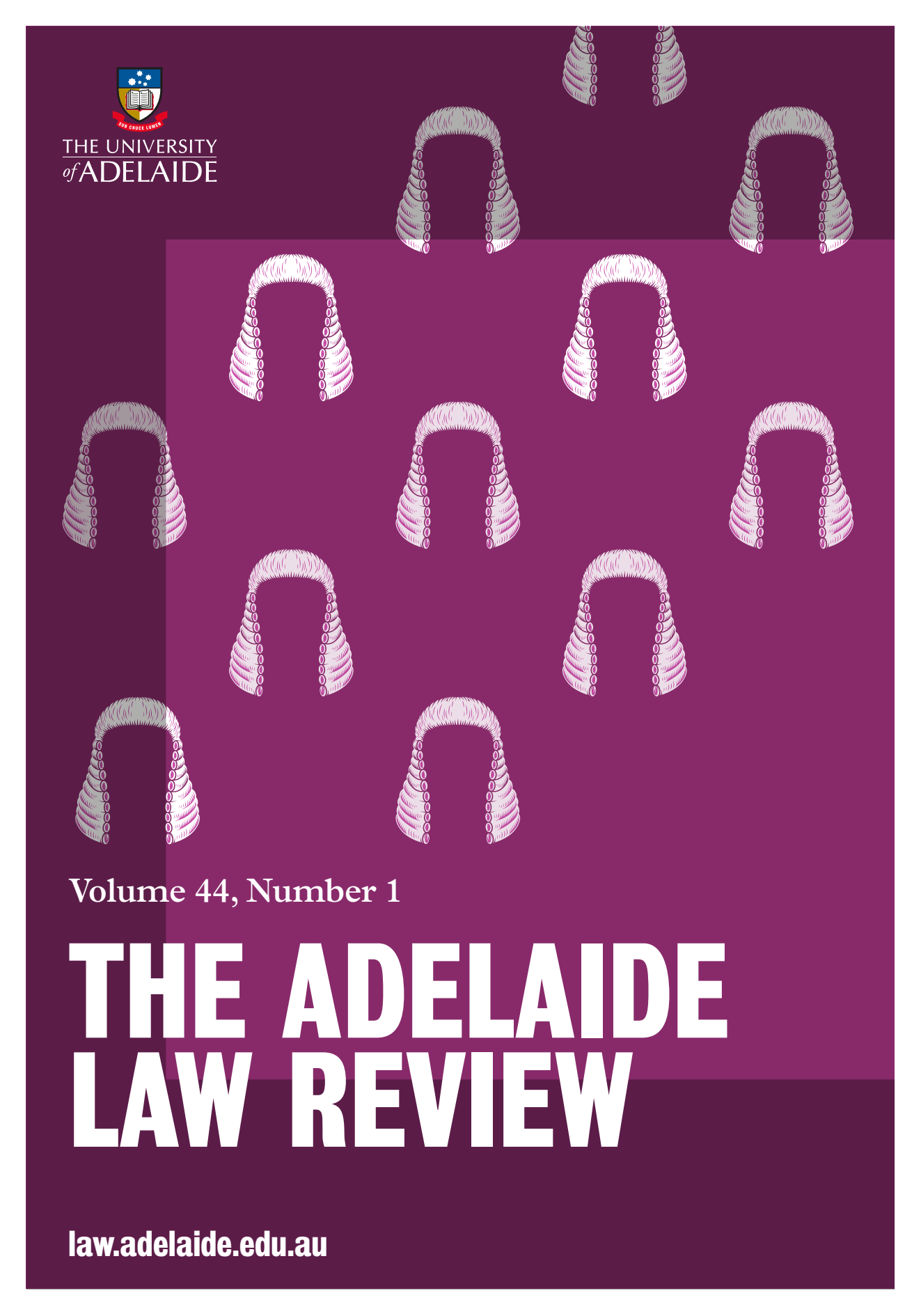

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CASE NOTES

*John R Morss**

THE HOLY SEE AND THE PERSONAL INJURY EXCEPTION TO FOREIGN STATE IMMUNITY IN AUSTRALIA

'[I]nternational law does not require the courts of a State to refrain from deciding a case merely on the ground that a foreign State or State instrumentality is an unwilling defendant.'[1]

'In the case of personal injuries and property claims dealt with in [*FSIA*] s 13, the basis of the exception to immunity is that, where a foreign State wrongfully causes death or injury or damage to tangible property in Australia, there is no merit in requiring the plaintiff to litigate in the defendant's national courts when Australian courts can provide the obvious and convenient local remedy.'[2]

