Before the High Court

Police Doorknocking in Comparative and Constitutional Perspective: *Roy v O'Neill*

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Abstract

Roy v O'Neill, currently before the High Court of Australia, raises the question of whether a police officer can knock on a person's front door to investigate them for potential criminal offending, in circumstances where the police officer has no explicit common law or statutory power to do so. In order to resolve that question, the High Court will need to develop, or at least refine, the common law relating to trespass and implied licences. This column explores two issues relevant to the development of the common law in this area, namely: the approach taken to implied licences in other common law jurisdictions; and the influence, if any, that divergent state and territory legislative positions in this area should have on the development of the single common law of Australia.

I Introduction

The questions raised by *Roy v O'Neill*,[1] currently before the High Court of Australia, are so fundamental that it is surprising they have not previously been definitively answered. Can a police officer knock on a person's front door to investigate them for potential criminal offending, in circumstances where the police officer has no explicit common law or statutory power to do so? In this situation, can the police officer claim the cover of the same implied licence extended to the door-to-door salesperson or the Jehovah's Witness? Or is the police officer's attendance so different that they are a trespasser? Unsurprisingly, the parties' written submissions on these questions focus on the Australian case law of trespass and implied licences.[2] The parties join issue on the principles to be extracted from the authorities relating to dual purposes for attendance and multiple occupancy residences. The authorities on these issues are not entirely in

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1 High Court of Australia, Case No D2/2020 ('*Roy*').

2 Aileen Roy, 'Appellant's Submissions', Submission in *Roy v O'Neill*, Case No D2/2020, 8 May 2020, 5–16 [18]–[43] ('*Appellant's Submissions*'); Julie O'Neill, 'Respondent's Submissions', Submission in *Roy v O'Neill*, Case No D2/2020, 5 June 2020, 5–17 [23]–[78] ('*Respondent's Submissions*'); Aileen Roy, 'Appellant's Reply', Submission in *Roy v O'Neill*, Case No D2/2020, 29 June 2020, 2–5 [4]–[13] ('*Appellant's Reply*').

agreement,[3] and thus it appears likely that the Court will be required to develop the common law in order to resolve the dispute in *Roy*. This column raises two considerations — neither considered in detail by the parties — that ought to inform the Court's development of the common law in this area: the approach taken to implied licences in other common law jurisdictions; and the influence, if any, that divergent state and territory legislative positions in this area should have on the development of the single common law of Australia. Ultimately, it is suggested that the High Court should develop the common law cognisant of the scope for reasonable disagreement as to the balance to be struck between public safety, personal privacy and individual property rights. Such an approach has constitutional considerations to recommend it where, as in the present case, the universalising force of the single common law has the capacity to render obsolete the balances struck by different state and territory legislatures within the Federation.

II A Knock at the Door

At lunchtime on a Friday in April 2018, three police officers attended the public housing compound in which Ms Roy lived with her partner, Mr Johnson, in Katherine in the Northern Territory.[4] Ms Roy was subject to a domestic violence order which prohibited her from, among other things, remaining in Mr Johnson's company when she was intoxicated. On the day police attended Ms Roy's residence, they had no specific information to ground a suspicion that Ms Roy was breaching her domestic violence order. Rather, the police were conducting proactive domestic violence order checks as part of a wider domestic violence prevention operation.

Ms Roy and Mr Johnson lived in a unit within a duplex building within the public housing compound. A perimeter fence surrounded the entire compound, albeit without a locked gate. Access to the unit's front door, which was situated in an alcove, was via a concrete path. When police attended, one of the officers knocked on the flyscreen door and, seeing Ms Roy and Mr Johnson inside, called Ms Roy to the door for the purpose of a domestic violence order check. As Ms Roy approached the door, the officer noticed her to be lethargic and showing other indicia of intoxication. The officer asked Ms Roy to submit to a handheld breath test, which returned a positive result. Ms Roy was then arrested and taken to the police watch house. There was no evidence that the police entered the unit or interacted with Mr Johnson at all. The entire interaction appears to have taken place on the doorstep, or in the alcove, of the unit's front door.

