chief Executive of the Office of Environment and Heritage v Humphries* [2013] NSWLEC 213, [9].
[102] *Director-General, Department of Environment and Climate Change v Hudson* (2009) 165 LGERA 256; *Director-General, Dept of Environment and Climate Change v Jack and Bill Issa Pty Ltd (No 5)* (2009) 172 LGERA 225; *Dept of Environment and Climate Change v Olmwood* (2010) 173 LGERA 366; *Director-General, Dept of Environment, Climate Change and Water v Graymarshall Pty Ltd* [2011] NSWLEC 125; *Director-General, Dept of Environment and Climate Change v Walker Corp Pty Ltd* (n 88); *Walker v Director-General, Dept of Environment, Climate Change and Water* (n 90).

concerns charges of illegal clearing under s 12 of the *Native Vegetation Act 2003* (NSW).[103]

Throughout these cases the courts also adopted naming as a sorting technique that established relations of belonging between the disputed trees and law's category of native vegetation. In each, the court first turned to the law's own definition of the category, and then to the evidence adduced by the parties. By giving the cleared trees a botanical species name, and drawing on expert botanical evidence that the named species was present in (the state now known as) NSW, relations of belonging were established between trees and category. Once the cleared trees belonged to the category of native vegetation, they also belonged to law as lawfully protected tree. For example, in *Department of Environment and Climate Change v Olmwood*, Pain J began her decision by setting out relevant provisions of the *Native Vegetation Act 2003* (NSW).[104] The first of these is the Act's definition of native vegetation, which provides:

> 6 Meaning of native vegetation
>
> (1) For the purposes of this Act, native vegetation means any of the following types of indigenous vegetation:
>
> (a) trees (including any sapling or shrub, or any scrub)
>
> (b) understorey plants
>
> (c) groundcover (being any type of herbaceous vegetation)
>
> (d) plants occurring in a wetland
>
> (2) Vegetation is *indigenous* if it is of a species of vegetation, or if it comprises species of vegetation, that existed in the State before European settlement.[105]

Over some 29 pages, the court provided overview of all the evidence by both parties. Next, the court considered each element of the offence. On the issue of whether the cleared plants came within the definition of native vegetation, the court was guided by the prosecution's approach, which was to prove this element of the offence in four steps:

- that the vegetation cleared consisted of trees, understorey plants, groundcover or plants occurring in a wetland;
- the date of European settlement;

[103] To date, there have been no prosecutions commenced for offences established by the new native vegetation protection provisions in the *Local Land Services Act 2013* (NSW), which came into force in 2016: Audit Office of New South Wales (n 10) 2.
[104] *Dept of Environment and Climate Change v Olmwood* (n 102).
[105] Ibid 372.

- the species names of the alleged native vegetation cleared on the property; and
- that those named species existed in the state prior to the date of European settlement.[106]

Each of these steps corresponds to a different part of the definition of native vegetation as set out in the Act. In this case, the category definition, like that of timber discussed above, shaped the court's naming practices. Each element of the definition of native vegetation shaped the type of evidence that the prosecution presented to the court to prove, beyond reasonable doubt, that the cleared trees belonged to the category of native vegetation.

When Pain J considered the evidence adduced by the prosecution, she named the plants with a botanical species name. The named trees included *Banksia integrifolia* (coastal banksia); *Leptosperumum laevigatum* (coastal tea tree), *Acacia longifolia* (coastal wattle) and *Acacia ulicifolia* (prickly Moses).[107] On the basis of uncontested evidence given by Mr Flynn, a historian working for the State Prosecutor, the court accepted the date of European settlement as 1788.[108] Next, the court turned to expert evidence from scientific officers employed by the Department of Environment and Climate Change, both botanists. This evidence was that the nine species named by the prosecutor were present in New South Wales from at least 1779.[109] The court here relied on 'unchallenged evidence' that the land was dominated by the two species of coastal banksia and coastal tea tree; however, the defendant contested whether the other seven species named by the prosecution had, in fact, been present on the cleared land. In doing so, the defendant tried to raise doubts about veracity of evidence given by the prosecution witnesses.[110] After detailed examination of the evidence given by the prosecution's expert witnesses, who had undertaken site visits to collect samples to name the alleged species of cleared vegetation, Pain J found that 'the prosecutor has established beyond a reasonable doubt that the native vegetation species particularised in its case were present on the property at the time it was cleared in 2006'.[111] As a result, the court found that the prosecution has proved this element of the offence and named the cleared trees as native vegetation.[112]

[106] Ibid 411.
[107] Ibid.
[108] Ibid 412.
[109] Ibid.
[110] Ibid 413.
[111] Ibid 417.
[112] Ibid.

In the native vegetation cases, as compared to the timber cases, fewer questions were raised about law's definition of the relevant category. Only in one case, that of *Walker*, did the defendant (on appeal) contest the accepted definition of native vegetation.[113] The argument turned on the meaning of the word 'comprise' in s 6(2), which provides that 'Vegetation is *indigenous* if it is a species of vegetation, or if it comprises a species of vegetation, that existed in the state before European settlement'. The issue for the court was whether comprise meant 'consists of' or 'composed of' (as argued by the appellant, the original defendant) or meant 'includes' (as argued by the respondent, the prosecution).[114] The defendant argued that the prosecution had 'failed to specify the actual vegetation alleged to have been cleared, the quantum of vegetation making up the seven species which were identified, or the location of the species or individual plants beyond a "vague assertion" that 23 hectares were cleared'.[115] Such interpretation of the definition of native vegetation was necessary, submitted the defendant, to enable a defendant to establish relevant defences under the Act, including whether the cleared vegetation was 'regrowth'.[116] In reply, the respondent argued that the word 'comprise' should be interpreted as 'includes' or 'contains'.[117] Such an interpretation, argued the respondent, was consistent with the objectives of the Act, set out in s 3, which were to prevent broad-scale clearing, protect native vegetation and improve the condition of native vegetation throughout the state.

Having considered the arguments put forward by both parties, the court found that 'comprises' should be interpreted as 'includes'.[118] As stated by McLellan CJ:

> To construe the word as meaning 'consists of' would frustrate the Act's stated objects of protecting native vegetation and preventing broadscale clearing that does not improve or maintain environmental outcomes.[119]

In particular, the court focused on the practical outcome of interpreting 'comprises' as 'consists of', which

[113] *Walker v Director-General, Dept of Environment, Climate Change and Water* (n 90).
[114] Ibid 20.
[115] Ibid 19.
[116] Ibid.
[117] Ibid 20.
[118] Ibid 22.
[119] Ibid.

> would require the prosecution to painstakingly identify the precise quantum of indigenous vegetation within a large parcel of land. In most cases where native vegetation has been cleared, although it may be possible to identify after the event that some individual trees have been removed, vegetation will be in such a state that it is not possible to identify individual plants or trees which have been destroyed. The practical result of the appellant's interpretation would be to preclude a good many prosecutions, even where the evidence suggests that large-scale clearing has incidentally destroyed native vegetation.[120]

While the courts in the timber cases had determined the relevant definition of 'timber' by referring to previously decided cases, in *Walker* the court relied on principles of statutory interpretation to achieve the same result: an authoritative definition of the category.

The institutional practice of naming trees, by turning first to the definition and then to the evidence, was repeated by the other native vegetation cases. For instance, in the case of *Director-General of the Department of Environment and Climate Change v Hudson*, when considering whether the 'vegetation cleared was "native vegetation"?' the court first refers to the s 6 definition of native vegetation in the *Native Vegetation Act*, then to expert evidence.[121] That evidence, provided by departmental officials, a senior resource officer and an ecologist, was that the cleared vegetation included 'trees' and named the species of cleared trees as 'coolibah, river cooba and belah'.[122] Again, the court relied on evidence from Dr Flynn, the historian employed by the Crown Solicitor's Office, to establish the date of European settlement as 1788. Again, the court relied on expert botanical evidence to determine that the species collected and identified by the departmental officials were present in the state prior to 1788.[123] The court concluded

> This evidence satisfies me beyond a reasonable doubt that the vegetation that was cleared on Yarrol [the relevant property] was 'indigenous' as defined by s 6(2) and comprised trees as required by s 6(1).[124]

Similar naming practices are to be found in the cases of *Director-General, Department of Environment and Climate Change v Jack and Bill Issa Pty Ltd*,[125] *Director-General of*

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[120] Ibid.
[121] *Director-General, Department of Environment and Climate Change v Hudson* (n 102) [17]-[24].
[122] Ibid [21].
[123] Ibid [23].
[124] Ibid [24].
[125] *Director-General, Dept of Environment and Climate Change v Jack and Bill Issa Pty Ltd (No 5)* (n 102) [66]-[69].

the Department of Environment, Climate Change and Water v Graymarshal[126] and *Director-General, Department of Environment, Climate Change and Water v Walker Corporation*.[127] The cases show that, at the level of technique, sorting techniques associated with law's category of native vegetation do not diverge greatly from those associated with law's category of timber.

Despite the similarity in naming practices between the two categories of timber and native vegetation, however, each category offers a different quality of belonging to law. As discussed above, NSW's native vegetation laws have been criticised for their failure to take into account local vegetation growth patterns. In addition, Bartel's empirical research has revealed a perception among some landholders of a disjuncture between the law and personal farming experiences.[128] Bartel describes this disjuncture as an 'epistemic distance' between the vernacular, place-based knowledge of farmers as compared to the bureaucratic knowledge of regulators and law-makers:

> The bureaucratic knowledge embodied in policy by contrast is intended for general application. It may be scientifically evidence-based at a state-level but lacking in understanding of environmental conditions and requirements at finer scales.[129]

As a result of her interviews with NSW landholders, Bartel suggests incorporating vernacular knowledge into government policy and laws concerning native vegetation, as a possible 'cure' for regulatory failure.[130] To be clear, the point here is not that landholder evidence is to be preferred to that of scientists (or vice versa). Rather, the point is that a jurisprudence of classification helps make visible law's sorting techniques and naming practices. Cleared trees do not belong to law's categories self-evidently; rather, belonging is the product of particular institutional practices, in this example naming, that draw on particular kinds of evidence presented to the court in different ways. A jurisprudence of

[126] The court first names the cleared trees with species names in paragraph [2]. Later, it considers whether the evidence offered by the prosecution satisfied the definition Native Vegetation set out in s. 6: [28]. In the case the defendant company, which failed to appear despite being made aware on many occasions by the prosecution of the date of the proceedings, was convicted its absence: *Director-General, Dept of Environment, Climate Change and Water v Graymarshall Pty Ltd* (n 102).
[127] The court sets out the definition of native vegetation at [81], then proceeds to examine the evidence, naming the cleared vegetation by their species names (paragraphs [86], [88]) before giving the cleared vegetation the name of 'native vegetation', based on evidence of the prosecution, proved beyond reasonable doubt, that the vegetation came within the definition (paragraph [93]): *Director-General, Dept of Environment and Climate Change v Walker Corp Pty Ltd* (n 88).
[128] Bartel (n 8).
[129] Ibid 902.
[130] Ibid 903.

classification helps to clearly render the active and productive contribution of category definition, and the kinds of evidence adduced by the parties, to the making of lawful relations.

In addition, and as discussed above in relation to timber, category definitions shape the quality of belonging produced by law's categories. To illustrate, recall Rush's proposed changes the definition of rape under Australian law (discussed above).[131] Rush's revised definition established a framework for naming a particular event as rape, for the purposes of criminal liability, through a schema relating to the consequences of an event (penetration, injury to the victim) rather than the circumstances that surround it (consent). In a very different context, the definition of native vegetation similarly establishes such a framework for naming a particular entity as 'native vegetation'. That framework is built around the biological species concept. By giving the cleared vegetation a species name, the cleared vegetation was brought into a particular relationship with plants and trees that were growing in the state of New South Wales prior to colonisation.[132] The species concept provides the necessary link between trees now present on the land and those growing prior to colonisation.

It is important here to recognise that 'species' is also a category. Despite being a central concept in the biological sciences, the definition of what 'species' are, and the extent to which the concept reflects a natural division between entities, remains far from settled.[133] As early as 1745, French naturalist Buffon argued that all 'systematic arrangements of organisms by essential characteristics revealed only an arbitrary order imposed by the mind'.[134] Buffon argued that taxonomists should instead classify organisms on the basis of their 'real and concrete relations'.[135] This argument, however, was rejected by the emerging botanical and biological scientific communities in Europe and England, in favour of Swedish naturalist Carl Linnaeus's conception of species as fixed, immutable and discrete groupings of plants and animals, formed and determined by the creative acts

[131] Rush (n 5).
[132] As Lesley Head observes, native vegetation is a category that manufactures a temporal divide, a bright line of vegetation stasis, marked by the date of colonisation in 1788: Lesley Head, 'Decentering 1788: Beyond Biotic Nativeness' (2012) 50(2) *Geographical Research* 166.
[133] Robert R Sokal and Theodore Crovello, 'The Biological Species Concept: A Critical Evaluation' (1970) 104(36) *The American Naturalist* 127.
[134] Phillip Sloan R, 'The Buffon-Linnaeus Controversy' [1976] (3) *Isis* 356. For an important discussion of Buffon's argument in relation to classification and classificatory methods in the biological sciences, see Michel Foucault, *The Order of Things* (Random House, 1970) 145–50.
[135] Sloan (n 134).

of God.[136] Although, in the post-Darwin era, the modern biological species concept is understood as variable and intergrading, as emerging from the natural processes of evolution, the notion of species as discrete biological grouping, genetically and reproductively isolated from other species, remains central to orthodox understanding of the natural world.[137] The quality of belonging produced by native vegetation is, then, perhaps best expressed as one attuned to finely attenuated physical differences between plants, as determined by botanical taxonomy.[138] In contrast, for example, to law's definition of timber, the category of native vegetation works through a scheme that is not attuned to bioregional differences in plant distribution within the state. In other words, it is evidence of an entity's botanical name that determines its relationship of belonging to law's category, rather than evidence of a particular tree's location and connection within a particular network of ecological and cultural networks and relations.