Abstract

This article is focused on the response to civil claims put forward by Australian nationals in which the respondent is the Holy See, Vatican City, or a senior officeholder of either of those entities. The scope for immunity from process for such defendant parties under the *Foreign States Immunities Act 1985* (Cth) ('*FSIA*') is interrogated. It is argued that even if a relevant statehood status is recognised, a well-founded claim in tort will satisfy the requirements in the *FSIA* for exceptions to State-based immunity over personal injury suffered by Australian nationals in Australia. Norms of international law relating to statehood-based protections are substantially influenced by certain decisions of national courts, including Australian courts, especially when such decisions converge across jurisdictions. In applying Australian law, a court will be contributing to the engendering of an international regime of accountability for

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1 JR Crawford, 'A Foreign State Immunities Act for Australia?' (1978) 8(1) *Australian Yearbook of International Law* 71, 81 ('A Foreign State Immunities Act').

2 *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31, 88–9 [198] (Nettle and Gordon JJ) ('*Firebird*'), discussing Law Reform Commission, *Foreign State Immunity* (Report No 24, 1984) ('ALRC 24').

institutions and natural persons who seek to cloak under colour of sovereignty their territorially distributed conduct causing harm in Australia.

I Introduction

This article seeks to clarify the judicial process for civil suit when a complaint is made in Australia against a foreign entity or natural person pleading — or otherwise found as enjoying — a statehood-based immunity under the *Foreign States Immunities Act 1985* (Cth) ('*FSIA*').[3] Its central focus is on complaints in tort made against one or other manifestation of the central decision-making institution of the Roman Catholic Church as headquartered in Rome, whether referred to as the Holy See or Vatican City ('Vatican-based entities'). For example, potential actions in tort might arise due to a failure by Church officials based in Rome, whether by act or omission, properly to direct or constrain the conduct of persons causing harm in Australia and over whom the Church has sufficient influence. Overseas experience provides little comfort to Australian litigants seeking civil remedies for harms when the respondent is one of that class of institutions or persons.[4] In order to contextualise this central focus, the broader international landscape of statehood-based immunities and inviolabilities is first surveyed.[5] As discussed below there are — from the perspective of such litigants — some welcome indications in foreign case law, including preliminary and procedural decisions such as declining dismissal of the suit. However complainants, generally speaking, continue to be disappointed by final outcomes in the United States ('US') and at the European Court of Human Rights ('ECtHR'), where considerations of immunity based on foreign statehood have prevailed.[6]

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3 *Foreign States Immunities Act 1985* (Cth) s 9 ('*FSIA*'). 'Immunities' will at times be used in this article in an inclusive sense, to encompass both immunities from judicial process and inviolabilities (from physical constraint).

4 Ioana Cismas, *Religious Actors and International Law* (Oxford University Press, 2014) 194; Meredith Rae Edelman, 'Judging the Church: Legal Systems and Accountability for Clerical Sexual Abuse of Children' (PhD Thesis, Australian National University, 2020); Geoffrey Robertson, *The Case of the Pope: Vatican Accountability for Human Rights Abuse* (Penguin, 2010) 8.

5 See, eg: Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law* (Oxford University Press, 2014); Hazel Fox and Philippa Webb, *The Law of State Immunity* (Oxford University Press, 3rd ed, 2015); Roger O'Keefe, Christian Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press, 2013); Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019).

6 Characteristic recent decisions, discussed below, include: *Doe v Holy See*, 557 F 3d 1066 (9th Cir, 2009) ('*Doe*'); *O'Bryan v Holy See*, 556 F 3d 361 (6th Cir, 2009) ('*O'Bryan*'); *Robles v Holy See*, (SD NY, No 20-CV-2106 (VEC), 20 December 2021) ('*Robles*'); *JC v Belgium* (European Court of Human Rights, Section III, Application No 11625/17, 12 October 2021) ('*JC*').

The tension between forum jurisdiction, on the one hand, and deference under the colour of comity or otherwise to a foreign sovereign authority, on the other, is not a question of a balance of rights. Rather, State immunity is an exception to the default principle of territorial curial sovereignty.[7] Rosalyn Higgins, formerly President of the International Court of Justice ('ICJ'), has written that '[i]t is very easy to elevate sovereign immunity into a superior principle of international law and to lose sight of the essential reality that it is an exception to the normal doctrine of jurisdiction'.[8] In a similar vein, as the Australian Law Reform Commission ('ALRC') has pithily observed:

> Where a foreign state wrongfully causes death or personal injury or damages property within the forum state, the forum's interest in asserting jurisdiction over the wrongful act seems clear. … [T]he primary justification for asserting jurisdiction in this case is that the foreign state has no privilege to commit local physical injury or property damage …[9]

It might be said that it should therefore always be an uphill battle for forum jurisdiction to be overturned, somewhat along the lines of the burden of the criminal standard of proof borne by State prosecutors which similarly represents a principled asymmetry in favour of the individual justified by the disparate gravity of outcomes. A refusal of jurisdiction is doubtless graver for an individual seeking redress of a tortious wrong than allowing jurisdiction would be for the State.[10]

The article proceeds in the following way. Part II provides an overview of general matters relating to statehood-based protection, with a focus on: (1) the methodology of the restrictive theory of foreign State immunity applicable in Australia; and (2) related issues of the relationships between national courts and international norms. Part II focuses on norms constituted by international agreements and expectations forming a general background to the operation of Australia's law of foreign State immunity. Drawing on this analysis, Part III interrogates the Australian law of State immunity in order to articulate the grounds on which a civil claim may (under

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7 *Benkharbouche v Embassy of the Republic of Sudan* [2019] AC 777, 821 [59] ('*Benkharbouche*'). See generally Pierfrancesco Rossi, *International Law Immunities and Employment Claims: A Critical Appraisal* (Hart, 2021) 13–14.

8 R Higgins, 'Certain Unresolved Aspects of the Law of State Immunity' (1982) 29(2) *Netherlands International Law Review* 265, 271.

9 ALRC 24 (n 2) 66–7 [113]–[114]. Similarly, 'the time of the "sacrosanctity" of foreign states is over — domestic courts must accept that they have a duty to decide cases presented before them and as part of that duty they must strive equitably to take into account all interests in the litigation': Richard Garnett, 'Foreign States in Australian Courts' (2005) 29(3) *Melbourne University Law Review* 704, 732.

10 As observed in *Estate of Michael Heiser v Iran* [2019] EWHC 2074 (QB), [129] ('*Heiser*'), access to justice is inevitably challenged by the invocation of State-based immunity.

Australian domestic law) be properly subject to the jurisdiction of Australian courts when the respondent is one or more of the Vatican-based entities.[11]

It should be emphasised that while international legal norms are discussed before the law of Australia, this is primarily for contextual purposes. It is with Australian law that this article is most centrally concerned. Australian law of State immunity represents an interface of national and international law — but it manifests that interface in terms of Australian courts looking out, not international law looking in. On this basis, Part III includes some subsidiary reference to overseas findings and international norms. In Australia such findings or associated norms may be invoked under certain circumstances to aid in the interpretation of applicable law. The High Court of Australia ('High Court') has made it clear that international treaties 'should be interpreted uniformly by contracting states'.[12] A treaty applied directly by an Australian statute should be interpreted using the rules of treaty interpretation under international law.[13] Judicial consideration of the *Diplomatic Privileges and Immunities Act 1967* (Cth) ('*DPIA*') provides an example. The *DPIA* incorporates in part the *Vienna Convention on Diplomatic Relations* 1961 ('*VCDR*')[14] to which Australia is a party. *DPIA* s 7 identifies a total of 18 articles of the *VCDR*, giving the 'provisions' of these 'the force of law' in Australia.[15] In addition, the entirety of the *VCDR* comprises the Schedule to the *DPIA*.[16] The United Kingdom ('UK') *Diplomatic Privileges Act 1964* ('*DPA* (UK)') similarly incorporates a selection of articles from the *VCDR*.[17] On the basis of these *VCDR* articles being law in both

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11 The focus of this article is on impediments to a tort suit, not on criteria as to the merits thereof. Australian law imposes a duty on various persons both natural and legal, to take reasonable precautions when carrying out their lawful activities, in order to avoid causing foreseeable harm in ways that would not be adequately addressed by contractual or other arrangements; this is 'an obligation to exercise reasonable care': *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330, 337–8 [18] (Gummow J); or more succinctly, a 'duty to take care': Justice Geoffrey Nettle, 'The Changing Position and Duties of Company Directors' (2018) 41(3) *Melbourne University Law Review* 1402, 1406.

12 See, eg: *Povey v Qantas Airways Ltd* (2005) 223 CLR 189, 202 [25] (Gleeson CJ, Gummow, Hayne and Heydon JJ) ('*Povey*'); *Spain v Infrastructure Services Luxembourg Sàrl* (2023) 97 ALJR 276, 286 [38] ('*Spain v ISLS*'). The High Court added in *Povey*, '[b]ut, of course, the ultimate questions are, and must remain: what does the relevant treaty provide, and how is that international obligation carried into effect in Australian municipal law?': at 202 [25].