Ms Roy was charged with a single count of breaching a domestic violence order. In the Local Court of the Northern Territory, the charge was dismissed on the basis that the police were trespassers and thus that the Prosecution evidence was unlawfully or improperly obtained. The Supreme Court of the Northern Territory dismissed a Prosecution appeal, concluding that '[t]o hold otherwise

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3 *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333, 342 [32], 343 [37] (Spigelman CJ; Mason P and Grove J agreeing).

4 Unless otherwise indicated, this section draws upon *O'Neill v Roy* (2019) 345 FLR 8, 10–11 [2]–[7].

would be an Orwellian intrusion into the fundamental rights of privacy that the common law has been at great pains to protect and would amount to a new exception to the common law.'[5] The Court of Appeal of the Northern Territory allowed a further Prosecution appeal, holding that there was an

> implied invitation to these visitors (albeit police officers) to walk up the path leading to the entrance to the dwelling (the threshold of the home) in order to knock on the door and undertake lawful communication with someone within the dwelling.[6]

The High Court granted Ms Roy special leave to appeal, with Edelman J noting at the hearing: 'there are courts across the world that are dealing with this issue and splitting as to the result and the manner in which it should be dealt with'.[7]

III Common Law Divergences Abroad

In the parties' written submissions in the High Court appeal, the decisions of 'courts across the world' receive relatively brief treatment.[8] This is not surprising. Each party has more to gain from attempting to frame the local case law as recommending a result in their favour. However, this column starts from the position that the Australian authorities do not determine the issue in *Roy*, and thus the High Court will have to develop the common law of Australia. If that is so, then there are good reasons[9] to think that the Court might gain assistance from the way in which the apex courts of comparable jurisdictions have dealt with this same issue. Accordingly, this section of the column outlines the thrust of the case law from the United Kingdom ('UK'), New Zealand ('NZ'), Canada and the United States of America ('US'). This outline reveals the scope for reasonable disagreement about the appropriate balance to be struck between public safety, personal privacy and individual property rights.

Of the jurisdictions considered here, the UK is that which most readily implies a licence in favour of a police officer attending an unobstructed front door in order to investigate an occupier. This position was first clearly expressed in *Robson v Hallett*,[10] where it was considered to be of no significance to the scope of the implied licence that the attendees were police officers investigating the occupier for the potential commission of a criminal offence. That such an attendance fell within the implied licence was said to be 'so simple' as to not require reference to authority.[11] Subsequent cases have given the issue similarly

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5 Ibid 26 [44].

6 *O'Neill v Roy* (2019) 345 FLR 29, 39 [38].

7 *Roy v O'Neill* [2020] HCATrans 43, 2.

8 *Appellant's Submissions* (n 2) 7 [25], 19 [49] n 115; *Respondent's Submissions* (n 2) 17–19 [79]–[86]; *Appellant's Reply* (n 2) 5 [14].

9 The High Court has regularly referred to foreign authority in developing the law of trespass and implied licences. See, eg, *Barker v The Queen* (1983) 153 CLR 338, 343 (Mason J); *Kuru v The Queen* (2008) 236 CLR 1, 15 [43] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

10 *Robson v Hallett* [1967] 2 QB 939, 951 (Lord Parker CJ; Diplock LJ and Ashworth J agreeing) ('*Robson*').

11 Ibid 953 (Diplock LJ; Ashworth J agreeing).

summary treatment,[12] although at least one UK court has acknowledged the 'theoretical … force' of an argument to the contrary.[13] The upshot is that, while the point of principle appears to be deeply embedded in UK case law, it has not been the subject of elaborate justification.[14]

The course of the authorities in NZ is more interesting. A convenient starting point is the 1987 decision of *Howden v Ministry of Transport*,[15] where, after consideration of *Robson*, it was held that there was no implied licence for a police officer to attend upon a person's driveway in order to conduct a 'random' breath test. Acutely aware of the matters of 'private property' and 'privacy' at stake, Cooke P refused to recognise an implied licence because it could not be clearly maintained that '[m]ost New Zealand householders' would have consented to police attendance in the circumstances.[16] Cooke P's framing of the question — essentially holding that the attendee bears the onus of persuading the Court that most householders would consent to police attendance in the circumstances — was also influenced by the limited ability of courts, as compared to legislatures, to estimate the majority views of the public.[17]