V. CONCLUSION

For both timber and native vegetation, courts have sorted trees by giving them names. By naming trees as timber, the courts sorted entities into law's category of timber and thereby established relations of belonging between the entity and law (specifically, law's category of timber). By naming trees as a particular botanical species, the courts sorted entities into law's category of native vegetation, thereby establishing relations of belonging between those entities and law's category. In both examples, the naming practices of the courts can be considered as institutional practices: established ways of naming that persist over time. The first step in this naming process is to establish law's definition of the category. For timber, sourced in the common law, the courts have looked to previous decisions and the rules regarding the reception of English law to the colonies to arrive at that definition. For native vegetation, sourced in legislation, the courts have looked to the provisions of the relevant Act, construed in accordance with principles of statutory interpretation. These definitions then structured the court's naming practices, shaping the

[136] James Larson, 'The Species Concept of Linnaeus' [1968] (3) *Isis* 291.
[137] Robert R Sokal and Theodore Crovello (n 133). Recent scientific discoveries in bacterial genetics has revealed that genetic traits can be passed laterally between species, as well as vertically through reproduction, posing another challenge to conventional understandings of the species category. For an introduction to this scholarship, see, eg, David Quammen, *The Tangled Tree: A Radical New History of Life* (William Collins, 2018); see also W Ford Doolittle, 'Lateral Genomics' (1999) 9(12) *Trends in Cell Biology* M5; Frederic Bushman, *Lateral DNA Transfer: Mechanisms and Consequences* (Cold Spring Harbor Laboratory Press, 2002).
[138] For an important discussion of the contribution of botanical taxonomic practices to the law of plant patents, see Brad Sherman, 'Taxonomic Property' (2008) 67 *Cambridge Law Journal* 560.

kinds of evidence that would be presented and considered by the court when naming trees. By giving the disputed trees a name, the courts sorted the trees into and out of law's categories, thereby establishing relations of belonging to the category and to law. In this way, naming can be understood as a technique of classification and jurisdiction: an institutional practice that enacts the court's authority to sort entities into and out of law's categories and thereby establish relations of belonging to law.

Understanding the productive capacity of naming as a technique of classification is important, because different naming practices produce different qualities of belonging to law. That quality is produced by the complex relationship between the category, its definition and the entity being sorted. By changing the category definition, the naming practices allied with that category also change. Similarly, law's definitions of 'native vegetation' and 'timber' provide a scaffold for law's naming practices: each constituent element of the definition frames the type of evidence that the prosecution will adduce to prove that the disputed trees belong to law's category. Changing or refining the definition of law's category, as discussed by the court in *Walker* or by the decision in *Campbell v Kerr*, changes the way in which the court sorts trees into law's categories by naming. In this sense, we can think of category definitions as naming devices, which scaffold and shape law's naming practices, as well as the quality of belonging to law produced by that particular category.[139]

By contrasting the court's naming practices for timber with those for native vegetation, two particular features of the quality of belonging offered by the category native vegetation become apparent. The first relates to the kind of evidence brought before the court to name trees as timber or native vegetation. The courts named trees as native vegetation by relying on expert evidence of scientific professionals. In contrast, as discussed above, the court named timber by relying on lay evidence of local landholders. Recognising this difference is important. It reminds us that law's categories do not simply reflect an *a priori* order of things but, rather, are active participants in law's jurisdictional practices. Conceivably, a revised definition of native vegetation might more readily incorporate vernacular knowledge – for example, by omitting a reference to a species name and by referring to evidence of local plant distribution patterns. In the same way, the definition of timber could be revised to incorporate expert evidence, from architects

[139] Dorsett and McVeigh (n 22) 485.

or foresters, as to the particular qualities of wood produced by particular types of trees. The overall point here is to recognise that law's definitions of its categories do not simply describe; they produce relations of belonging through the shaping of naming practices adopted by the courts that sort entities into and out of law's categories. To put the matter bluntly, crafting definitions for law's categories is not a question of metaphysical enquiry ('what is native vegetation?') but a task that might involve choosing between different qualities of belonging to law ('what kind of naming practices will be produced by this definition of native vegetation, as compared to that definition?').

The aim of this chapter has been to demonstrate that relations of belonging between entity and category cannot be overlooked as self-evident. Rather, as exemplified by the Supreme Court and Land and Environment Court decisions, belonging is an effect produced by law's sorting techniques. Just as the governor enacted the authority to make law's categories through the institutional practice of writing proclamations, so, too, have the courts established relations of belonging between entities and law's categories through institutional practices of naming. A jurisprudence of classification alerts us to the productive capacity of law's classificatory techniques, and the institutional practices through which they are expressed. As a technique that sorts entities into law's categories, naming can thus be analysed by thinking about how category definitions scaffold law's naming practices by drawing on particular kinds of evidence that produce different qualities of belonging to law. In so doing, this chapter complements the analysis of the previous chapter; both consider how law classifies through an analysis of how law's institutions make categories and sort entities. The next chapter turns to the final register of a jurisprudence of classification here proposed: the jurisdictional effects of classification.

CHAPTER 7. THE EFFECTS OF CLASSIFICATION: BELONGING TO LAW IN THE *SPENCER* CASES

I. INTRODUCTION

This chapter engages the final register of the jurisprudence of classification proposed by this thesis: effects. The chapter builds on two propositions developed throughout the thesis. First, law's categories can be understood as technologies of jurisdiction because of their capacity to establish, alter or sustain lawful relations.[1] Second, each category offers a different quality of belonging to law, meaning that each offers a distinctive form of belonging to law, as discussed in the previous chapter in the context of naming. This chapter now add a third proposition. I argue that the quality of belonging to law produced by law's categories is also shaped by the institutional procedure or transaction that frames the category.[2] These three propositions are brought together, explained and sustained in the context of the procedural history of the *Spencer* cases, litigation commenced by a NSW landholder in order to challenge the validity of NSW's native vegetation protection laws.[3] In these decisions, the disputed trees were variously classified as 'native vegetation', 'timber' and 'carbon'. This chapter examines the jurisdictional effects of each category. I show how each category offered a different quality of belonging to law *and* that this quality was shaped by the institutional procedure or transaction that framed the category, namely the cause of action. This analysis demonstrates that the jurisdictional effects of law's categories do not inhere within the categories themselves, but are produced by the activity of classifying in the context of a particular institutional procedure or transaction.

This chapter considers the effects of classification by elaborating on Alain Pottage's argument about the 'agency' of law categories. The crux of Pottage's argument is that the

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[1] Dorsett and McVeigh, *Jurisdiction* (n 1) 14, 71–6.

[2] Alain Pottage, 'Law after Anthropology: Object and Technique in Roman Law' (2014) 31 *Theory, Culture, Society* 147 discussed further below.

[3] *Spencer v Australian Capital Territory* (2007) 13 BPR 24,307 ('*Spencer v Australian Capital Territory*'); *Spencer v Commonwealth of Australia* (2007) 2007 FCA 1415 ('*Spencer v Commonwealth of Australia (2007)*'); *Spencer v Commonwealth of Australia (No 2)* (2007) 2007 FCA 1787 ('*Spencer v Commonwealth of Australia (2007) (No 2)*'); *Spencer v Commonwealth of Australia* (2008) 2008 FCA 1256 ('*Spencer v Commonwealth of Australia (2008)*'); *Spencer v Commonwealth of Australia* [2009] FCAFC 38 ('*Spencer v Commonwealth of Australia [2009]*'); *Spencer v Commonwealth of Australia* (2010) 241 CLR 118 ('*Spencer v Commonwealth of Australia (2010)*').

agency of law's categories comes not from a category's propositional content but, rather, from the way in which the category is 'operationalised' by particular procedures or transactions.[4] Although I do not adopt Thomas and Pottage's language of agency, their insights are helpful for thinking about how classification produces relations of belonging to law.[5] In particular, Pottage and Thomas demonstrate that there is a reciprocal relationship between legal form and procedural frame, between category and cause of action. By investigating how institutional procedures and transactions shape the quality of belonging to law produced by classification, this chapter completes the third and final register of the jurisprudence of classification proposed in this thesis.

This chapter remains with the courts to investigate these issues. Specially, the chapter offers an account of protected tree classification found in the procedural history of litigation commenced by Peter Spencer to challenge the validity of NSW's native vegetation laws. These cases comprise six preliminary decisions – by the New South Wales Supreme Court, the Federal Court of Australia and the High Court of Australia – in which the courts considered whether Spencer's statements of claim should be struck out or summarily dismissed, rather than proceed to trial.[6] For ease of expression, I refer to this collection of cases as the '*Spencer* cases'. The chapter remains with the courts and focuses on the *Spencer* cases for a number of reasons. First, the *Spencer* cases concerned a dispute over law's protected trees – or, more precisely, a dispute about the capacity of the State government to enact legislation that prevents landholders from cutting down trees growing on their land. Spencer, a NSW landholder, was prevented from clearing trees on his property by NSW's native vegetation protection laws. In the media, Spencer alleged that the Commonwealth was guilty of 'carbon theft'.[7] He claimed that the Commonwealth government had worked with the New South Wales government to ban broadscale clearing so that Australia would meet international obligations under the Kyoto Protocol concerning greenhouse gas emissions.[8] Spencer felt that he (and other

[4] Pottage (n 2) 157.
[5] Ibid.
[6] *Spencer v Australian Capital Territory* (n 3); *Spencer v Commonwealth of Australia (2007)* (n 3); *Spencer v Commonwealth of Australia (2007) (No 2)* (n 3); *Spencer v Commonwealth of Australia (2008)* (n 3); *Spencer v Commonwealth of Australia [2009]* (n 3); *Spencer v Commonwealth of Australia (2010)* (n 3).
[7] Lucy Knight, 'Farmers Rally against Spencer "Carbon Theft"', *The Dairy Farmer* (online at 4 January 2010) <adf.farmonline.com.au/news/state/agribusiness/general-news/farmers-rally-against-spencer-carbon-theft/1717681.aspx>.
[8] 'Hundreds Rally for Hunger-Striking Farmer', *ABC News Online* (online at 4 January 2010) <http://www.abc.net.au/news/2010-01-04/hundreds-rally-for-hunger-striking-farmer/1197122>.

rural landholders) had been unfairly forced to bear the financial burden of these obligations:

> The Commonwealth had enriched itself, by servicing an international agreement. The land was locked up by the Commonwealth and they used the carbon credits to offset Kyoto, and they should pay all farmers for the use of their carbon.[9]

Although the link between protected trees and climate change may appear tenuous, reduced rates of land clearing were, in fact, crucial to Australia's ability to meet emissions targets established under the *Kyoto Protocol*.[10] This fact was recognised by the Commonwealth, both in its own reporting under the United Nations Framework Convention on Climate Change and in its own evidence in the *Spencer* cases.[11] At the heart of this dispute was the nature of the lawful relations held by the various parties to the case – the landholder (Spencer), the New South Wales government and the Commonwealth government – to the disputed trees growing on Spencer's property.

Second, the procedural history of the *Spencer* cases concerns a central question of jurisdiction, about 'what is to count as a legal action'.[12] In these preliminary decisions, Spencer was initially unable to convince the courts that his grievance was one that belonged to law. Repeatedly, the (mostly) unrepresented litigant initiated proceedings only to have his claims struck out or summarily dismissed for failing to disclose facts that would give rise to a known cause of action.[13] The preliminary decisions and procedural history of this case were directly engaged in answering the jurisdictional question of what

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[9] As quoted in: Michael Condon, 'Spencer Wins Right to Appeal', *ABC Rural* (online at 2 September 2010) <www.abc.net.au/news/rural/2010-09-01/spencer-wins-right-to-appeal/6197058>.

[10] *Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997* (Vol 2303 UNTS) 162; For commentary on the Kyoto Protocol carbon accounting methods which include reduced emissions from avoided deforestation, see, e.g.: Andrew MacIntosh, 'The Australia Clause and REDD: A Cautionary Tale' (2012) 112(2) *Climate Change* 169; Clive Hamilton and Lins Vellen, 'Land-Use Change in Australia and the Kyoto Protocol' (1999) 2 *Environmental Science and Policy* 145.

[11] During the first commitment period (2008–2012) under Kyoto, Australia's greenhouse gas emissions across the energy, industrial, waste and agriculture sectors increased by 31% (as compared to emissions in 1990, the baseline year for Kyoto targets). This increase, however, was off-set against an 88% reduction in emissions from land-clearance, which brought Australia's net emissions to a total of 2.4%, as compared to 1990. This small net increase was well within Australia target of containing emissions to an 8% increase: Commonwealth of Australia, *National Inventory Report 2012 Volume 1* (2014) 2; *Kyoto Protocol to the United Nations Framework Convention on Climate Change* (n 10) Annex B. For the Commonwealth's concession on this point, see: *Spencer v Commonwealth of Australia*, *Spencer v Commonwealth of Australia (2008)* (n 3) [145].

[12] Dorsett and McVeigh, *Jurisdiction* (n 1) 6.

[13] *Spencer v Australian Capital Territory* (n 3); *Spencer v Commonwealth of Australia (2007)* (n 3); *Spencer v Commonwealth of Australia (2007) (No 2)* (n 3); *Spencer v Commonwealth of Australia (2008)* (n 3).

kinds of wrongs will belong to law, and what kinds of wrongs will not. A keen personal sense of injustice is not sufficient to enliven the jurisdiction of common law courts to decide a dispute. Rather, the complainant must formulate their claim as a 'recognised' cause of action over which courts have the authority to decide.[14] Sometimes this question is about which court to go to initiate proceedings; sometimes it is about whether a particular defendant is amendable to the authority of a particular court.[15] However, sometimes the question may also be a question about whether a particular kind of wrong or grievance belongs to law at all.[16] This is a foundational question of jurisdiction, one that echoes Frederic Maitland's classic discussion of the medieval forms of action under the common law:

> [A plaintiff] may find that, plausible as his [sic] case may seem, it just will not fit any of the receptacles provided by the courts and he may take to himself the lesson that where there is no remedy there is no wrong.[17]

This was precisely the issue before the courts in the preliminary decisions in the *Spencer* cases. Through the procedural mechanisms of 'striking out' and 'summary dismissal' (discussed in detail below), the courts exercised the authority to determine whether Spencer's grievance belonged to law. These decisions are, then, unlike the waste and native vegetation cases discussed in the previous chapter, in which the court's authority to decide was not at issue: the fact scenarios in those cases clearly enlivened the court's authority to determine criminal proceedings and disputes between landlords and tenants concerning rights to land. In the *Spencer* cases, however, the preliminary decisions demonstrate how the same set of 'facts', the same disputed trees and the same alleged wrong, might be bound to law through different causes of action. In other words, the *Spencer* cases provide an opportunity to consider how different institutional procedures – namely, different causes of action – might also shape the jurisdictional effects of law's categories.