13 See, eg, *Maloney v The Queen* (2013) 252 CLR 168, 180–1 [14] (French CJ), 256 [235] (Bell J).

14 *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964) ('*VCDR*').

15 *Kumar v Consulate General of India, Sydney* (2018) 329 FLR 90, 99 [52]. The selected *VCDR* (n 14) articles are arts 1, 22–4, and 27–40: *Diplomatic Privileges and Immunities Act 1967* (Cth) s 7(1) ('*DPIA*'). See also *Spain v ISLS* (n 12) 286 [38].

16 *DPIA* (n 15) sch.

17 *Diplomatic Privileges Act 1964* (UK) s 2, sch 1 ('*DPA* (UK)').

Australia and the UK, and the shared context of their inclusion in a statute on diplomatic protection, Australia's Federal Court relied on the reasoning of the UK Supreme Court in *Al-Malki v Reyes* when interpreting arts 31 and 39 of the *VCDR*.[18]

Following the analysis of Australian law, focused on the *FSIA* and the *DPIA*, Part IV gives an overview of recent indicative case law from the US and from Europe concerning the Holy See as respondent. Australian courts may observe trends in reasoning and may seek for insights into the puzzles generated by this species of litigation worldwide. Part V draws the threads together.

Before moving on to Part II, some brief comment is required on the legal nature of the Vatican-based entities. The complexity, rich history and manifold interconnectivities of the Vatican, Vatican City, the Holy See, the Papacy and the Roman Catholic Church are undeniable. Correspondingly, scholarship in international law is still evolving on the question of the statehood, as a sovereign independent entity, of either or both of the Vatican City and the Holy See, whether severally or in a combined or integrated form.[19] It is paradigmatic of modern international law that statehood when recognised confers a formal equality on entities that are highly diverse, for example in terms of population size, territorial extent and economic

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18 *Mahmood v Chohan* [2021] FCA 973, [15]–[17], citing *Al-Malki v Reyes* [2019] SC 735, 749 [4] (Lord Sumption JSC, Lord Neuberger agreeing), 771–2 [55] (Lord Wilson JSC, Baroness Hale PSC and Lord Clarke agreeing). *DPA* (UK) (n 16) sch 1 prescribes the same selection of articles from the *VCDR* as having the force of law in the UK, as the *DPIA* prescribes with respect to Australia, but with the addition of art 45. In interpreting the *VCDR* in the context of the *DPA* (UK), the UK Supreme Court has indicated in *Basfar v Wong* [2023] AC 33, 55 [16] (Lords Briggs and Leggatt JJSC, Lord Stephens JSC agreeing) ('*Basfar*') that

> [t]he text of an international convention is intended to be given the same meaning by all the states which become parties to it. The provisions of the [*VCDR*] enacted into UK law by the [*DPA* (UK)] must therefore be interpreted, not by applying domestic principles of statutory interpretation, but according to the generally accepted principles by which international conventions are to be interpreted as a matter of international law.

This position has been explicitly endorsed by the High Court of Australia: *Spain v ISLS* (n 12) 286 [38].

19 Cismas (n 4) 153–238; John R Morss, 'The International Legal Status of the Vatican/Holy See Complex' (2015) 26(4) *European Journal of International Law* 927, 930; Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3(3) *Göttingen Journal of International Law* 829, 859; Ntina Tzouvala, 'The Holy See and Children's Rights: International Human Rights Law and Its Ghosts' (2015) 84(1) *Nordic Journal of International Law* 59, 66; William Thomas Worster, 'The Human Rights Obligations of the Holy See under the Convention on the Rights of the Child' (2021) 31(1) *Duke Journal of Comparative and International Law* 351, 377–84; Nicolás Zambrana-Tévar, 'Reassessing the Immunity and Accountability of the Holy See in Clergy Sex Abuse Litigation' (2020) 62(1) *Journal of Church and State* 26, 35 ('Reassessing'); Nicolás Zambrana-Tévar, 'The International Responsibility of the Holy See for Human Rights Violations' (2022) 13(6) *Religions* 520; Luca Pasquet and Cedric Ryngaert, 'The Immunity of the Holy See' (2022) 8(2) *Italian Law Journal* 837.

or military capacity.[20] Consistent with this diversity alongside formal equality, as Gleider Hernández observes, 'States may … determine freely their internal organization'.[21] Thus, international law pays little heed to the nature of the interconnections between the Vatican City and the Holy See.[22] In any event, this article does not further consider the contested question of the legitimacy of the Holy See as claimant to statehood-based immunity in an Australian court.[23] For a court to set aside such a claim ab initio would of course represent the most direct path or 'the high road' to engagement with the merits of a civil action, that is to say to the exercise of its proper competence.[24] But there is another path to the same procedural end. To anticipate, this 'low road' comprises a recognised exception to foreign State immunity. An overview of the law of foreign State immunity, including its international aspects, is therefore necessary.