Around the turn of the 21st century, implied licence arguments rose to prominence in a number of NZ judgments,[18] some of them difficult to reconcile with the reasoning of Cooke P in *Howden*. The burden of the NZ authorities appears to be, however, that a licence will be implied for police to attend at a person's unobstructed front (or back) door where they have dual purposes, one being investigatory and the other being communicative.[19] Thus, in 2010, the Supreme Court implied a licence in favour of an undercover police officer attending the front door of a residence to ask to purchase drugs, notwithstanding that the officer was also covertly recording the interaction.[20] Just a year later,

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12 *Lambert v Roberts* [1981] 2 All ER 15, 19 (Donaldson LJ; Kilner Brown J agreeing); *Pamplin v Fraser* [1981] RTR 494, 499–500 (Ackner LJ; McNeill J agreeing); *Fullard v Woking Magistrates' Court* [2005] EWHC 2922 (Admin, QBD), [18]. The issue was given slightly more consideration in *Wiltshire v Crown Prosecution Service* [2014] EWHC 4659 (Admin), [7]–[16] (Simon J; Beatson LJ agreeing).

13 *Snook v Mannion* [1982] RTR 321, 325 (Ormrod LJ; Forbes J agreeing).

14 Indeed, a search of BAILII and AustLII reveals that *Robson* (n 10) has been cited much more often in Australia than it has in the UK: see British and Irish Legal Information Institute ('BAILII') <https://www.bailii.org/>; Australasian Legal Information Institute ('AustLII') <http://www.austlii.edu.au/>.

15 *Howden v Ministry of Transport* [1987] 2 NZLR 747 (Court of Appeal) ('*Howden*'). See also *Transport Ministry v Payn* [1977] 2 NZLR 50 (Court of Appeal).

16 *Howden* (n 15) 751 (Cooke P).

17 Ibid.

18 See *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720 (High Court); *R v Bradley* (1997) 15 CRNZ 363 (Court of Appeal); *R v Ratima* (1999) 17 CRNZ 227 (Court of Appeal); *Attorney-General v Hewitt* [2000] 2 NZLR 110 (High Court); *R v Pou* [2002] 3 NZLR 637 (Court of Appeal); *R v Soma* (2004) 21 CRNZ 23 (Court of Appeal); *R v Meyer and Woods* [2010] NZAR 41 (Court of Appeal); *King v Police* [2010] NZAR 45 (High Court); *O'Connor v Police* [2010] NZAR 50 (High Court) ('*O'Connor*'); *Police v McDonald* [2010] NZAR 59 (High Court) ('*McDonald*'); *Hunt v The Queen* [2011] 2 NZLR 499 (Court of Appeal) ('*Hunt*'); *R v Balsley* [2013] NZCA 258.

19 *Gerrard-Smith v New Zealand Police* [2016] NZHC 2543, [17]. See also *Warren v Attorney-General* [2019] NZHC 1690, [79]–[84].

20 *Tararo v The Queen* [2012] 1 NZLR 145, 172 [15] (Blanchard, Tipping, McGrath and William Young JJ) ('*Tararo*').

however, the Supreme Court explained that such a licence will only be implied where there is a 'genuine' 'purpose of communicating with the owner or occupier'.[21] What is especially interesting about the recent NZ authorities is the willingness to engage with explicit considerations of 'common convenience',[22] 'welfare of society'[23] and 'matter[s] of social and legal policy'.[24] Direct resort to policy is apparently justified in NZ because the implied licence is now considered a legal 'fiction'[25] and 'an invention of the common law to reflect the balance between respect for an individual's right to privacy, and the public interest in enforcement of the criminal law'.[26] That being so, NZ courts no longer consider themselves bound, as Cooke P did in *Howden*, by objective inquiries as to what '[m]ost New Zealand householders' would have consented.[27] This has led to results which would probably be at odds with the expectations of most NZ householders, including implied licences extending to highly orchestrated police operations.[28]