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[14] Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (The Federation Press, 2012) 1.
[15] Robert C Casad, *Jurisdiction in Civil Actions: Territorial Basis and Process Limitations on Jurisdiction of State and Federal Courts* (Butterworth Legal Publishers, 2nd ed, 1991) [1–2].
[16] Peter Rush, 'An Altered Jurisdiction - Corporeal Traces of Law' (1997) 6 *Griffith Law Review* 144, 151; Dorsett and McVeigh, *Jurisdiction* (n 1) 6.
[17] FW Maitland, *The Forms of Action at Common Law* (Cambridge University Press, 1971) 4.

The chapter proceeds as follows. It begins with a discussion of the literature that informs my analysis of the jurisdictional effects of classification. The rest of the chapter is structured by the three different categories offered for the disputed trees in the *Spencer* cases: 'native vegetation', 'land' and 'carbon'. Finally, the conclusion returns to broader questions about the value of a jurisprudence of classification that examines the jurisdictional effects of law's classification practices.

II. THE JURISDICTIONAL EFFECTS OF CLASSIFICATION

Before discussing the 'jurisdictional effects' of classification, it is necessary to first address an important critique of the effects of classification in relation to environmental and property law. At the heart of this critique is the argument that common law traditions are bound up in a particular classificatory style that simplifies and abstracts entities into dichotomous, exclusive and binary categories.[18] For present purposes, a helpful entry point to this scholarship is James Scott's *Seeing Like a State*, in which he argues that the modern nation state simplifies things (nature, cities, measurements) in order to render those entities 'legible' and thereby amenable to state control.[19] Categories perform this simplification process by reducing complex, interconnected entities to a single element – for example, by simplifying the complex and interconnected social and ecological networks of a forest into the singular category of 'timber'.[20] Nicholas Blomley has refined Scott's argument in the context of real property law, arguing that 'simplification is complicated'.[21] Blomley argues that complex and extensive resources are required by law's institutions to simplify entities and events into law's binary categories. As Lee Godden puts it, the common law embodies a particular classificatory tradition, one that 'institutes bimodal categories of exclusion and inclusion', thereby producing the 'natural' objects to which common law property rights might attach.[22] As Blomley further argues, making property in the common law tradition

[18] For an important articulation of this argument, see Lee Godden, 'Nature as Other: The Legal Ordering of the Natural World' (Griffith University, 2000) especially 20–39.
[19] James C Scott, *Seeing like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, 1998).
[20] Ibid 11–22.
[21] Nicholas Blomley, 'Simplification Is Complicated: Property, Nature and the Rivers of Law' 40 *Environment and Planning A* 1825.
[22] Lee Godden, 'The Invention of Tradition: Property Law as a Knowledge Space for the Appropriation of the South' (2007) 16(2) *Griffith Law Review* 376, 388. The legitimacy of these common law classifications is, of course, contestable, and remains contested, from multiple jurisprudential perspectives in locations such as New South Wales, where the common law has asserted its authority to the exclusion of other, pre-existing, jurisdictions.

> entails the convention of a network of social relationships into a set of discrete, bounded things. The objects of property, in other words, become imagined as separate spaces. The production of property entails a process of pulverization whereby units (such as fish, ideas, genomes or land) are identified, bounded and detached and thus rendered legible and actionable.[23]

Blomley urges legal scholars to recognise the contingency and non-permanence of these objects of property, carved out by law from the 'flow of processes creating spaces'. Yet he also points to the importance of recognising the effect of law's 'cuts' into the flows of networked relations. Through this process of simplification and legal identification, law organises the world by allocating property rights and restricting land use, for example. To simply argue that law simplifies nature into absurd and illusory categories, Blomley argues, 'is to risk ignoring the ways in which such absurdities organize the world for us in often brutally efficient and powerful ways'.[24]

This thesis does not contest the premise, as articulated by Bromley, that the objects of property are actively produced by property law practices. Such a position is entirely congruent with the proposition that law's categories are fabricated and deployed by institutional practices, rather than reflecting an *a priori* ontology. The difference in our approaches, however, lies in the underlying conceptual framework and orientation. While this thesis is informed by the jurisprudence of jurisdiction, Blomley's work is that of critical legal geography. As explained in Chapter 2, throughout this thesis classification is treated as a 'way of working with law as a medium of the creation, representation and disposition of lawful relations'.[25] Rather than focusing on the ontological gap between law's categories and the flows of nature, or on the ways in which law's objects of property intervene in issues of environmental or spatial justice, the focus here is on how law's categories produce relations of belonging to law. Such a jurisdictional approach to classification is important. Without it, legal scholars risk missing the significant technical work that that makes legal existence possible.[26] The importance of this perspective is also recognised by Andreas Philippopoulos-Mihalopoulos, who argues that

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[23] Nicholas Blomley, 'Cuts, Flows and the Geographies of Property' (2011) 7(2) *Law, Culture and the Humanities* 203, 205–6. See also Margaret Davies's important work on how property and planning law individuates trees from their material social and ecological relations, sometimes with fatal consequence: Margaret Davies and Kynan Rogers, 'Tale of a Tree' (2014) 16 *Flinders Law Journal* 43.
[24] Blomley (n 21) 1840.
[25] Dorsett and McVeigh, *Jurisdiction* (n 1) 23.
[26] Ibid 22.

> although environmental law is required to position itself amidst the ecology of unbounded disciplines, non-linguistic materiality, dead nature, human/nature/artificial hybrids and looming ecological disasters; at the same time, and after all its disciplinary excursus, *environmental law must always return to the employment of legal language and house itself in courts*.[27] [my emphasis]

Here, Philippopoulous-Mihaloupoulos recognises that, as well as embracing interdisciplinary and theoretically adventurous scholarship, scholars of environmental law 'must' retain a sense of how to find a way back to 'legal language' and to 'courts'. It is at this point, of returning to 'legal language' and the courts, that this thesis intersects with critical environmental law. It does so by confining the analysis in this chapter within the productive limits of its jurisdictional scope: what makes law's categories effective at producing relations of belonging to law? And how do different categories produce different qualities of belonging to law?

This chapter considers the jurisdictional effects of classification in the context of summary dismissal proceedings in the *Spencer* cases. I do so because the *Spencer* cases raise important jurisdictional questions about what counts as a legal action. As Dorsett and McVeigh point out, the courts 'delimit law' by maintaining the boundary between what counts as a legal action, and what does not.[28] One way the courts exercise this authority is by summarily dismissing or striking out statements of claim. As Clifton Barker explains, by striking out statements of claim, the courts maintain a particular quality in their form.[29] If the argument is poorly expressed, or does not address all the required facts necessary to make out a claim, the court may strike out the statement (in full or in part), granting the applicant leave to file an amended statement of claim that remedies the formal defects.[30] Summary dismissal, however, addresses deficiencies of substance.[31] Summary dismissal terminates the proceedings by the court entering a summary judgment for the other party, without proceeding to trial.[32] Relevant to the *Spencer* cases, one ground for summary dismissal is that the plaintiff's statement of claim

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[27] Andreas Philippopoulos-Mihalopoulos, 'Looking for the Space between Law and Ecology' in Andreas Philippopoulos-Mihalopoulos (ed), *Law and Ecology: New Environmental Foundations* (Routledge, 2011) 1, 5–6.
[28] Dorsett and McVeigh, *Jurisdiction* (n 1) 16.
[29] Clifton Baker, 'Terminating Proceedings before Trial: Summary Judgement and Striking out of Pleadings' (2017) 142(September/October) *Precedent* 8.
[30] Bernard Cairns, *Australian Civil Procedure* (Law Book, 7th ed, 2007) 387.
[31] Baker (n 29).
[32] Cairns (n 30) 387–8.

does not disclose a reasonable cause of action. A cause of action 'arises from some wrongful act or breach … where some common law or statutory relationship exists between the parties'.[33] A cause of action will be established if the plaintiff can plead the existence of facts that would give rise to a type of complaint 'legally known to the law of the forum in which it is brought'.[34] By summarily dismissing a claim, the court delimits the extent of the common law's authority, pronouncing the grievance of which the plaintiff complains as beyond the authority of the court. In other words, summary dismissal enacts an 'excommunication' of the claim from the juridical domain.[35] It is in this context, of a plaintiff seeking admittance from the courts as the gatekeepers of jurisdiction, that this chapter considers the effect of the cause of action on the quality of belonging produced by law's classification practices.

To consider how a cause of action might shape the quality of belonging to law produced by law's categories, I draw on the scholarship of Pottage and Yan Thomas on law's categories of persons and things. Through discussions of Roman law categories for persons (such as *persona ficta* and *res religiosae*), Pottage and Thomas argue that the effectiveness (or 'agency' as Pottage puts it) of law's categories comes not from a category's reflection of broader social meaning but, rather, from the way in which the category is deployed within the context of law's institutional procedures.[36] For example, Thomas offers an account of the Roman law of tombs, in which he details the differences between the tombs of law and the religious and social taboos associated with death and dead bodies.[37] Roman law protected tombs as inviolable places: protected from physical harm by criminal laws that prohibited damaging or altering the physical structure of a tomb; protected from the realm of exchange as places that were inalienable.[38] Yet, when Thomas drills down into the practice of the Roman law of tombs, he finds that the laws were oriented towards pragmatic requirements, such as the need to clearly delimit the extent of physical space occupied by the tomb, and what kinds of monuments could be

[33] Mann, Trischa and Audrey Blunden (eds), *Australian Law Dictionary* (Oxford University Press, 1st ed, 2010) 'cause of action'.
[34] Mann, Trischa and Blunden (n 33).
[35] Peter Goodrich, 'Visive Powers: Colours, Trees and Genres of Jurisdiction' (2008) 2 *Law and Humanities* 213, 216.
[36] Pottage (n 2) 157.
[37] Yan Thomas, 'Reg Religiosae: On the Categories of Religion and Commerce in Roman Law' in *Law, Anthropology and the Constitution of the Social: Making Persons and Things* (Cambridge University Press, 2004).
[38] Ibid 40–1.

accorded the exceptional status of a tomb.[39] Importantly, a tomb without a body interred did not come within the law's category of a 'tomb'.[40] To remove a body from a tomb was not a crime; once the body was removed, there was nothing left to protect, and so the tomb simply became a 'memorial' and lost its inviolable and inalienable status.[41] As Thomas argues:

> The religion of the dead was something quite distinct from the [legal] status of the objects that were dedicated to them. This status was defined at the prosaic level of legal commerce and management … in the Roman world the category of religion was rationalised in such a way as to facilitate the development of rules which were ultimately concerned with the disposition of worldly goods, with ownership and exchange.[42]

For Thomas, it is critical to maintain a distinction between the register of 'the institution' (meaning the legal institution) and broader social practices or subjective senses of self:

> We must resist the tendency of common sense to confuse the two registers between which a speaking self and a claiming self is divided … Nothing obscures the intelligence of law more than the mixing up of these two levels.[43]

Put a different way, Thomas argues:

> In the register of the institution, which should be distinguished from the order of beliefs, the exhumation of bodies [from tombs] … had the immediate effect of extinguishing a religious place by removing its essential condition of existence.[44]

In this way, law's persons and things can be understood as emerging within the particular institutional frame, including that of the legal procedure or transaction in which the categories are deployed.[45]

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[39] Ibid 44.
[40] Ibid 43.
[41] Ibid 61.
[42] Ibid 68.
[43] Yan Thomas, 'Le Sujet de Droit, Law Personne et La Nature: Sure La Critique Contemporaine Du Sujet Dr Driot' (1998) 100 (Mai-Aout) *Le Debat* 85, cited in Ed Mussawir, 'The Jurisprudential Meaning of the Animal' in Edward Mussawir and Yoriko Otomoto (eds), *Law and the Question of the Animal: A Critical Jurisprudence* (Routledge, 2013) 89, 97.
[44] Thomas (n 37) 61.
[45] Pottage (n 2) 155.

For Pottage, Thomas's work resonates with scholarship emerging from the intersection of law and anthropology that seeks to understand law 'as itself'.[46] These approaches, Pottage argues, do

> [s]omething that the modern lawyer would least expect anthropology to do; they strip away the modes of sociality that legal scholars over the past few decades have so inventively ascribed to legal form.[47]

What distinguishes Thomas's work, and this particular anthropological view of law, from critical legal scholarship is a non-instrumental conception of law. To explain, Pottage draws on Annelise Riles's argument that 'modern lawyers' see legal procedures and forms of action as 'means to ends': as more or less effective instruments for achieving a particular social purpose (economic efficiency, environmental sustainability, justice etc).[48] In contrast, Pottage suggests that Thomas's work demonstrates the value of seeing legal procedures and causes of action as objects: not a means to an end but as having their own 'objectivity (in the sense of thingness)'.[49] Pottage makes a distinction here between law as object and law as instrument. If a legal action is treated as some a kind of object, then its composition and structure could be examined on its own terms, through the processes and practices that unfold within its own frame. If a legal action, is treated as an instrument, its composition and structure tend to be examined through the lens of an external social process or normative value:

> [W]hereas the modern understanding of law takes legal forms and institutions to be means to social ends, or as expressions of broader social processes, the set of law-objects existed and were employed without reference to the same abstract social function or normative principle. Actions were species without genus; there was no abstract universal principle called 'law' that was expressed in, or that traversed, these frames.[50]

For present purposes, the point Pottage makes so well, drawing on Thomas' scholarship, is that the agency of law's categories does not come from the way they reflect or reproduce external patterns of social or economic relations. Instead, the agency of law's categories comes from within law's institutional frame: 'objects and endpoints are not

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[46] Pottage (n 2); Annelise Riles, 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities' (2005) 53 *Buffalo Law Review* 973.
[47] Pottage (n 2) 150.
[48] Riles (n 46), cited in Pottage (n 2) 154.
[49] Pottage (n 2) 154.
[50] Ibid 155.

found in nature, ready to be discerned and acted upon by law through the exercise of cognitive and practical reason, but are instead immanent in the legal operations and transactions that act upon them'. [51] Pottage's insights are helpful because they highlight the sense in which the effects produced by the common law's categories emerge from the institutional procedure or transaction in which they are deployed, as this chapter will explore.