II Statehood-Based Protections and the Restrictive Theory of Foreign State Immunity: International Norms

A *Jurisdiction and Statehood-Based Protections: Procedural Matters*

Protection derived from foreign statehood may take the form of declared inviolability of an institution, an object or a natural person, or of an immunity from juridical process of a natural or a legal person.[25] Thus 'immunity may be understood as a freedom from liability to the imposition of duties by the process of Australian courts'.[26] The approach to foreign statehood-based immunity applicable in Australia

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20 Gleider Hernández, *International Law* (Oxford University Press, 2019) 117.

21 Ibid.

22 However, factual matters going to civil liability might well involve scrutiny of institutional administrative arrangements.

23 In any event, the Minister could foreclose this issue under s 40 of the *FSIA* — see below n 79.

24 '[A] right to jurisdictional immunity cannot be derived from the mere fact that the Holy See participates in international law by entertaining diplomatic relations and concluding treaties *like a State*': Pasquet and Ryngaert (n 19) 854 (emphasis in original).

25 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 21–2 [52]–[55], 30 ('*Arrest Warrant*'); Roger O'Keefe, 'Review of Tom Ruys and Nicolas Angelet (eds), Luca Ferro (assistant ed), *The Cambridge Handbook of Immunities and International Law*' (2021) 32(2) *European Journal of International Law* 709, 712–13 ('Review'). Immunity from process and from execution are to be distinguished: *Thor Shipping A/S v Ship 'Al Duhail'* (2008) 252 ALR 20, 40 [69] ('*Thor*'). See also: James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9th ed, 2019) 472–4 ('*Brownlie's*').

26 Such that in Australia's *FSIA* (n 3) s 9 'jurisdiction' means 'amenability of a defendant to the process of Australian courts': *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240, 247 [17] (French CJ, Gummow, Hayne and Crennan JJ) ('*Garuda* HCA').

is known as the restrictive theory (or doctrine) of immunity.[27] This approach is predominant in national courts across the globe, albeit not exclusively so.[28] It is commonplace to compare the restrictive theory to an absolute (or 'unqualified') approach.[29] However, the restrictive theory cannot be characterised as a historical evolution from one customary norm of international law to another, or as the emergent consequence of cumulative inroads into the absolute approach: as 'there has probably never been a sufficient international consensus in favour of the absolute doctrine of immunity to warrant treating it as a rule of customary international law'.[30] The drafting convention used in State immunity legislation of conferring a general immunity as a rule and then providing exceptions to that rule, which may suggest a more absolute approach, should not be interpreted as articulating a substantive default status.[31] The restrictive theory of immunity is the best description of State practice in the granting of immunities, in that a foreign State 'is entitled to immunity only in respect of acts done in the exercise of sovereign authority'.[32]

The contrast between conduct of the State understood as inherent to sovereignty (acts *jure imperii*) and other conduct (acts *jure gestionis*), while somewhat imprecise as it stands, has proved robust.[33] Importantly, within the restrictive theory of immunity *jure gestionis* is seen expansively, applying to conduct 'that was open to any person (individual or corporation) however unlikely it may be such a person would have engaged in it'.[34] Protection from suit in a national court, in the form of an immunity based on (foreign) statehood, therefore requires that a set of criteria be met. While the precise specification of those criteria differs across national jurisdictions in terms of statute and other kinds of governing law, the requirements are broadly equivalent.

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27 'The [*Foreign States*] Immunities Act was enacted to give effect to the restrictive doctrine of foreign State immunity': *Firebird* (n 2) 86 [189] (Nettle and Gordon JJ).

28 Crawford, *Brownlie's* (n 25) 472–4.

29 James Crawford, 'Foreword' in Roger O'Keefe, Christian Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press, 2013) v ('Foreword').

30 *Benkharbouche* (n 7) 819 [52]. In the English courts the 'myth surrounding … absolute immunity' was queried by Lord Denning for two decades before his Lordship's intervention in *Trendtex*: Ernest K Bankas, *The State Immunity Controversy in International Law: Private Suits against Sovereign States in Domestic Courts* (Springer, 2nd ed, 2022) 98; *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529 ('*Trendtex*').