In Canada, where implied licences often arise in litigation concerning the right to be free from unreasonable searches and seizures, the position is very different. There, as recently as 2019, a majority of the Supreme Court of Canada has refused to recognise an implied licence for police to attend on a person's property for the purpose of 'communication' where police also have a 'subsidiary purpose' of securing evidence against the person.[29] Such a subsidiary purpose would amount to 'speculative criminal investigation, or a "fishing expedition"'.[30] The majority in *R v Le* held that the 'doctrine of implied licence was never intended to protect this sort of intrusive police conduct'.[31] The provincial courts have also been largely consistent in holding that an investigatory purpose will disqualify police from relying on an implied licence, even where the purpose can also be described as communicative.[32]

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21 *Hamed v The Queen* [2012] 2 NZLR 305, 355 [157] (Blanchard J; Elias CJ and Gault J agreeing). See also 370 [219] (Tipping J), 380–1 [263] (McGrath J agreeing with the conclusion reached by Blanchard J).

22 *Tararo* (n 20) 168 [1] (Elias CJ).

23 Ibid 172 [16] (Blanchard, Tipping, McGrath and William Young JJ) quoting *Toogood v Spyring* (1834) 1 CM & R 181, 193.

24 Ibid 172 [15] (Blanchard, Tipping, McGrath and William Young JJ).

25 *Hunt* (n 18) 513 [51] quoting *Pannett v P McGuinness & Co Ltd* [1972] 2 QB 599, 606 (Lord Denning MR).

26 *McDonald* (n 18) 67 [35].

27 *Howden* (n 15) 751 (Cooke P). For the most explicit rejection of Cooke P's approach see *McDonald* (n 18) 67 [34], approved in *Tararo* (n 20) 171 [12] n 19 (Blanchard, Tipping, McGrath and William Young JJ). See also *Maisey v Police* [2014] NZHC 629, [22]–[23].

28 See, eg, *Hall v The Queen* [2019] 2 NZLR 325.

29 *R v Le* [2019] SCC 34, [126]–[127] (Karakatsanis, Brown and Martin JJ). See also *R v Evans* [1996] 1 SCR 8, 18–19 [16] (Sopinka, Cory and Iacobucci JJ; La Forest J agreeing in the result) ('*Evans*'); *R v Côté* [2011] 3 SCR 215, 225–6 [12] (McLachlin CJ, Binnie, LeBel, Fish, Abella, Charron, Rothstein and Cromwell JJ), reciting with apparent approval the trial judge's finding that the police were trespassers in that case.

30 *R v Le* (n 29) [127] (Karakatsanis, Brown and Martin JJ), quoting *R v Le* [2018] 402 CRR (2d) 309, [107] (Lauwers JA).

31 *R v Le* (n 29) [127] (Karakatsanis, Brown and Martin JJ).

32 See, eg, *R v Mulligan* [2000] 128 OAC 224, [24], [31] (ONCA) (Sharpe JA; Laskin and Feldman JJA agreeing); *R v Fowler* [2006] NBR (2d) 106, [31] (NBCA) (Richard JA; Drapeau CJ and Turnbull JA agreeing); *R v Rogers* (2016) 4 DLR (4th) 347, [51], [54] (SKCA) (Jackson JA;

In the US, while the Supreme Court is not usually responsible for developing the common law of tort, some of its constitutional jurisprudence requires it to first ask whether a police officer's action is a trespass.[33] In this context, the Court has said that a 'licence may be implied from the habits of the country'[34] and 'background social norms'.[35] On this objective approach, the Court has recognised an implied licence for police to approach a front door to engage in investigatory *questioning* of an occupant,[36] but not to engage in investigatory *observations* of an occupant.[37] Thus, it would appear that approaching a person's front door to request them to submit to a breath test would fall within the scope of an implied licence.[38]

The diversity of views among the jurisdictions surveyed above reveals the competing interests of privacy, property and public safety that are engaged by situations like those in *Roy*. It is unsurprising, then, that a similar diversity of opinion is reflected in the Australian state and territory legislative regimes governing police attendance on private property.

IV Legislative Diversity at Home

Across Australia, a number of state and territory legislative regimes authorise police to attend upon a person's unobstructed private property as far as the front door. These legislative regimes are not uniform: they authorise attendance in different circumstances, for different purposes and are subject to different preconditions.