III. Belonging to Law in the Spencer Cases

Landholder Peter Spencer initiated legal proceedings in 2007 to challenge the validity of NSW's native vegetation protection laws. He wanted to clear trees from areas of his rural property in Shannon's Flat (near Cooma) and applied for approval from the Murrumbidgee Catchment Management Authority, pursuant to the relevant provisions under the *Native Vegetation Act* 2003 (NSW) ('the *Native Vegetation Act*'). This application was denied for failing the meet the requirement that the clearing would 'maintain or improve' environmental outcomes.[52] Spencer was then advised that because his farming venture was no longer 'commercially viable', due to the effects of the *Native Vegetation Act*, his property was eligible for purchase under the Farmer Exit Assistance Program, managed by the NSW Nature Conservation Trust ('the Trust').[53] Under the original terms of the Farmer Exit Assistance Program, the amount offered by the Trust to purchase eligible properties was assessed on the basis that native vegetation laws did *not* apply. Around the same time as Spencer and the Trust were in negotiations concerning purchase, the NSW government changed the Trust's method for assessing property values. The Trust was required to assess properties at 'current market value', that is, on the basis that the native vegetation law did apply.[54] Spencer perceived this change as unfair.[55] In November 2007, the Trust made an offer to purchase Spencer's property for

[51] Ibid.
[52] *Native Vegetation Act 2003* (NSW) s 14. *Spencer v Commonwealth of Australia* (2015) 2015 FCA 754, [170]-[171] ('*Spencer v Commonwealth of Australia (2015)*'). Although there was some question over whether Spencer had in fact made a formal application to clear. Nevertheless, the court found that on 19 February 2007 Spencer met with relevant officials from the Catchment Management Authority on his property and verbally indicated the areas of land that he wanted to clear. The court found that Spencer was treated by the various NSW government agencies as having made an application at this time: ibid [161]-[171].
[53] *Spencer v Commonwealth of Australia (2015)* (n 52) [177].
[54] Ibid [184]-[185].
[55] Spencer also initiated separate legal proceedings to challenge the validity of the NSW government's decision to value properties at to 'current market value': *Spencer v NSW Minister for Climate Change, Environment and Water* [2008] NSWSC 1059.

$2.17 million, assessed at current market value.[56] Spencer did not accept this offer and responded with his own valuation of the property, of over $9 million.[57] The NSW government's offer to purchase the property eventually lapsed and Spencer took the matter to the courts.

Spencer first initiated proceedings in the Supreme Court of New South Wales, making three separate claims against three different defendants. He alleged trespass (of wild dogs) against the Australian Capital Territory government, invalid exercise of legislative power against the NSW government, and tortious conspiracy against the Commonwealth. [58] His claim against the ACT was struck out and his claims against NSW and the Commonwealth were summarily dismissed. Not to be deterred, Spencer reframed his grievance as one of constitutional law. He initiated proceedings in the Federal Court claiming that the Commonwealth had acquired his property on other than just terms, in contravention of s 51(xxxi) of the *Australian Constitution*.[59] After considering several revised versions of Spencer's claim, Emmett J in the Federal Court eventually summarily dismissed Spencer's claim for want of a reasonable chance of success.[60] Spencer, however, appealed the summary dismissal in the High Court, and won.[61] Spencer's case was then remitted to the Federal Court for trial. Eventually, in 2015, the Federal Court handed down its decision, in favour of the Commonwealth.[62] Spencer unsuccessfully appealed this decision to the Full Federal Court.[63] He was denied special leave to appeal to the High Court, which effectively put an end to the litigation.[64] As discussed above, this chapter considers the classifications of the disputed trees in the preliminary proceedings concerning summary dismissal, up to and including the High Court decision of 2010.[65] The analysis is structured by various categories offered for the disputed trees, which allows for an exploration the jurisdictional effects of each category in relation to the cause of action in which the activity of classification takes place.

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[56] *Spencer v Commonwealth of Australia (2015)* (n 52) [183].
[57] Ibid [187].
[58] *Spencer v Australian Capital Territory* (n 3).
[59] Ibid.
[60] *Spencer v Commonwealth of Australia (2007)* (n 3); *Spencer v Commonwealth of Australia (2007) (No 2)* (n 3); *Spencer v Commonwealth of Australia (2008)* (n 3).
[61] *Spencer v Commonwealth of Australia (2010)* (n 3).
[62] *Spencer v Commonwealth of Australia (2015)* (n 52).
[63] *Spencer v Commonwealth of Australia* [2018] FCAFC 17 ('*Spencer v Commonwealth of Australia [2018]*').
[64] *Spencer v Commonwealth* [2018] HCASL 168.
[65] *Spencer v Commonwealth of Australia (2010)* (n 3).

It is worth noting here the temptation to dismiss Spencer's initial failures as the consequence of his status as litigant who was, for the most part, unrepresented. However, this particular quality of the proceedings supports the argument that classification is an institutional practice, an established way of doing things. The proceedings reveal the difficulties encountered by someone who has not previously been enmeshed in law's classification practices. As compared to statements of claim written by a solicitor or barrister, someone who works through and with law's classifications as a matter of daily practice, Spencer's statements of claim are perceived by the courts as awkward, ill-informed and poorly expressed. To illustrate, consider this passage from one iteration of Spencer's statement of claim:

> The applicant holds, and at all material times has held the conveyed freehold entitlements, Crown registered and Crown-sealed under Torrens; and recorded as the Constitution demands under s 51 in the Local Government Registry of Approval [s 113 Local Government Act] as the full volume of land is known, described and identified as Saarahnlee at Shannon's Flat in the State of New South Wales.[66]

In Emmett J's assessment, given 'the greatest respect to the author', this passage was, quite simply, 'gobbledygook'.[67] The difficulty encountered by Spencer in articulating his grievance as one that belongs to law, and in finding categories for his trees that would achieve the result he sought from the courts, supports Pottage's observation that the relationship between law's categories and entities is not obvious or self-evident. Law's 'things' do not lie, already formed, readily perceived and neatly inserted into a statement of claim. Instead, as the following analysis will reveal, belonging to law is produced through institutional practices of classification, established ways of doing things that require classification to take place within a specific frame offered by law's institutional procedures and transactions.

A. *Belonging to law as native vegetation*

The legal classification of the trees on Spencer's land as 'native vegetation' formed the central grievance upon which Spencer based his claims. Spencer did not dispute that the trees on his property belonged the category of 'native vegetation'. Rather, it was assumed by all parties that the disputed trees *did* belong to law's category of native vegetation, and that this classification had the effect of lawfully protecting the trees from being cleared.

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[66] *Spencer v Commonwealth of Australia (2007) (No 2)* (n 3) [3].
[67] Ibid.

For example, in Spencer's first statement of claim, filed in the New South Wales Supreme Court, in 2007, Spencer alleged

> against the State [of New South Wales], that it enacted the *Native Vegetation Act*, in excess of legislative power, and/or in breach of an agreement with Mr Spencer (or his predecessor in title) embodied in his fee simple title, with the result that Mr Spencer is prevented from clearing the secondary regrowth from Saarahnlee, occasioning further, permanent, damage to the value of his property.[68]

Similarly, in proceedings initiated in the Federal Court, Emmett J summarised Spencer's argument as being that:

> New South Wales has passed the *Native Vegetation Conservation Act* 1997 (NSW) and the *Native Vegetation Act* 2003 (NSW). Mr Spencer says that, pursuant to those legislative enactments, he has been prohibited from clearing native vegetation on his land.[69]

The High Court also classified the trees as native vegetation:

> Restrictions had been imposed on the clearing of vegetation on his farm by reason of the *Native Vegetation Conservation Act 1997* (NSW) … and the *Native Vegetation Act 2003* (NSW) … He claimed that the restrictions constituted an acquisition of property from him...[70]

Unlike the cases concerning prosecutions for illegal clearing of native vegetation considered in the previous chapter, liability in this case did not turn on whether the disputed trees belonged to the category of 'native vegetation'.[71] Rather, it was accepted by Spencer, and the courts, that the disputed trees did come within law's category of native vegetation. It was this classification, the fact of the trees belonging to this category of law, that constituted one of the key injuries, or grievances, for which Spencer sought a legal remedy.

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[68] *Spencer v Australian Capital Territory* (n 3) [11].
[69] *Spencer v Commonwealth of Australia (2007)* (n 3) [3].
[70] *Spencer v Commonwealth of Australia*, *Spencer v Commonwealth of Australia (2010)* (n 3) 121–2 per French CJ and Gummow J.
[71] In the New South Wales Supreme Court, Brereton J raised the question of whether Spencer's trees belonged to the category 'secondary regrowth', which, under the Act, was exempted from protection: *Spencer v Australian Capital Territory*, *Spencer v Australian Capital Territory* (n 3) [35]. However, it appears that Spencer never pursued this line of argument.

The jurisdictional effects of the classification of trees as native vegetation was to bring the disputed trees to law in a particular form, thereby altering the pre-existing lawful relations between the trees and Spencer. That pre-existing lawful relation was one of possession and ownership, established between Spencer and the trees through law's category of 'land' (as will be discussed further in the next section). As 'land', the trees belonged to law as an object of property rights. As 'native vegetation', the disputed trees belonged to law in a different form. It is worth noting here, of course, that not all the trees growing on Spencer's property necessarily belonged to both categories. Any introduced species of trees growing on the property, which did not come within the category of 'native vegetation', would not have been drawn into these same set of lawfully protected relations, though they still would belong to law as 'land'. The point is simply that each category establishes qualities of similarity and difference in different ways; producing the lawful trees to which lawful relations attach. The category of native vegetation, however, triggered the application of the regulatory regime contained within the provisions and regulations of the *Native Vegetation Act* to the trees came within the category. As a result, various government agencies and officials were also brought into lawful relations with the trees. In particular, as discussed, the Murrumbidgee Catchment Management Authority became responsible for visiting the site, collecting data about the trees and making the final decision as to whether the proposed clearing would be permitted. As native vegetation, the disputed trees were bound to law, drawn into discrete sets of lawful relations with other entities – landholders and government officials – producing a particular quality of belonging to law.

Starting with the native vegetation classification helps us understand the procedural history of the *Spencer* cases as an extended exercise in legal classification, in which Spencer searched for an alternative category that would bring the trees back back under his control. As noted above, entities can belong to more than one of law's categories simultaneously. The relationship between law's categories and entities is 'not analogue', a point Pottage makes well.[72] There is no 1:1 ratio, no natural affinity or single correspondence between law's categories and entities that necessarily results in only one legal classification for each entity. The open-ended nature of law's classifications allows for novel arguments, for competing claims and classifications. These competing classifications emerge as different persons, institutions, or office holders seek to establish

[72] Pottage (n 2) 160.

lawful relations with one another in different ways. As relationships of life are changed, so too are new categories created and old categories abandoned. Mary Douglas argues that this is how categories

> get changed and … things are rejigged to fit the new categories…[and] people are tempted out of their niches by new possibilities of exercising or evading control.[73]

In a similar sense, the *Spencer* cases can be read as a series of attempts by Spencer to re-assert his control over the trees by offering alternative, competing classifications for the trees, classifications which would draw those trees into different sets of lawful relations.

B. *Belonging to law as land*

Next, Spencer classifies the disputed trees as 'land'. This classification first appeared in Spencer's statement of claim filed with the NSW Supreme Court in 2007. Brereton J summarised Spencer's argument in the following way:

> At the centre of both propositions is the theory that a grant of a fee simply is a grant of full and free ownership of the land to the grantee, subject only to such restrictions as affect it at the time of the grant, so that additional restrictions on its use cannot thereafter be imposed, except with the consent of the fee simple owner (or, perhaps, just compensation).[74]

Spencer also classified the disputed trees as 'land' in his first statements of claim filed with the Federal Court:

> In his statement of claim, the applicant, Mr Peter Spencer, alleges that he is the owner of a freehold parcel of land situated in New South Wales. His complaint, essentially, is that restrictions on his use of the land have been imposed by the State of New South Wales, and that those restrictions are such as to prevent him making any reasonable use of the land. He says that the effect of the restrictions amounts to an acquisition of the land.[75]

He also classified the disputed trees as timber in his third statement of claim in the Federal Court and in his appeal to the High Court concerning summary dismissal.[76] In all

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[73] Mary Douglas, *How Institutions Think* (Routledge & Kegan Paul, 1987) 108.
[74] *Spencer v Australian Capital Territory*, *Spencer v Australian Capital Territory* (n 3) [20].
[75] *Spencer v Commonwealth of Australia*, *Spencer v Commonwealth of Australia (2007)* (n 3) [2].
[76] *Spencer v Commonwealth of Australia*, *Spencer v Commonwealth of Australia (2008)* (n 3) [2]; *Spencer v Commonwealth of Australia*, *Spencer v Commonwealth of Australia (2010)* (n 3) 136 per Hayne, Crennan, Kiefel and Bell JJ.

instances, Spencer classified the disputed trees in the course of an argument that sought to challenge the validity of law's category of 'native vegetation'. His argument, essentially, was that NSW's native vegetation laws constituted an unlawful interference with the lawful relations between himself, as owner, and his land. That relationship was one of exclusive possession, derived from Spencer's title to the fee simple and leasehold interests in the various parcels of land that comprised his farm. Against NSW, Spencer argued that the enactment of the native vegetation legislation constituted an excess of legislative power.[77] Against the Commonwealth, he argued an unconstitutional acquisition of property, within the terms contemplated by s 51(xxxi) of the Constitution.[78]

By classifying his trees as 'land', Spencer deployed an established common law category that drew the trees into the domain of law's authority in a particular form: as an object to which his real property rights attached. As discussed in Chapter 3, law's category of 'land' is sourced in the common law and trees certainly fall within the common law definition of land as it relates to real property.[79] However, Spencer wanted the category 'land' to do more than establish lawful relations between himself and the trees. His argument, in the Supreme Court at least, was that the enactment of NSW's native vegetation laws constituted an unlawful interference with that lawful relationship. In so doing, Spencer joined a small number of other landholders who had also challenged (unsuccessfully) the validity of legislation that effected land-use restrictions in Queensland and NSW courts.[80]