31 *Benkharbouche* (n 7) 810–11 [38]–[39]. For Lord Sumption JSC this can be said of the US, Canadian and Australian legislation as well as that of the UK: at 810–11 [38].

32 Ibid 810 [37]. For the High Court of Australia, the restrictive approach is 'necessary in the interest of justice': *Garuda* HCA (n 26) 244 [6], quoting *Playa Larga v I Congreso del Partido* [1983] 1 AC 244, 262 (Lord Wilberforce) ('*I Congreso del Partido*').

33 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) (Judgment)* [2012] ICJ Rep 99, 125 ('*Jurisdictional Immunities*').

34 *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2011) 192 FCR 393, 419 [119] (Rares J) ('*Garuda* FCA').

A relevant status for a foreign entity must be shown. Depending on jurisdiction, the protection of the foreign entity may be: (1) asserted by the defendant party; (2) found by the court acting on its own motion; or (3) accepted by the court on the basis of a certificate issued by the executive branch.[35] The conduct complained of must be shown to fit within the applicable parameters of protected conduct. Falling at any hurdle may restore the judicial process to its default mode of local forum jurisdiction over process, the outcome of which is of course always open at that early point.

B *Protections Conferred on a State by International Law: An Overview*

The most important recent consideration of State jurisdictional immunities by an international tribunal is *Jurisdictional Immunities of the State* (*Italy v Germany, Greece intervening*) ('*Jurisdictional Immunities*') at the ICJ.[36] The case concerned delicts in relation to human rights, committed in Italy by German forces during World War II. These were found by the ICJ not to found exceptions to Germany's State immunity from foreign State litigation, despite the unquestioned harms inflicted.[37] From the perspective of complaints that might arise in Australia relating to conduct of a foreign State or its agencies, this finding is extremely narrow. Deployment of military forces in time of war is a paradigmatic sovereign act. Such inter-State protection is based in customary international law ('CIL'). However States around the world, from whose conduct the norm is ultimately deduced, 'do not agree on [the] scope and extent' of such a customary norm.[38] When the harmful conduct was carried out by officials of a foreign State (from the forum perspective), statehood-based immunity has in some instances been an impediment to the continuation of procedure in the complainant's own State. As discussed below in Part IV, where the focus is overseas case law on the Holy See and the Roman Catholic Church, the ECtHR has the responsibility of assessing compliance of member States of the Council of Europe with the *European Convention on Human Rights* ('*ECHR*') which provides (at art 6) a guarantee of access to justice for nationals of States parties.[39] A finding of foreign State immunity forecloses this access to justice, but this is a breach of art 6 only if the granting of the immunity was disproportionate. No breach had occurred, for example, when the Irish High Court declined — on

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35 See, eg: Fox and Webb (n 5) 11, 19; *FSIA* (n 3) s 40.

36 *Jurisdictional Immunities* (n 33).

37 Ibid 154–6 [139].

38 Sally El Sawah, 'Jurisdictional Immunities of States and Non-Commercial Torts' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 142, 157.

39 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 Sep 1953), as amended by *Protocol No 15 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 11 May 2021, CETS No 213 (entered into force 1 August 2021) art 6 ('*ECHR*').

grounds of UK State immunity — to allow an aggrieved Irish national to pursue a civil claim against a serving British soldier.[40]

Immunities for natural persons are an important variety of statehood-based protection. At the level of international tribunals, and in relation to protections for the highest officials of foreign States on the basis of that status, the ICJ found in *Arrest Warrant of 11 April 2000 (Congo v Belgium)* (‘*Arrest Warrant*’) that an incumbent Foreign Minister may not be made subject to an arrest warrant issued by the courts of another national jurisdiction.[41] Since the immunity subsists on behalf of the relevant State, that State may waive the protection. It was indicated that the protection is cognate with the immunity for a head of State visiting another jurisdiction and is likewise based on CIL.[42] There are some commonalities across criminal and civil actions in relation to the claim to statehood-based immunity for a high-level official. In the context of criminal charges, the 1999 extradition proceedings in London against former President of Chile Augusto Pinochet Ugarte gave rise to a claim of such immunity.[43] While decided largely under the *State Immunity Act 1978* (UK) (‘*SIA* (UK)’), significant reference was also made to CIL as variously apprehended by the Law Lords.[44]

Diplomats are protected at the international level under the *VCDR*. Relevantly, art 39 of the *VCDR* provides that protection for diplomats begins when they take that role and terminates when they complete their term of office. While incumbent, accredited diplomats are thus immune from prosecution *ratione personae* for all

40 *McElhinney v Ireland* [2001] XI Eur Court HR 37, 46–7 [38]–[40]. In general, State conduct conforming with the norms of international law will not constitute a disproportionate restriction of *ECHR* art 6(1): *Al-Adsani v United Kingdom* [2001] XI Eur Court HR 79, 100 [56]; *Jones v United Kingdom* [2014] I Eur Court HR 1.