In the Northern Territory, the *Housing Act 1982* (NT) provides that a police officer may 'enter a yard, garden or other area associated with public housing premises (but not the residence)'[39] to ask a person their name, address and, if relevant, age.[40] However, the officer may only do so if they reasonably believe the person has engaged in proscribed conduct or may be able to help with the investigation of proscribed conduct.[41]

Whitmore and Ryan-Froslie JJA agreeing); *R v Parr* (2016) 27 CR (7th) 131, [3], [44], [55], [60] (BCCA) (Fitch J; Saunders and Smith JJ agreeing). Cf *R v Lotozky* (2006) 81 OR (3d) 335 (ONCA), [32], [35]–[36].

33 See David P Miraldi, 'The Relationship between Trespass and Fourth Amendment Protection After *Katz v. United States*' (1977) 38(3) *Ohio State Law Journal* 709.

34 *McKee v Gratz*, 260 US 127 (1922) 136 (Holmes J), quoted with approval in *Florida v Jardines*, 569 US 1 (2013) 8 (Scalia J; Thomas, Ginsburg, Sotomayor and Kagan JJ agreeing).

35 *Florida v Jardines* (n 34) 9 (Scalia J; Thomas, Ginsburg, Sotomayor and Kagan JJ agreeing).

36 *Kentucky v King*, 563 US 452 (2011) 469–70 (Alito J; Roberts CJ, Scalia, Kennedy, Thomas, Breyer, Sotomayor and Kagan JJ agreeing); *Florida v Jardines* (n 34) 9 n 4 (Scalia J; Thomas, Ginsburg, Sotomayor and Kagan JJ agreeing). Police attendance for the purpose of investigatory questioning has come to be known as a 'knock and talk': see, eg, *United States v Carloss*, 818 F 3d 988 (10th Cir, 2016); *United States v Lundin*, 817 F 3d 1151 (9th Cir, 2016).

37 *Florida v Jardines* (n 34) 9 n 3 (Scalia J; Thomas, Ginsburg, Sotomayor and Kagan JJ agreeing), 12 (Kagan J; Ginsburg and Sotomayor JJ agreeing).

38 *Brennan v Dawson*, 752 Fed Appx 276 (6th Cir, 2018).

39 *Housing Act 1982* (NT) s 28W(2)(a).

40 Ibid s 28D(2), read with s 5 definition of 'public housing safety officer' and s 28W(2)(a).

41 Ibid s 28D(1).

In Victoria, the *Family Violence Protection Act 2008* (Vic) appears to address circumstances, like those in *Roy*, where multiple people occupy a residence. That statute permits police to enter premises (including a front yard) if police have the 'implied consent of *an* occupier of the premises to do so'.[42] That provision would appear to empower police to approach a person's front door where one occupant would consent to that attendance but another would not.

In Queensland, the *Police Powers and Responsibilities Act 2000* (Qld) provides that a police officer may, without the consent of the occupier, enter onto the land surrounding a suburban dwelling house 'to inquire into or investigate a matter'.[43] That provision 'dispenses with the need to rely on the common law implied licence or consent to enter private property for likely welcome purposes, such as approaching and knocking on the front door'.[44] While that authorisation may be subject to some qualification,[45] it appears far broader than statutory authorisations in other states or territories.

The existence of the Northern Territory, Victoria and Queensland legislation raises the question of whether and how the Court should account for these legislative regimes in the development of an adjacent common law doctrine. One important, if preliminary, comment is that legislative activity in a particular area of regulation is often considered to be a reason for courts to be cautious in their development of the common law.[46] For example, in a NZ decision denying the existence of an implied licence for police to breath test a person at their front door, the NZ High Court's conclusion was 'reinforced' by the existence of a 'special statutory power … in limited form'.[47] Similarly, for Brennan J in *Halliday v Nevill*, the fact that Parliament had 'carefully defined the rights of the police to enter' was a matter cautioning against 'too ready an implication of a licence', especially in light of the sensitive 'balance between individual privacy and the power of public officials'.[48] Finally, in Canada, it was said that 'Parliament is in a better position' than the courts 'to obtain evidence' and 'to assess' the competing policy considerations engaged by police attendance on private property.[49]