In the Supreme Court, Spencer framed this argument as a cause of action founded on an excess of legislative power or, alternatively, a breach of the 'fee simple' principle.[81] These claims were based on a proposition, advanced by Spencer, that once land has been granted by the state to an individual, that state cannot, by later legislative act, restrict or alter the substantive rights to land contained in the original grant.[82] Spencer argued that, by restricting the uses to which he could put his land, the New South Wales government had either acted in excess of its legislative authority or had breached the contractual terms of

[77] *Spencer v Australian Capital Territory*, *Spencer v Australian Capital Territory* (n 3) [20]-[35].
[78] *Spencer v Commonwealth of Australia*, *Spencer v Commonwealth of Australia (2007)* (n 3).
[79] As discussed in Chapters 2 and 3.
[80] See, eg, *Bone v Mothershaw* (2003) 2 Qd R 600. For commentary, see Justine Bell, 'Tree Clearing, Hunger Strikes and Kyoto Targets - The Need for Middle Ground' [2011] *Environment and Planning Law Journal* 201, 205.
[81] *Spencer v Australian Capital Territory*, *Spencer v Australian Capital Territory* (n 3) [20].
[82] Ibid.

the original land grant. However, the Supreme Court summarily dismissed Spencer's claim against NSW, finding the claims to be 'unarguable' and concluding that Spencer had 'no triable case' against NSW.[83] In reaching this decision, the court described Spencer's argument as containing 'a number of fallacies'.[84] First, the court found that a grant of land in fee simple is not a contract, but a grant made pursuant to an Act of Parliament, which can be repealed, amended or varied by further Acts of Parliament. Second, even if the grant could be characterised as a contract, the contract could not constrain the powers of the legislature:

> [T]he Executive cannot, by representation or promise, disable itself from performing a statutory duty or exercising a statutory discretion to be performed or exercised in the public interest, by binding itself not to perform the duty or exercise the discretion in a particular way … [T]he Executive cannot by contract bind the Legislature not to exercise its legislative powers.[85]

Third, the court found that a grant of an estate in fee simple did not preclude the later exercise of legislative power regarding that land. In other words, '[a] sovereign parliament (such as that of a State) can lawfully impose by statute restrictions on the use or of activities which may be carried out on land held in fee simple'.[86]

Finally, the court found that a law which regulates or restricts the use of land is not inconsistent with ownership in fee simple.[87] The NSW state government had not acquired any formal interest in Spencer's land, and although the effect of the restrictions may have been to sterilise, or severely restrict, the uses to which Spencer may put that land, this was not an injury that the common law would recognise:

> [T]he law provides no remedy for this action or its consequences when it is the result of legislation validly passed under law-making authority that by its terms or nature authorises or permits such an outcome.[88]

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[83] Ibid [34]. Pursuant to the Uniform Civil Procedure Rules of the Supreme Court, the court may strike out pleadings if the pleading 'discloses no reasonable cause of action' or has a tendency to cause prejudice, embarrassment or delay in proceedings, or is otherwise an abuse of the court's processes: *Uniform Civil Procedure Rules 2005* (NSW) r 14.28.
[84] *Spencer v Commonwealth of Australia (No 2)*, *Spencer v Commonwealth of Australia (2007) (No 2)* (n 3) [21].
[85] *Spencer v Australian Capital Territory*, *Spencer v Australian Capital Territory* (n 3) [23].
[86] Ibid [25].
[87] Ibid [27].
[88] MacPherson JA in *Bone v Mothershaw* (n 80) at [25]. Cited by Brereton J in *Spencer v Australian Capital Territory*, *Spencer v Australian Capital Territory* (n 3) [27].

The court bolstered its decision by explaining that, in NSW, there was no common law or statutory right to compensation when property is acquired by the State. Although the Commonwealth is required to acquire property 'on just terms', pursuant to s 51(xxxi) of the Constitution, neither the common law nor the NSW state constitution requires the State to pay compensation for the acquisition of property.[89] Overall, the court found that the restrictions effected by NSW's native vegetation laws did not constitute any kind of wrongful interference with Spencer's lawful relationship to land.

In the course of this particular institutional procedure – a cause of action founded on 'a breach of a fee simple contract' or an invalid exercise of legislative power – classifying the trees as land had the jurisdictional effect of drawing the disputed trees into a discrete set of lawful relations. 'Land' established a lawful relation between the disputed trees and Spencer as the landholder, a quality of belonging shaped by Spencer's argument that the native vegetation protection laws effected some kind of unlawful interference with his real property rights to that land. In other words, by classifying the trees as 'land', Spencer succeeded in joining the trees to law, as an object of Spencer's property rights. However, in this particular procedure, the category failed to join the trees to law in a way that precluded the NSW government from enacting native vegetation protection legislation.

However, when Spencer classified his trees as land in a claim based on an unconstitutional acquisition of property against the Commonwealth, different jurisdictional effects resulted. Crucially, what changed here was not the category itself but the cause of action in which it was operationalised. His complaint, as summarised by Emmett J in the Federal Court, was

> that restrictions on his use of the land have been imposed by the State of New South Wales, and that those restrictions are such to prevent him making any reasonable use of the land. He says that the effect of the restrictions amounts to an acquisition of the land. Secondly, he says that the reason for the restrictions are to be found in

[89] The court noted that in some instances the *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW) would provide for compensation, but that was only for acquisitions that fell within the scope of that legislation. There was not general right to compensation for acquisition of property by NSW: *Spencer v Australian Capital Territory*, *Spencer v Australian Capital Territory* (n 3) [29]. For more on the High Court's current approach to interpreting s 51(xxxi), generally, see Lael K Weis, 'On Just Terms, Revisited' (2017) 45 *Federal Law Review* 223.

> arrangements between the Commonwealth and the State concerning consequences of Australia having signed the Kyoto Protocol in 1997...[90]

Essentially, the complaint was that there had been an 'acquisition of Mr Spencer's land by the Commonwealth on other than just terms, as is contemplated by s 51 of the *Commonwealth of Australia Constitution Act* 1900 (Cth).' This time, the court did not summarily dismiss Spencer's claim for failing to disclose a known cause of action. However, the court found that Spencer's statement of claim was 'embarrassing', in the sense that it failed to disclose the necessary facts, which, if established, would support the relief claimed.[91] Accordingly, Spencer's initial statement of claim was struck out by the court. The court found that Spencer had not specified with sufficient detail the nature of the property that had been acquired by the Commonwealth.[92] Neither had Spencer demonstrated that the acquisition was affected or authorised by the Commonwealth, given that the native vegetation laws were sourced in NSW statutes.[93] Spencer's first and second statements of claim, filed in the Federal Court, were struck out for the same reasons.[94] On both occasions, the court granted Spencer leave to file an amended statement of claim to address these deficiencies in the form of his pleadings.[95]

The Federal Court's decision to strike out, rather than summarily dismiss, Spencer's claim is significant when thinking about the jurisdictional effects of law's categories. Rather than dismissing Spencer's case for failing to disclose any kind of known cause of action, as had the NSW Supreme Court, the Federal Court acknowledged that, depending on the nature of the facts alleged by Spencer, and a clearer articulation of his argument, his claim may potentially 'fit' within a recognised cause of action. In order to establish the possibility of such as claim, however, Spencer was required by the courts to identify 'precisely' the property which had been acquired by the Commonwealth.[96] This was something he had failed to do in his first and second statements of claim.[97] In the third

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[90] *Spencer v Commonwealth of Australia*, *Spencer v Commonwealth of Australia (2007)* (n 3) [2].
[91] Ibid [8].
[92] *Spencer v Commonwealth of Australia*, *Spencer v Commonwealth of Australia (2007)* (n 3).
[93] Ibid [6].
[94] *Spencer v Commonwealth of Australia (No 2)*, *Spencer v Commonwealth of Australia (2007) (No 2)* (n 3) [10]-[11].
[95] *Spencer v Commonwealth of Australia*, *Spencer v Commonwealth of Australia (2007)* (n 3) [8]; *Spencer v Commonwealth of Australia (No 2)*, *Spencer v Commonwealth of Australia (2007) (No 2)* (n 3) [11].
[96] *Spencer v Commonwealth of Australia (No 2)*, *Spencer v Commonwealth of Australia (2007) (No 2)* (n 3) [5].
[97] Ibid.

iteration of his argument however, Spencer focused in on the category of 'land', and what it comprised, arguing

> that land is nothing more than a bundle of rights amounting to a relationship between a person with possession, or a right to possession, of those rights and the physical resources that comprise the land, such as grass, trees, soil and water. If that relationship is sterilized or impaired by statute, an acquisition of property occurs.[98]

To substantiate his claims, Spencer provided evidence of a letter he had received from the Rural Assistance Authority, in which the Authority had assessed his property as being 'no longer commercially viable' as a result of the operation of the *Native Vegetation Act.*[99] The court found that the letter suggested 'considerable support for Mr Spencer's contention that the effect of the State Statutes has been to occasion significant detriment to him'. [100] As a result, Emmett J found that there was a real question to be tried as to whether these restrictions amounted to an acquisition of property:

> All of the Rights and Interests, as described above, are incidents of being the holder of leasehold or freehold title in respect of Saarahnlee. Whether the loss of all those Rights and Interests is sufficient to constitute something more than mere regulation and constitute a taking or acquisition is a question of fact and degree to be assessed after all the evidence is in.[101]

In respect of this part of Spencer's argument, the court found that summary dismissal would not be appropriate. There was a real question to be tried regarding an acquisition of property effected by restrictions on land use.

Classifying trees as 'land', in a cause of action founded in unconstitutional acquisition of property, potentially reconfigured the lawful relations to which the trees belonged. As land, it was clear that the trees were drawn into lawful relations with Spencer (of exclusive possession). However, it was also possible that, as 'land', the trees might be drawn into lawful relations with the Commonwealth (of acquisition). As such, Spencer had classified his trees as land with different jurisdictional effects, as compared to the Supreme Court proceedings. He had established that his injury or grievance was, potentially, one that belonged to law. The constitutional cause of action made possible a legal argument that

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[98] *Spencer v Commonwealth of Australia*, *Spencer v Commonwealth of Australia (2008)* (n 3) [123].
[99] Ibid [128].
[100] Ibid [129].
[101] Ibid [135].

the native vegetation legislation had restricted his use of land to such an extent that it amounted to an acquisition of the substance of his property rights. It was an argument that the Federal Court was prepared to recognise as one that involved a 'serious question' to be tried, of which Spencer may have a reasonable prospect of success.[102] Within the framework of this cause of action, the category of land had a different jurisdictional effect: it potentially drew the trees into a lawful relationship with the Commonwealth, a relationship of acquisition on other than just terms. A different cause of action permitted the category to do different jurisdictional work. As 'land' in this constitutional claim, the trees were, at least potentially, capable of being drawn into a relation with the Commonwealth that law would recognise: a relationship of acquisition. This was a relation the law would recognise, but not countenance, unless it had occurred on just terms, per s 51(xxxi) of the Constitution.

The capacity of law's categories to establish relations of belonging to law, and the quality of that belonging, here emerges as a reciprocal relationship between 'form' and 'frame', to use Pottage's terms.[103] In other words, the category 'land' offers a particular form of belonging to law for the disputed trees. The shape of that belonging, however, emerges from and is shaped by the institutional procedure – in this instance the cause of action – that frames the category. In an action for breach of a 'fee simple principle' against the NSW government, the law's category of land drew the trees into a lawful relation with Spencer, as owner. The category of land, however, had no capacity to establish lawful relations between the disputed trees and the NSW government that would have supported Spencer's claim for a remedy from the courts. However, when the category of 'land' was framed by a constitutional claim of unjust acquisition of property, its jurisdictional effects were different: there was now potential for the category to draw the disputed trees into a lawful relationship with the Commonwealth. The classification of Spencer's trees as 'land' in these cases supports Pottage's argument, that 'persons and things have their existence in legal formulae that are formed and reformed within specific cases or transactions'.[104] In other words, the disputed trees come to belong to law as land within the frame of the particular transaction, or cause of action, through which they are deployed. In addition, the framing of the form produces different qualities of belonging

[102] *Spencer v Commonwealth of Australia*, *Spencer v Commonwealth of Australia (2008)* (n 3).
[103] Pottage (n 2) 154.
[104] Ibid 160.

to law – as an object of private property, or as unjustly acquired by the Commonwealth, for example.

C. *Belonging to law as carbon*

The disputed trees were also classified throughout the *Spencer* cases as 'carbon'. Spencer first classified the disputed trees as carbon in the 2007 NSW Supreme Court proceedings. The classification was made in a claim of tortious conspiracy. Spencer argued

> that the third defendant, the Commonwealth of Australia, has appropriated for its own benefit the carbon sink created by the preservation of native vegetation on Saarahnlee, by claiming in international forums that while it is not a signatory to the Kyoto Protocol, it is nonetheless meeting the targets that would apply were it a signatory through the preservation of vegetation as a result of the various vegetation protection Acts of the States.[105]

Spencer sought damages for the diminution in value of his property and restitution of the carbon credits. He argued that, in order to meet its international obligations under the Kyoto Protocol, the Commonwealth had induced New South Wales to enact legislation that provided broad protections for native vegetation. In this way, the Commonwealth had conspired with New South Wales to acquire the carbon credits associated with the carbon sink (the trees) on Spencer's property.[106] By reclassifying the disputed trees as a carbon, Spencer was searching for a category that would adequately reflect the benefit he believed the Commonwealth had acquired as a result of the State's native vegetation laws.

The Supreme Court summarily dismissed Spencer's claim, based on three 'fundamental deficiencies' with his argument.[107] First, at the time of judgment, Australia had not ratified the Kyoto Protocol and as such, the greenhouse gas emissions targets were 'hypothetical' only.[108] The court found that meeting such hypothetical targets did not involve the 'use or appropriation in any legal sense of any property of Mr Spencer'.[109] As result, the court held:

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[105] *Spencer v Australian Capital Territory*, *Spencer v Australian Capital Territory* (n 3) [1].
[106] Ibid [36]. Tortious conspiracy is generally defined as an agreement between two or more persons to commit an unlawful act that willfully causes damage to the plaintiff: *McKernan v Fraser* (1831) 46 CLR 343, 403. See generally Ellen Goodman, 'Civil Conspiracy: Better Dead than Alive?' (1991) 3(1) *Bond Law Review* 66, 67.
[107] *Spencer v Australian Capital Territory*, *Spencer v Australian Capital Territory* (n 3) [37].
[108] Ibid. Australia ratified the *Kyoto Protocol* in December 2007.
[109] Ibid.