41 *Arrest Warrant* (n 25) 24 [58].

42 It is said to be ‘firmly established’ that immunities from forum jurisdiction ‘both civil and criminal’ apply to ‘holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs’: ibid 20–1 [51]. The observation made by the ICJ is a broad-brush one and little more than ‘an introductory remark’: *Al Maktoum v Al Hussein* [2021] EWCA Civ 890, [20] (‘*Al Maktoum*’). The extensive overseas case law on such protections for high officials, and for diplomats of foreign States, is indicated below in Part III.

43 *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte [No 3]* [2000] 1 AC 147 (‘*Pinochet No 3*’).

44 In this context see, eg, ibid 167–8, 172, 174, 176–7, 210, 240–5. Since the *Trendtex* decision and related developments, English courts had enjoyed the possibility of direct incorporation of such international legal norms by the bench when compatible with applicable statute: Crawford, *Brownlie’s* (n 25) 64; *Trendtex* (n 30). In this context, the Law Lords found that the conduct of a former head of State in instigating acts of torture and directing political assassinations overseas during his incumbency, falls outside the conduct that continues to be protected from process under English law once they have left office: ibid 291–2. Egregious conduct has also been found to lie outside the sphere of protected private conduct in a Head of Government: *Al Maktoum* (n 42) [20].

criminal conduct, and civil conduct with some specified exceptions. Under the relevant articles of the *VCDR*, the only conduct for which protection for a diplomat persists beyond their time in office, in the form of immunity *ratione materiae*, is 'acts performed … in the exercise of his functions as a member of the mission'.[45]

C *The* European Convention on State Immunity *and the* United Nations Convention on Jurisdictional Immunities of States and Their Property

Despite not having entered into force, the 2004 *United Nations Convention on Jurisdictional Immunities of States and their Property* ('*UNCSI*')[46] has been referred to by courts in several jurisdictions and exhaustively analysed by commentators.[47] *UNCSI* was cited by the ICJ in *Jurisdictional Immunities* in 2012.[48] Reference was also there made to the 1972 *European Convention on State Immunity* ('*ECSI*')[49] art 11.[50] The ECtHR has suggested that *UNCSI* corresponds to CIL in relation to the rights and obligations that it expresses.[51]

UNCSI provides for statehood-based immunities of various kinds and articulates exceptions to those immunities.[52] Those exceptions include: commercial transactions;[53] contracts of employment;[54] dealing in moveable and immoveable

45 *VCDR* (n 14) art 39(2).

46 *United Nations Convention on Jurisdictional Immunities of States and Their Property*, GA Res 59/38, UN GAOR, 59th sess, 65th plen mtg, Agenda Item 142, UN Doc A/RES/59/38 (16 December 2004) annex ('*UNCSI*').

47 O'Keefe, Tams and Tzanakopoulos (n 5).

48 *Jurisdictional Immunities* (n 33) 129.

49 *European Convention on State Immunity*, opened for signature 16 May 1972, 1495 UNTS 181 (entered into force 11 June 1976) ('*ECSI*'). States parties include Austria, Belgium, Cyprus, Germany, Luxembourg, Netherlands, Switzerland and the UK. The *SIA* (UK) was itself closely based on *ECSI*: ALRC 24 (n 2) 14 [16].

50 *Jurisdictional Immunities* (n 33) 128–9 [67].

51 See, eg: *Oleynikov v Russia* (European Court of Human Rights, First Section, Application No 36703/04, 14 March 2013) 17 [66] ('*Oleynikov*'); *Cudak v Lithuania* (European Court of Human Rights, Grand Chamber, Application No 15869/02, 23 March 2010) 18 [67]. However, the claim that worldwide State practice is well represented by the wording of *UNCSI* is questionable and in any event, the universal adoption of *UNCSI* might give rise to a somewhat hollow uniformity of high-level rules: Roger O'Keefe, 'The Restatement of Foreign Sovereign Immunity: *Tutto il Mondo è Paese*' (2022) 32(4) *European Journal of International Law* 1483, 1496.

52 *UNCSI* (n 46) art 3. See generally Roger O'Keefe, 'Article 3', in Roger O'Keefe, Christian Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press, 2013) 73.

53 *UNCSI* (n 46) art 10.