Outside the Northern Territory, Victoria and Queensland, however, Australian legislatures have largely left the lawfulness of police doorknocking to be governed by the common law.[50] Should this 'legislative inertia'[51] be relevant to the development of the common law? If characterised as mere inattention, legislative inertia might be of little relevance. If, however, legislative inertia is

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42 *Family Violence Protection Act 2008* (Vic) s 157(1)(d) (emphasis added).
43 *Police Powers and Responsibilities Act 2000* (Qld) ss 19(3), (5).
44 *R v Hammond* (2016) 258 A Crim R 323, 332 [49].
45 *R v Yatta* [2015] QDC 58, [90]–[92].
46 Paul Finn, 'Statutes and the Common Law' (1992) 22(1) *University of Western Australia Law Review* 7, 22.
47 *O'Connor* (n 18) 56 [19].
48 *Halliday v Nevill* (1984) 155 CLR 1, 20 (Brennan J).
49 *Evans* (n 29) 13 [4] (La Forest J).
50 Note, however, that South Australia has made doorknocking an offence in certain circumstances: *Summary Offences Act 1953* (SA) s 50.
51 Justice Mark Leeming, 'Theories and Principles Underlying the Development of the Common Law — The Statutory Elephant in the Room' (2013) 36(3) *University of New South Wales (UNSW) Law Journal* 1002, 1022–3.

characterised as a 'choice to be silent'[52] — that is, the product of political compromise or deliberation[53] — it might warrant judicial modesty in development of the common law for the reasons expressed in the preceding paragraph. Finally, if legislative inertia is based on a particular state or territory legislature's view of the common law, that ought not to be given much weight by a court looking to develop the single common law of Australia.[54]

This final observation points to a further reason for judicial caution in developing the common law of implied licences, a reason rooted in Australia's federal structure and the respect for policy diversity entailed in that structure.

V State and Territory Policy Diversity and the Universalising Force of the Single Common Law

Australia's federal structure was designed, and continues to operate, to accommodate state and territory policy diversity in areas (like policing) that are not the subject of Commonwealth legislative power.[55] In fact, it has been persuasively argued that one benefit of Australia's federal structure is that it *facilitates* policy experimentation in such areas.[56] Against this feature of Australian federalism, however, is the fact that Australia has a single common law.[57] The doctrine of the single common law has been acknowledged to exert a universalising force over what might otherwise have been diverse and locally-grounded bodies of common law unique to each state or territory.[58] For present purposes, however, what is important is that the single common law can also render obsolete differences in the statutory law of the states and territories.[59]

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52 Stephen McLeish, 'Challenges to the Survival of the Common Law' (2014) 38(2) *Melbourne University Law Review* 818, 827.

53 See, eg, *Howden*, where Cooke P was sensitive to the fact that the legislature had not statutorily empowered police to attend upon private property to conduct breath tests, apparently because the legislature considered the topic 'too difficult or sensitive to tackle': *Howden* (n 15) 750.

54 See, by analogy, *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 571 [132] (Gaudron, McHugh and Gummow JJ).

55 Even in areas that are subject of non-exclusive Commonwealth legislative power, ss 107–109 of the *Australian Constitution* are capable of accommodating policy diversity as between the states and territories, and a measure of policy diversity (but not inconsistency) as between the states and territories and the Commonwealth.

56 Gabrielle Appleby and Brendan Lim, 'Democratic Experimentalism' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 221, 230–3.

57 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 112–13 (McHugh J); *Lipohar v The Queen* (1999) 200 CLR 485, 505–7 [43]–[50] (Gaudron, Gummow and Hayne JJ), 551–2 [167] (Kirby J) ('*Lipohar*').

58 Paul Finn, 'Statutes and the Common Law: The Continuing Story' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 52, 59. See also Justice L J Priestley, 'A Federal Common Law in Australia?' (1995) 6(3) *Public Law Review* 221, 232–3; James Stellios, 'The Centralisation of Judicial Power within the Australian Federal System' (2014) 42(2) *Federal Law Review* 357, 376, 378.