> The claiming of political credit for a result that has been brought about by the imposition of some burden on a citizen does not found any cause of action.[110]

Second, the court found that the enactment of legislation (i.e., NSW's native vegetation legislation) by a sovereign state is generally not an act capable of attracting liability.[111] In other words, there was no 'unlawful' action to which the tort of conspiracy could refer.[112] Third, even if the enactment of legislation was capable of being recognised as an act in the pursuit of conspiracy, Spencer would have had great difficulty proving that the motive, or 'ultimate object', of the unlawful act was to inflict injury on the plaintiff. Here, the court relied on Spencer's own argument that the Commonwealth's primary motive for inducing the state to enact native vegetation protections was to achieve reductions in greenhouse gas emissions, rather than to specifically to cause harm to the plaintiff. Spencer's claim was summarily dismissed by the court, because Brereton J found that the court was

> unable to imagine any known basis of liability that might be asserted against the Commonwealth. It follows in my opinion that Mr Spencer has no arguable case against the Commonwealth and the proceedings against the Commonwealth must be dismissed.[113]

The Supreme Court, in other words, conclusively rejected Spencer's claim for failing to give rise to a known cause of action. The court could see no possible means by which Spencer could frame his grievance that would enliven the court's authority to decide. Spencer's grievance was not one that belonged to law; the decision to summarily dismiss Spencer's claim 'excommunicated' it from the juridical domain.[114]

A jurisprudence of classification that considers the jurisdictional effects of classification offers some insight into why Spencer's claim failed. In this iteration of his argument, Spencer failed to establish that 'carbon' was law's category, in the sense of being an authorised category that belonged to law (as discussed in Chapters 3 and 4). It was not enough to make factual or scientific assertions about the relationship between trees, carbon and Australia's international law obligations under the Kyoto Protocol. Spencer

[110] Ibid.
[111] Ibid.
[112] Ibid.
[113] Ibid [38].
[114] Drawing on Goodrich's idea that the opposite to jurisdiction is excommunication: Goodrich (n 35).

had to demonstrate that carbon was a category that belonged to law. Spencer may have convinced the court that the category of 'carbon' belonged to the international climate law, by referencing the Kyoto Protocol. However, Spencer's claim was not in international law. For his argument to work, Spencer needed to establish that 'carbon' was a category that belonged to domestic Australian law – more specifically, as an object to which property rights might attach. Carbon, in this iteration of Spencer's argument, was not a category of law but, rather a political measure of how well Australia was meeting international efforts to combat climate change:

> The claim against the Commonwealth cannot succeed. The claiming of political credit for a result obtained at the expense of a citizen founds no cause of action known to law.[115]

The allegations that Spencer had made against the Commonwealth did not constitute an injury or a grievance that belonged to law.

In his second statement of claim, Spencer next classified the disputed trees as carbon in the Federal Court. Instead of arguing that the Commonwealth had acquired his land, Spencer alleged that the Commonwealth had acquired his carbon. As expressed by Emmett J:

> In the Second Statement of Claim, rather than alleging an acquisition of the freehold of 'Saarahnlee' by reason of the imposition of restrictions on its use, the allegation now appears to be that the Commonwealth has acquired property of the applicant that is variously described as 'carbon sequestration takings' (paragraph 27), 'substantial commercial carbon sequestration crop' (paragraph 32), 'carbon crop produced from the conveyed attributes of the Land' (paragraph 34) and 'CARBON developed beneficial use of Land' (Prayer A) [sic].[116]

The court did not express a view at this point as to whether 'carbon' was a category to which property rights might attach. Rather, Emmett J simply said that Spencer's 'pleadings must identify precisely what property of the applicant is alleged to have been acquired by the Commonwealth'.[117] Spencer was required, in other words, to make up his mind and step out the argument. Had the Commonwealth acquired his 'land' or his

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[115] *Spencer v Australian Capital Territory*, *Spencer v Australian Capital Territory* (n 3) [44].
[116] *Spencer v Commonwealth of Australia (No 2)*, *Spencer v Commonwealth of Australia (2007) (No 2)* (n 3) [5].
[117] Ibid.

'carbon'? And how exactly was that acquisition effected, given that there had been no transfer of formal title, either to land or to carbon? Once again Spencer's statement of claim was struck out, but he filed several amended statements of claim with the court between November and February 2008.[118]

It was in response to the fifth statement of claim that the Federal Court, for the first time, engaged with the substance of Spencer's claims. In a decision handed down in August 2008, the Federal Court heard and decided upon preliminary applications made by each party. The first application was by the Commonwealth, to have Spencer's claim summarily dismissed pursuant to s 31A of the *Federal Court of Australia Act 1975* (Cth). The second was by Spencer, for interlocutory relief. Regarding summary dismissal, the question for the court was whether Spencer had a 'reasonable prospect of successfully prosecuting the proceeding'.[119] Regarding interlocutory relief, the question for the court was whether 'there was a serious question to be tried' as to whether Spencer was entitled to the final relief as set out in the statement of claim.[120] The court considered it expedient to hear both motions together, because they formed opposite sides of the same legal question: whether or not there was a serious question to be tried (or whether Spencer has no reasonable prospects of successfully prosecuting the claim) concerning whether the Commonwealth had acquired Spencer's property on other than just terms.[121]

In the context of this institutional procedure – a constitutional claim regarding the acquisition of property on just terms – Spencer classified the trees as carbon. As summarised by Emmett J, Spencer claimed that, prior to the enactment of NSW's native vegetation laws, his property comprised 'valuable, marketable and productive farming and grazing land'. In particular, Spencer claimed his 'rights and interests' in that land included

> [c]arbon sequestration rights, including the legal commercial and other benefits or advantages of carbon sequestration by existing trees or future trees or forests on Saarahnlee after 1990 (the Carbon Sequestration rights)…[122]

[118] Ibid [11].
[119] *Spencer v Commonwealth of Australia*, *Spencer v Commonwealth of Australia (2008)* (n 3) [7].
[120] Ibid [1].
[121] Ibid [7].
[122] Ibid [6].

Spencer claimed that the carbon sequestration rights that he held in respect of his property constituted 'property within the meaning of s 51(xxxi) of the constitution. He claimed that

> [u]pon the prohibition or general restriction [of clearing on his land] taking effect, some or all of the Carbon Rights were expropriated or acquired by the Commonwealth and an identifiable and measurable benefit and advantage was obtained by the Commonwealth for its purposes.[123]

In this iteration of his argument, Spencer, for the first time, identifies 'carbon' as an authorised category of tree protection, capable of drawing the disputed trees into the domain of law's authority as objects of property rights. This is made explicit in his claim that rights to carbon sequestration by vegetation and soil 'constitute property' within the meaning of s 51(xxxi) of the Constitution. Unlike the NSW Supreme Court decision, which deployed the category of carbon in the context of Australia's international obligations under the Kyoto Protocol, here, Spencer is deploying carbon as a category of real property rights.

Spencer's claim raised an interesting and novel question: could 'carbon', or the process of 'carbon sequestration', constitute an object to which real property rights might attach?[124] As Rosemary Lyster has observed, the question of who 'owns' the carbon absorbed by trees and forests poses a complex substantive legal question within the domain of environmental and climate law.[125] It may have been possible to argue that the common law recognised property rights in carbon; however, as Peter Butt observes, such an argument would have been uncertain, novel and complex.[126] Instead of relying on the common law, however, Spencer relied on statute. Here, he pointed to provisions in the *Conveyancing Act 1919* (NSW) regarding 'carbon sequestration rights' as a type of real property interest known as forestry rights. Pursuant to s 87A, the *Conveyancing Act* defines carbon sequestration rights as

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[123] Ibid.

[124] There is substantial legal scholarship on this question. See, eg, Peter Butt, 'Carbon Sequestration Rights - a New Interest in Land?' (1999) 73 *Australian Law Journal* 235; Steven A Kennett, Arlene J Kwasniak and Alastair Lucas, 'Property Rights and the Legal Framework for Carbon Sequestration on Agricultural Land' (2005) 37(2) *Ottawa Law Review* 171; Samantha Hepburn, 'Carbon Rights as New Property: The Benefits of Statutory Verification' (2009) 31(2) *Sydney Law Review* 239; Pamela O'Connor et al, 'From Rights to Responsibilities: Reconceptualising Carbon Sequestration Rights in Australia' (2013) 30(5) *Environmental and Planning Law Journal* 403.

[125] Rosemary Lyster, 'The New Frontier of Climate Law: Reducing Emissions from Deforestation (and Degradation)' (2009) 26 *Environmental and Planning Law Journal* 417, 445.

[126] Butt (n 124).

> …a right conferred on a person by agreement or otherwise to legal, commercial or other benefit (whether present or future) of carbon sequestration by any existing or future tree or forest on the land after 1990.[127]

The Act specifies that a carbon sequestration right is a new type of 'forestry right', a *profit à prendre* interest, within the existing real property law framework in NSW.[128] This category of property interest enables a landholder to sever ownership of particular entities from the underlying land, by granting a forestry or carbon sequestration right to a third party.[129] The Act provides that land-use restrictions may be imposed on the land subject to a forestry right, so long as the instrument creating the restriction describes the effected land and specifies the particulars of the restriction.[130] Such instruments may be recorded on the register.[131] Once recorded, it is deemed to be an interest in land within the meaning of s 42 of the *Real Property Act 1900* (NSW).[132] The effect of these provisions is that any subsequent purchasers of the land will take their interest subject to carbon sequestration rights, and any associated covenants regarding restrictions as to land use that are recorded on the register. The carbon sequestration rights, and any restrictions on cutting down trees made ancillary to that right, will run with the land and bind future interest holders.[133]

Having classified his trees as carbon (or as carbon sequestering), Spencer then offered an argument as to how the Commonwealth had acquired his property. The crux of Spencer's argument relied on the carbon accounting rules under the Kyoto Protocol, namely, that any carbon credits generated for trade under the Kyoto scheme must be 'additional' to carbon reductions that would have occurred otherwise.[134] Spencer argued that NSW's native vegetation laws effectively made carbon sequestration 'mandatory' on his farm, with the effect that the disputed trees were no longer an eligible source of carbon credits

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[127] *Conveyancing Act 1919* (NSW) s 87A. For important commentary see Hepburn (n 124); O'Connor et al (n 124).
[128] *Conveyancing Act* (n 127) s 87A, s 88EA. A *Profit à prendre* is real property interest, the essence of which is the right to enter another person's property to take away something considered to be a 'natural' product of the land, such as timber, soil or minerals: Peter Butt, *Land Law* (Thomson Reuters, 6th ed, 2010) 512.
[129] Butt notes that prior to statutory reform, it may have been possible, albeit very complicated, to achieve the same result at common law: Butt (n 124) 235.
[130] Section 88EA (1)
[131] Section 88EA (2)
[132] Section 88EA (5)
[133] Section 88EA (4) provides that the person holding the benefit of such a restriction may enforce it against any person 'who is, or who claims under' a signatory to the original instrument as if that person had entered into a binding agreement with the person holding the benefit of the restriction or covenant. For further commentary, see Butt (n 124).
[134] David Jones, 'The Kyoto Protocol, Carbon Sinks and Integrated Environmental Regulation: An Australian Perspective' (2002) 19(2) *Environmental and Planning Law Journal* 109, 113.

within the terms of the Kyoto Protocol. Put slightly differently, were it not for the native vegetation protection laws, the trees growing on Spencer's land could have formed the basis of carbon credits, recognised by domestic Australian law as 'carbon sequestration rights', which he could have sold and traded in voluntary carbon markets. As that right has now been denied to him, there was an acquisition of his carbon.[135] In addition, he argued that the Commonwealth had derived a substantial benefit from the enactment of NSW's native vegetation protection laws which would result in Australia meeting its Kyoto Protocol targets. (By the time of this Federal Court decision in August 2008, Australia had ratified the Kyoto Protocol.) As evidence of this benefit, Spencer pointed to a concession made by the Commonwealth during the proceedings that

> if the Commonwealth did not have the ability, for the purposes of its obligations under the Kyoto Protocol, to account for the emissions reductions resulting from reducing land clearing, in the period between 2008 and 2012, the Commonwealth would need to take other measures to reduce emissions in order to meet its obligations and such measures would be likely to involve expense to the Commonwealth.[136]

In response, the court found that it was 'clearly debatable whether the comparison proposed by Mr Spencer between the alleged detriment to him, on the one hand, and the purported benefit to the Commonwealth on the other has validity'.[137] Given the Commonwealth's concession, the court found that there was an arguable case that there had been an acquisition of Spencer's property, in the form of 'carbon sequestration rights'.[138]

Ultimately, however, Spencer's claims (with respect to an alleged acquisition of land and carbon) were summarily dismissed by Emmett J because Spencer was unable to demonstrate how any acquisition of property was effected by the Commonwealth. After all, the native vegetation laws were State, not Commonwealth, legislation. As the Federal Court put it, the *Native Vegetation Act* (and its predecessor, the *Native Vegetation Conservation Act 1997* (NSW))

> operate and have effect by reason of their being valid statutes of the Parliament of New South Wales. It is the provisions of the State Statutes that have effected or authorised any acquisition or expropriation of Mr Spencer's property.[139]

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[135] *Spencer v Commonwealth of Australia*, *Spencer v Commonwealth of Australia (2008)* (n 3) [141].
[136] Ibid [145].
[137] Ibid [147].
[138] Ibid [149].
[139] Ibid [175].