59 This is not a topic that has received much academic or judicial attention. For analogous consideration of how judicial developments in constitutional law have a homogenising effect, see Gabrielle Appleby, 'The High Court and *Kable*: A Study in Federalism and Rights Protection' (2014) 40(3) *Monash University Law Review* 673, 674, 681, 686–90; Stephen McLeish SC, 'Nationalisation of the State Court System' (2013) 24(4) *Public Law Review* 252, 253–60.

This universalising potential of the single common law looms large in *Roy*. If the High Court were to recognise an implied licence for police officers to attend a person's front door for investigative inquiries, that would afford police a much wider authorisation than that provided by, for example, the Northern Territory legislature. In fact, the effect would be to essentially bring all states and territories into line with the Queensland legislation.[60] That result might appear to be insufficiently respectful not just of the Northern Territory legislature – which has positively authorised only certain police attendances – but also of the other state and territory legislatures that were presumably aware of the Queensland legislative model (enacted in 2000) and chose not to follow it. Of course, if the Court were to develop the common law in this manner, state and territory legislatures would be free to reverse or modify the position by legislation.[61] However, the theoretical possibility of legislative override in this direction should not be overstated, especially given the sociopolitical realities that weigh against legislative action to limit the powers of police.[62]

The suggestion that the High Court in *Roy* should proceed cognisant of Australia's federal structure, and the diversity of state and territory legislation, should not be controversial. The Court has shown the same sensitivity to federal diversity when it has refused to develop the common law in a particular direction in the absence of a 'consistent pattern of State legislation'.[63]

VI Conclusion

Can a police officer knock on a person's unobstructed front door in order to investigate them? This column has not proposed an answer to the question at the heart of *Roy*. It may be that any answer depends on matters not explored in this column, such as the principles relating to dual purposes for attendance and multiple occupancy residences. However, insofar as the Court in *Roy* must develop or refine the common law of Australia, it should be mindful of the approaches taken in other jurisdictions and the diversity of Australian state and territory legislative positions.

It is important to appreciate the federalism values at stake in circumstances where an extension of the common law would answer a question uniformly, and nationally, that might otherwise have been answered differently, and locally, by each state and territory legislature. Such circumstances warrant caution in the

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Cf Brendan Lim, 'Laboratory Federalism and the *Kable* Principle' (2014) 42(3) *Federal Law Review* 519, 527–37.

60 See above nn 43–5 and accompanying text.

61 *Lipohar* (n 57) 509 [57] (Gaudron, Gummow and Hayne JJ).

62 See, generally, William J Stuntz, 'The Pathological Politics of Criminal Law' (2001) 100(3) *Michigan Law Review* 505.

63 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 303 [94] (Gummow and Kirby JJ; Hayne J agreeing at 306 [105]). See also *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 63 [27] (Gleeson CJ, Gaudron and Gummow JJ); *Baker v The Queen* (2012) 245 CLR 632, 666–7 [113]–[114] (Heydon J); Justice Michelle Gordon, 'Analogical Reasoning by Reference to Statute: What is the Judicial Function?' (2019) 42(1) *University of New South Wales (UNSW) Law Journal* 4, 16–22. Cf *Binsaris v Northern Territory* (2020) 94 ALJR 664, 673–4 [44] (Gageler J).

development of the common law, particularly where, as here,[64] development of the common law depends on an estimation of what ordinary members of the public would think. As has been said in a different context, 'we have sophisticated electoral and parliamentary systems which are meant to reflect what [ordinary people] think'.[65] Where the High Court is in doubt about whether ordinary people would consent to a particular entry onto private property, it is suggested that the safer course is to leave any further qualification of individual property rights to the better equipped, and more accountable, state and territory legislatures.

[64] The law of implied licences depends on the Court's estimation, based on 'the common behaviour of citizens of our community' (*Munnings v Barrett* [1987] Tas R 80, 87), of whether 'most … householders' would consent to a particular attendance on private property (*Howden* (n 15) 751 (Cooke P)).

[65] Robert Orr, '*Kable v DPP*: Taking Judicial Protection Too Far?' (1996) 11 *AIAL Forum* 11, 15.