In other words, the court found that none of the provisions of the *Native Vegetation Act* depended, for their validity, on Commonwealth legislation or inter-governmental agreements made between NSW and the Commonwealth pursuant to Commonwealth legislation. Although Spencer had demonstrated that there was an arguable case that his property had been acquired, the court found that Spencer had 'no reasonable prospect of successfully prosecuting the proceedings', because he could not demonstrate how the acquisition had been effected, or authorised by, the Commonwealth.[140]

Spencer's next move was to appeal the summary dismissal. He first appealed, unsuccessfully, to the Full Federal Court. However, his appeal to the High Court was ultimately successful.[141] The High Court's decision was that summary dismissal was not appropriate in this case because the claim 'potentially involve[d] important questions of constitutional law'.[142] The High Court's decision focused entirely on the second arm of Spencer's argument: whether the acquisition had been effected or authorised by the Commonwealth. Following the High Court's decision in *ICM Agriculture v The Commonwealth (ICM)*,[143] handed down *after* Emmett J's initial decision to summarily dismiss Spencer's case, the High Court found that it was open to Spencer to argue that an informal arrangement between NSW and the Commonwealth had authorised NSW to acquire property within the contemplation of s 51(xxxi).[144] The High Court unanimously overturned Emmett J's decision to summarily dismiss Spencer's claim. As French CJ and Gummow J explained:

> Where the success of a proceeding depends upon propositions of law apparently precluded by existing authority, that may not always be the end of the matter. Existing authority may be overruled, qualified or further explained. Summary processes must not be used to stultify the development of the law.[145]

For the purposes of this chapter, it is relevant that the classifications of the trees as 'land' and as 'carbon' were not questioned or disputed by the High Court. Before the Federal

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[140] Ibid [7].
[141] *Spencer v Commonwealth of Australia*, *Spencer v Commonwealth of Australia (2010)* (n 3).
[142] Ibid 123 per French CJ and Gummow J.
[143] *ICM Agriculture Ltd v Commonwealth of Australia* (2009) 240 CLR ('*ICM Agriculture Ltd v Commonwealth of Australia*').
[144] *Spencer v Commonwealth of Australia*, *Spencer v Commonwealth of Australia (2010)* (n 3) 136 per Hayne, Crennan, Kiefel and Bell JJ. For more commentary on this aspect of the case, see Stephen Lloyd, 'Compulsory Acquisition and Informal Agreements: Spencer v Commonwealth' (2011) 33 *Sydney Law Review* 137.
[145] *Spencer v Commonwealth of Australia*, *Spencer v Commonwealth of Australia (2010)* (n 3) 132.

Court, Spencer had already met the threshold condition required to avoid summary dismissal: that there was a reasonable prospect of successfully prosecuting his claim that there has been an acquisition of property. As concluded by Emmett J, regarding both land and carbon, this was a complex question of fact and law to be considered once all the evidence was in. This aspect of the Federal Court's decision was not revisited by the High Court.

The classification of the disputed trees as 'carbon' demonstrates how the jurisdictional effects of law's categories are shaped by particular institutional transaction or procedure into which the category is deployed. The jurisdictional effects of the category of 'carbon', like land', changed depending upon the cause of action in which the activity of classifying took place. Spencer's early classifications of the trees as 'carbon', based on evidence of material conditions of carbon sequestration and its relationship to climate change, were insufficient to generate relations of belonging to law. The category of 'carbon' within the frame of a tortious claim of conspiracy did not bring the trees to law in any particular form. Instead, as 'carbon', the disputed trees floated outside and beyond law, in the domain of 'political credit', and failed to establish lawful relations between Spencer and the trees, or between the Commonwealth and the trees. However, the category of 'carbon', operationalised within the frame of a constitutional claim of an unjust acquisition of property, was deployed with different jurisdictional effects. Here, the Federal Court was prepared to recognise the potential for Spencer's trees to belong to law as 'carbon', and thus to be drawn into lawful relations with both Spencer and the Commonwealth. This argument was significantly bolstered by Spencer's reference to the carbon sequestration rights provisions under the *Conveyancing Act 1919* (NSW). It was only by framing his claim as one concerning the constitutional guarantee contained in s 51(xxxi), *and* deploying law's category of 'carbon' within that frame, that the capacity of 'carbon' to modify lawful relations was unlocked.

Potentially, carbon, as a category of law, had the capacity to offer a particular quality of belonging to law for the disputed trees. As carbon, the trees could be bound to law as an object of real property rights, and so potentially drawn into lawful relations both with Spencer and the Commonwealth. In this respect, the quality of belonging offered to law by 'carbon' was fairly similar to that offered by 'land'. In both examples, it can be argued that quality of belonging was shaped by the cause of action within which the category was deployed. Both carbon and land were deployed in claims founded in constitutional

law concerning the acquisition of real property by the Commonwealth. In this sense, both categories offered a quality of belonging to law as an object of real property rights. This classification of the trees as carbon, however, did not derive its effectiveness as a technique of jurisdiction from the material status of the trees as entities busily sequestering carbon. Nor did this quality derive from an inherent status as passive entities, as 'objects' in an ontological sense, as compared to active agents or persons. Rather, the jurisdictional effects of law's categories unfolded as an effect of the activity of classifying within the context of a particular institutional procedure or transaction. Returning to Blomley's arguments discussed above, as an object of property rights, carbon does cut through complex bio-chemical relationships: between the sun, the Earth's atmosphere and terrestrial carbon cycles. But as a category of law, carbon does more than this. Classifying trees as carbon is also technique of jurisdiction, designed to, or capable of, establishing, altering or disposing of lawful relations.

For Pottage, the reciprocal relationship – between law's categories and institutional procedures – means that we cannot ask too much of law's categories. In other words, if the agency of law's categories is confined to a particular institutional procedure or transaction, then there is limited warrant for extending the work of the category beyond that institutional context.[146] Through this argument, Pottage reminds us that law's categories are not able, nor designed, to disclose an authentic interior, phenomenological expression of 'a tree' (or any other entity).[147] Rather, law's categories are a particular kind of technique – one that is capable of establishing lawful relations, when deployed by particular institutional transactions. However, I feel some disquiet at the extent of Pottage's claim. There remains a sense in which the effects of law's categories *can* also be read as expressions of broader social power relations, as the expression of a particular ontological presuppositions, or as regulatory tools designed in order to achieve a particular ideal or outcome.

It is possible, however, to pare back Pottage's claims somewhat. Here I draw on the work of Ed Mussawir, who also argues for modes of jurisprudence that are comfortable with

[146] Alain Pottage, 'Introduction: The Fabrication of Persons and Things' in Alain Pottage and Martha Mundy (eds), *Law, Anthropology and the Constitution of the Social: Making Persons and Things* (Cambridge University Press, 2002) 11.
[147] Ibid.

treating law 'as itself'. He does this without making a broader ontological claim about legal agency. As Mussawir has written of Yan Thomas' scholarship:

> Thomas allows us to see … the extent to which law constitutes something more than a reflection of a social practice. It doesn't just place its stamp on a social reality that exists outside it. Rather, it makes up an institutional technique placing a wedge between artifice and reality and widened this gap even further.[148]

Mussawir has further detailed how Thomas regarded modern legal scholarship as reflecting a particular preoccupation with tethering law to 'the real', something that was of far less concern to Roman jurists. Pottage also picks up on this point, as explained here:

> Of course lawyers recognised that legal arguments had to do with things in the world, but the 'real' or material existence of those things was eclipsed by the existence that they came to have within the discourse or rhetorical frame of legal debate ...[149]

Mussawir contributes to Pottage's reading of Thomas by containing an austere reading of law's categories to a particular mode or style of jurisprudence. There is value in jurisprudential modes of scholarship that do not always pull law back to an external measure but, rather, are focused on 'pos[ing] and refin[ing] the problems of law'.[150] This proposition sits well with the jurisprudence of jurisdiction, which similarly engages with questions about law's own internal techniques and practices for pronouncing law. Rather than adopting Pottage's language of the 'agency' of law's categories, this chapter has refined his argument to express the active, productive capacity of law's classification practices through the idiom of the jurisprudence of jurisdiction: by examining the effects of classification on relations of belonging to law.

IV. CONCLUSION

This chapter has offered an account of the procedural history of the *Spencer* cases, read as an extended exercise in classification, and re-classification, of law's protected trees. These decisions can be read as an attempt by an aggrieved landholder to find a legal category that reflected his sense that his trees, or at least his control over those trees, had been taken from him. The question for the courts was whether such a grievance properly

[148] Edward Mussawir, 'To Isolate Law: The Activity of the Jurist in Digest 9.2.27.12 and Digest 45.3.18.2' (2018) 10(1) *Jurisprudence* 54, 57.
[149] Pottage (n 2) 150-1.
[150] Mussawir (n 148) 74.

belonged to law; did Spencer's grievance come within a recognised cause of action that would entitle Spencer to the relief he claimed in damages and for return of the acquired property? As Spencer free-wheeled between various causes of action against the New South Wales and Commonwealth governments, so too did he offer different classifications for the disputed trees, as 'native vegetation', 'land' and 'carbon'. The focus of this chapter has been to consider the effects of each of these categories on relations of belonging to law.

Through this account of the *Spencer* cases, the chapter has demonstrated the significance of institutional procedures and transactions to capacity of law's categories to produce relations of belonging to law. In particular, it has shown that the jurisdictional effects of law's categories – in this example, native vegetation, land and carbon – changed in response to the cause of action within which the category way deployed. The analysis put forward supports the arguments made by Pottage and Thomas about the institutional specificity of law's categories: the jurisdictional effects of legal classification can be understood as unfolding within the 'time of the trial', rather than the 'time of the world' to adopt Thomas' turn of phrase.[151] Whether or not 'carbon' was capable of drawing the disputed trees into a relationship of acquisition with the Commonwealth was not determined by scientific evidence as to whether those particular trees did, in fact, sequester carbon. Nor was the category of 'native vegetation' capable of drawing the trees into a relation of lawful protection vis-à-vis Spencer because land-clearing had been recognised by the scientific community as a leading cause of loss of biodiversity. Rather, it was the activity of classifying the trees, by drawing on law's own authorised categories, within the frame of a particular cause of action, that produced relations of belonging to law.

[151] Pottage (n 146) 153.

CHAPTER 8. CONCLUSION

This thesis has proposed a jurisprudence of classification that engaged the question of how law classifies across three registers: who, how and effects. This concluding chapter summarises the findings and arguments put forward in relation to each register. It then reflects on the implications of these findings as they relate to the thesis's dual orientation to trees and to jurisprudence. Finally, the chapter considers how a jurisprudence of classification could contribute to future legal scholarship.

I. SUMMARY OF ARGUMENT

Law's substantive rules and procedures are suffused with categories: categories for persons (employees, tenants, company directors, authors) for relations (marriage, employment), for events (sale, assault, long service leave) and for material entities (wild flowers, explosives, animals). These categories establish relations of similarity and difference by grouping entities together to determine when two (or more) entities can be considered equivalent. Yet law's categories also do more than this: law's categories tell us what belongs to law and the form of that belonging. Thinking about law's categories in this way, as a technique of jurisdiction, offers a new perspective on how legal scholars might productively and critically engage with law's categories. Rather than focusing on a particular (and, often, troublesome or contested) category, a jurisprudence of classification offers a wide-angle lens for thinking about classification as an institutional practice and strategy that binds entities (such as trees) to law.

This thesis has aimed to demonstrate that this wide-angled perspective on law's classificatory practices is of value to legal scholars. Just as botany, psychology and anthropology have developed their own discipline-specific accounts of classification, there is potential for legal scholars also to reflect critically on the way that law classifies from within the discipline's own internal idioms and institutional frameworks. Such a perspective has been offered by this thesis, presented as a jurisprudence of classification that has considered sources of the authority to classify; who can classify; how classification occurs; and the jurisdictional effects of classification.

This thesis began by examining different sources of authority to classify law's protected trees, as well as who can classify. It found that, within the history of the common law,

there were multiple sources of authority to classify law's protected trees. Three examples of protected tree categories – royal forests, timber and endangered species – revealed three different sources of authority: crown prerogative, common law and legislation. Each source of authority was found to be shaped differently from the start, providing insight into how the common law itself expresses and delimits the authority to classify. In addition, each category was joined to its source through the workings of a different institution: Crown, courts and parliament respectively. This finding pointed to the central role of institutions in understanding how law classified protected trees. Next, the thesis examined who, as a matter of practice, can exercise the authority to classify. The thesis chose to explore this question by investigating who was authorised to classify law's protected trees in the early years of the NSW colony. Through an analysis of historical and archival records, it was found that it was the early NSW governors who fabricated law's protected tree category of 'timber'. They did this by including Crown reservations of timber on grants of freehold land, pursuant to delegated Crown prerogative. The archival records of the governors' land-granting practices revealed additional insights into the shape and expression of their authority, which could not be disinterred from their formal Commissions and Instructions. For example, the governors routinely included reservations of timber on all grants of freehold land, not just on grants to ex-convicts. In addition, a standard form of words for land grant deeds potentially standardised the practice of granting land, such that law's category of timber was routinely and repetitively fabricated each time a deed was executed.

The thesis next engaged a second register of classification: how law classifies, considered as a question of technique. Chapter 5 considered how law makes its categories by writing proclamations. Chapter 6 considered how entities were sorted into and out of law's categories, and thereby came to belong to law through the category. These chapters directly addressed the productive quality of law's classification practices. Law's categories for protected trees were not founded upon an *a priori* ontology but, rather, in particular kinds of institutional practices. Similarly, whether or not a particular entity belonged to law's category was not self-evident but was instead produced by particular sorting practices, such as naming. Each practice inaugurated law in different ways, but common to both was their quality as institutional practices: established ways of doing things. In addition, each institutional practice revealed something different about law's practices of category-making and entity-sorting. Writing proclamations revealed the

capacity of law's institutional practices to incorporate new, digital, writing technologies without significant disruption to the practice of proclamation writing. Naming trees as 'timber' and 'native vegetation' revealed that, for both categories, the courts sorted entities through institutional practices of naming. By first looking at a category's definition and then to the evidence adduced by the parties, the courts named particular entities as belonging (or not) to law's category, and so to law. However, different kinds of naming practices were also found to produce different qualities of belonging to law. Both writing proclamations and naming can in this way be understood as productive techniques of classification that joined categories and entities to law in different ways.

Finally, Chapter 7 considered the jurisdictional effects of classification. This chapter examined how each category offered a different form of belonging to law for disputed trees. Through an analysis of the procedural history of the *Spencer* cases, the chapter showed how each category offered a different form of belonging to law. As 'native vegetation', the trees on Spencer's land belonged to law as trees protected from clearing by the landholder, as per the provisions of the *Local Land Services Act 2013* (NSW). As 'land', the disputed trees belonged to law as Spencer's private property. As 'carbon', the disputed trees (potentially) belonged to law as property that had been acquired by the Commonwealth. Importantly, this chapter demonstrated that the jurisdictional effects of law's classification practices are produced through a reciprocal relationship between form (category) and frame (in this example, the cause of action). In other words, the capacity of law's categories to produce jurisdiction (to join entities to law) does not lie nascent within the categories themselves, but is produced as an effect of classifying particular things, in particular ways, in the context of particular institutional procedures or transactions.

II. IMPLICATIONS

The implications of these findings are here set out in relation to the two orientations – to trees and jurisprudence – that shaped how this thesis engaged with the research question.[1] In relation to trees – or, to be precise, the history of tree protection laws in NSW – this thesis has demonstrated the value of a jurisprudence of classification that engages with law through 'categories-other'. In other words, by orienting to a particular relationship of life, this thesis has brought together laws and practices from throughout NSW's legal

[1] As outlined in Chapter 1.

history that would otherwise have been separated by doctrinal and conceptual categories – property/environment, civil/criminal, substantive/procedural – that exert considerable influence over the way in which modern law is presently studied and practiced. From the laws of the medieval forest to contemporary procedural rules of summary dismissal, a disparate array of rules, institutions and procedures were brought together to demonstrate how each contributed, in different ways, to the classification of law's protected trees. As a result, a jurisprudence of classification makes available to legal scholars the diversity and richness of the common law's own classificatory resources.

One such example of classificatory resources found within the common law is the naming practice associated with 'timber', as discussed in Chapter 6. Developed within the action of waste, this common law category makes only rare appearances in contemporary disputes. However, the naming practice associated with the category, which relied on lay evidence of customary building practices in a particular location, produced relations of belonging to law that were capable of responding to bioregional differences in plant and tree growth. A particular species might be considered 'timber' in one particular time and place, but not in others, depending on local building practices. In contrast, naming trees as 'native vegetation', on the basis of expert botanical evidence concerning physical differences between plants, produced qualities of belonging to law that precisely differentiated between different plant characteristics. Although the doctrine of waste is rarely called upon to resolve disputes today, there is, nevertheless, something valuable about the naming practices associated with the age-old category.[2] For example, if a particular law, or category, is perceived as being insensitive to local conditions, the naming practices associated with 'timber' offer a useful resource for thinking about how classification done differently might produce different qualities of belonging to law.

Additionally, thinking about *who* classifies reframes analysis away from the substance or meaning of particular categories and towards how the authority to classify is sourced and expressed. Although contemporary environmental law is predominantly a creature of statute, this has not always been the case. Law's categories for protected trees have also

[2] For a rare, but interesting use of the doctrine of waste in modern law, see *Auckland Waterfront Development Agency v Mobil Oil New Zealand* (2015) 16 NZCPR 546; *Mobil Oil New Zealand v Development Auckland* (2016) 17 NZCPR 680. In these cases, the doctrine of waste was raised in argument before the New Zealand courts in a dispute concerning contamination of land by a lessee. For commentary, see David Grinlinton, 'Liability of Commercial Lessees for Historical Contamination of Land Following Mobil Oil in the Supreme Court' (2017) 17(10) *Butterworths Conveyancing Bulletin* 390.

been sourced in Crown prerogative and in the common law. Further, the legislature commonly delegates its authority to make law's categories to the executive or to other bodies (such as the Scientific Committee established under threatened species legislation discussed in Chapter 3). In this way, procedural provisions found in instruments that delegate authority from one institution to another (such as those regarding appointment of Scientific Committee members) can be revealed as shaping the authority to classify in particular ways. Rather than thinking about whether a particular category is good/bad or efficient, thinking about *who can classify* directs our attention to how the authority to classify is itself given legal form and how it is shaped and expressed. As a result, rather than measuring the quality of law's categories against an external measure or ideal (such as sustainable development, protection of biodiversity or economic efficiency), a jurisprudence of classification explores the common law's own measures of the propriety of its classificatory practices.

In relation to jurisprudence, this thesis has extended existing literature on classification as a technique of jurisdiction. Rather than engaging in category-specific critique, or developing a legal taxonomy of doctrine, this thesis has developed a jurisprudence of classification that engages with law's categories as a way of 'working with' law.[3] In other words, law's categories were here treated as tools of a jurisprudential craft of making lawful relations.[4] In particular, this thesis has extended the scholarship of Alain Pottage and of Shaunnagh Dorsett and Shaun McVeigh on the central role law's categories and classification practices play in shaping law's institutions and as a technique of jurisdiction. Rather than focusing only the jurisdictional effects of law's categories, this thesis has dug deeper into law's classificatory processes – slowing the jump between category and entity – to reveal the extensive institutional practices involved in the making of law's categories. In particular, this thesis has shown that the capacity of law's categories to produce relations of belonging to law does not lie nascent within the categories themselves. This capacity instead is produced through layers of institutional practices and sources of law that tell us who can make law's categories and how. In addition, the capacity of law's categories to produce relations of belonging to law is shaped by the institutional procedure or transaction in which the category is deployed, such as the particular cause of action claimed before a court.

[3] Dorsett and McVeigh, *Jurisdiction* (n 1) 23.
[4] Ibid 55.

By tracing how a particular relationship of life – tree protection – has come to belong to law in different ways, this thesis has contributed to a jurisprudential understanding of jurisdiction as something other than territory or the authority of the court to decide. The thesis helps us see that jurisdiction is a practice that joins entities to law in particular forms. For some entities and events, such as trees and tree clearing, jurisdiction is layered.[5] Category laid upon category – land, native vegetation, timber, carbon – law's classificatory practices potentially brought trees to law in multiple forms. Each category pulled the entity into different sets of lawful relations. In this way, law's categories offer a measure of how thickly common law jurisdiction is layered over a particular entity or event.[6] For some entities (for example, mycorrhizal fungi, which mediate nutrient transfer between tree roots and soil), jurisdiction is translucent and thin. For others, like trees, common law jurisdiction is heavily layered, as demonstrated in the procedural history of the *Spencer* cases in Chapter 7. In this way, a jurisprudence of classification offers a way of 'getting around law'; a navigational aide for understanding how particular entities or events come to belong to law in multiple forms. By searching for law's categories that bring particular events or entities to law, a jurisprudence of classification can help legal scholars see where law's authority is thickly layered and where it is thinly stretched.

III. Possibilities for the Future

There is considerable potential for a jurisprudence of classification to contribute to future legal scholarship. One avenue of future contribution lies in further unpacking how particular kinds of practices, devices and strategies fabricate and deploy law's categories. This thesis has focused on two techniques of classification in particular – writing and naming – but other areas of law would reveal other kinds of practices that also make law's categories and sort entities. Such practices might include listing (for example, of terrorist organisations); filing (for example, documents in a court registry); registration (for example, of land title documents), signing (for example, contracts); and posting (for example, tweets on Twitter or status updates on Facebook).[7] In addition, considerable

[5] As discussed in Chapter 4.

[6] In a different context, anthropologist Clifford Geertz draws on the metaphor of layers and layering to describe the way in which western scholarship tends to disaggregate the study of humans and human behaviour through different lenses: physiological, psychological, social, cultural etc: 'As one analyzes man, one peels off layer after layer, each such layer being complete and irreducible in itself, revealing another, quite different sort of layer underneath': Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books, 1973) 37.

[7] For more on 'the list' as a device of government and normative ordering, see: Marieke de Goede and Gavin Sullivan, 'The Politics of Security Lists' (2016) 34(1) *Environment and Planning D* 67. On Twitter

work remains to be done to explore the ways in which particular material technologies and devices come to be taken up by law's institutional practices of category-making and entity-sorting.[8] For example, there is potential for exploring the relations between authority, law's writing practices and the writing of code or algorithms that sit behind the act, and visual representation, of digital writing.[9] A jurisprudence of classification offers a framework for legal scholarship that works with law's institutional practices to understand how these practices might facilitate or hinder the flow of law's authority.

Another avenue of future contribution lies in further investigation of how other relationships of life, beyond that of tree protection, have historically come to belong to law through its classificatory practices. By orienting to relationships of life, rather than to law's existing categories, a jurisprudence of classification orders law differently, serving as a reminder that current categories, institutions and practices offer one particular technique, but not the only technique, for joining entities to law. For example, one might consider the ways in which the particular *events* come to belong to law through classification, such as those of seeking asylum; releasing effluent into a waterway; or prostitution.[10] Another example might be to consider the way in which particular *places* come to belong to law through classification. This might include considering the multiple legal categories to which iconic and everyday places (such as the Sydney Opera House, the Great Barrier Reef or a local council tip) belong. Such analysis would offer insight into who is authorised to make law's categories for that particular place, and the quality of lawful relations that bind that place to law. One last example would be to adopt a comparative approach to the study of law's classificatory practices by considering how other common law jurisdictions order the making of law's categories and the sorting of entities. The three registers of a jurisprudence of classification proposed here – who, how and effects – could provide a helpful framework for comparative analysis, whether historical or contemporary. As discussed in Chapter 5, for example, there remains

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as an instrument of the executive in the United States of America, see Kristina Bodnar, 'Sheer Force of Tweet: Testing the Limits of Executive Power on Twitter' (2019) 10(1) *Journal of Law, Technology and the Internet* 1.

[8] For more on how material devices and practices contribute to the fabrication of law's categories, see: Alain Pottage and Brad Sherman, *Figures of Invention: A History of Modern Patent Law* (Oxford University Press, 2010).

[9] For an introduction to some of the legal issues raised by algorithms and computer programming, see Philip Treleaven, Jeremy Bartnett and Adriano Koshiyama, 'Algorithms: Law and Regulations' (2019) 52(2) *Computer* 32.

[10] For more on how prostitution has come to belong to law in different forms, see Lee Godden, 'A Jurisdiction of Body and Desire: Exploring the Boundaries of Bodily Control in Prostitution Law' in Shaun McVeigh (ed), *Jurisprudence of Jurisdiction* (Routledge-Cavendish, 2007) 181.

interesting work to be done on the use of colonial proclamations as an instrument of law-making. Such research could involve tracing how various practices and techniques of category making were transported around the British Empire.

Overall, however, the jurisprudential engagement with classification offered here is intended to be nothing less than practical. It has been developed as a contribution to a mode of jurisprudential scholarship concerned with the 'practical knowledge of how to do things with law'. Such an orientation contributes to a domain of thought that is not so much concerned with 'transcending or escaping law but seeks to deepen and expand the ways of engaging with law'.[11] Through a jurisprudence of classification, law's classification practices are revealed as shaping the legal forms inhabited by classified entities, such as trees, when they enter the domain of law's authority. Without attending to who has the authority to make these categories, how we know which categories belong to law, how to sort entities into those categories and how jurisdictional effects are produced, the conditions of legal existence produced by classification are easily overlooked. Law's categories bring life to law; understanding this process is an important and worthwhile task for jurisprudents.

[11] Dorsett and McVeigh (n 3) 20.

APPENDIX 1: LAND GRANT REGISTER ENTRIES

Title and date range	NSW State Archives Reference	Granted by	Date range	Number of grants surveyed (indexed by page or grant number)
*Colonial Secretary, Register of Land Grants and Pardons, Vol. 1 (1792–1795)	NRS 1215 [SZ75]	Phillip Grose	22/02/1792 – 08/12/1792 : 25/2/1793 – 28/05/1793	99 grants, pp 1–49 10 grants, pp 51–60
Colonial Secretary, Register of Land Grants and Pardons Vol. 2 (1795–1800)	NRS 1215 [SZ47]	Hunter	12/11/1795 – 23/03/1796 15/09/1796 – 15/09/1795 13/12/1796 – 13/12/1795 12/12/1796 – 01/01/1797 13/12/1976 – 01/05/1797 01/05/1797 – 01/05/1797 01/08/1799 – 17/09/1799 18/10/1799 – 18/10/1799 18/12/1799 – 08/12/1799	20 grants, pp 12–31 10 grants, pp 61–70 10 grants, pp 107–116 10 grants, pp 107–116 10 grants, pp 130–139 10 grants, pp 191–200 10 grants, pp 281–290 10 grants, pp 351–360 10 grants, pp 411–420
Colonial Secretary, Register of Land Grants and Pardons, Vol 3. (1800–1809)	NRS 1215 [SZ76]	King Foveaux/ Patterson	12/11/1800 – 31/03/1801 01/02/1802 – 31/03/1802 05/11/1803 – 17/12/1802 01/01/1806 – 01/01/1806 29/11/1808 – 12/02/1809	10 grants, pp 58–64 10 grants, pp 92–97 10 grants, pp 118–123 20 grants, pp 190–196 10 grants, pp 247–256
Colonial Secretary, Register of Land Grants and Pardons, Vol 4. (April 1809–January 1810)	NRS 1215 [reel 2505, no item number]	Patterson	14/09/1809 – 16/11/1809	10 grants, pp 201–204

Colonial Secretary, Indexes and Registers of Land Grants and Leases Vol. 2 (1810–1821)	NRS 13836 [7/447]	Macquarie	01/01/1810 – 01/01/1810 22/05/1811 – 25/08/1812 01/01/1810 – 25/08/1812 20/09/1815 – 20/09/1815 01/01/1817 – 01/01/1817 13/01/1818	20 grants, no. 1–20 10 grants no. 300–309 10 grants, no. 583–592 10 grants, no. 862–871 10 grants, no.1024–1033 9 grants no. 1312–1320
Colonial Secretary, Registers of Land Grants and Leases Vol. 3. (1816–1822)	NRS 13836 [7/448]	Macquarie	08/10/1816 – 08/10/1816 31/08/1819 – 31/08/1819	10 grants, no. 1–10 7 grants, no 267–273
Colonial Secretary, Register of Land Grants and Leases, Vol 4 (1822–1836)	NRS 12836 [7/499]	Brisbane	09/07/1822 30/06/1823 27/05/1820 – 03/09/1826	10 grants, no. 1–10 10 grants, no. 282–291 5 grants no. 388–392

*Interpreting the information contained within the early registers is not straightforward. Due to the poor and fragile conditions of the register books contained within the first series, NRS 1215 *Registers of Land Grants and Pardons*, some records are wholly or partially illegible. At some point, a typed copy of NSWSR SZ75 was made by the land titles office to preserve the data. Those typed records were later digitised and I accessed this digital version of SZ75 via public terminals located at the NSW Land Titles Office (now Land Registry Services). For helpful background to these records, see the introduction to Keith A Johnson and Malcolm R Sainty, *Land Grants: 1788–1809* (Genealogical Publications of Australia, 1974)

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