54 Ibid art 11.

property;[55] intellectual and industrial property;[56] and participation in certain collective bodies.[57] For present purposes the key exception is provided at art 12, wherein immunity is displaced in the case of

> death or injury to the person … caused by an act or omission … attributable to [a] State [which] occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.[58]

Article 12 of *UNCSI* is unusual among international instruments, in its exclusion of immunity being based on territorial location and not on the non-sovereign nature of the impugned act.[59] As a result, this ground for exception to immunity has been referred to curially and by commentators, as the 'territorial tort' exception or principle.[60] Sally El Sawah cautions in the context of what she more often terms 'the non-commercial tort exception' that 'disparity of State practice … cannot be ignored'[61] and that 'the exact contours of the material and territorial scope of the non-commercial tort exception are still ambiguous and uncertain'.[62]

Circumscribing the ostensible inclusivity of the 'in whole or in part' clause is the 'author present' clause ('if the author of the act or omission was present'), a clause shared only with *ECSI* art 11.[63] As cited by Joanne Foakes and Roger O'Keefe, the 'author present' clause was intended by the International Law Commission ('ILC') — in drafting what became *UNCSI* — to exclude 'transboundary injuries or trans-frontier torts or damage'.[64] To paraphrase, such transboundary effects would comprise three kinds of circumstance: (1) non-deliberate but possibly negligent harm through exporting fireworks, hazardous substances and the like; (2) deliberate infliction of harm across a frontier in real time as by firing a weapon or in a delayed

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55 Ibid art 13.

56 Ibid art 14.

57 Ibid art 15.

58 Ibid art 12. See generally Joanne Foakes and Roger O'Keefe, 'Article 12' in Roger O'Keefe, Christian Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press, 2013) 209.

59 El Sawah (n 38) 144–5; Foakes and O'Keefe (n 58) 209, 218–19.

60 *JC* (n 6) 21 [2] (Judge Pavli); *Jurisdictional Immunities* (n 33) 126 [62]. The term is often used 'for convenience': Foakes and O'Keefe (n 58) 209.

61 El Sawah (n 38) 156.

62 Ibid 157. The term 'non-commercial tort' itself is also unsatisfactory — it should be glossed as 'a tort that is not necessarily commercial' and 'commercial' can be given very wide scope. See below n 157.

63 *ECSI* (n 49) art 11, framed as applying 'if the author of the injury or damage was present in that territory at the time when those facts occurred'. This article is also referred to in *Heiser* (n 10) [149] and in the dissent of Judge Pavli in *JC* (n 6) 23 [10]: see Part IV(A) below.

64 Foakes and O'Keefe (n 58) 221–2.

manner by means of a time bomb or letter bomb; and (3) the possibly negligent (or otherwise wrongful) 'spill-over' effects of armed conflict within sovereign borders.[65] Always conditional on facts, transboundary or trans-frontier torts might be glossed as torts (or other wrongful acts) whose components are distributed across a frontier and may also be distributed temporally and as between actors whether legal or natural. In the analysis of Foakes and O'Keefe, and consistent with the ILC ruminations that they cite, absent the 'author present' clause such trans-frontier torts might well satisfy art 12 in the light of its 'in whole or in part' provision. There is no 'author present' clause in the national statutes of the US[66] or the UK[67] — or that of Australia,[68] to which we now turn.[69]

III Australian Law

A *The* Foreign States Immunities Act 1985 *(Cth): General and Procedural Aspects*

In Australia the primary governing statute is the *Foreign States Immunities Act 1985* (Cth) ('*FSIA*'). As stated by the High Court in *Firebird Global Master Fund II Ltd v Republic of Nauru* ('*Firebird*'), the *FSIA* 'was enacted to give effect to the restrictive doctrine of foreign State immunity'.[70] It provides 'a considered regime of immunities, and exclusions from immunity'.[71] No Australian common law of statehood-based immunity survived the coming into force of the *FSIA*.[72] Australia's statute is broadly comparable to that of the UK, in form as well as in substance. Thus *FSIA* s 9 provides a 'general' form of immunity for public conduct, not of a criminal nature, by a range of entities in similar terms to that provided by the *SIA* (UK).[73]

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65 Ibid.

66 *Foreign Sovereign Immunities Act*, 28 USC §§ 1602–11 (1976) ('*FSIA* (US)').

67 *State Immunity Act 1978* (UK) ('*SIA* (UK)').

68 *FSIA* (n 3).

69 As observed by Foakes and O'Keefe, the 'author present' clause is integral to the 'territorial tort exception' as in *UNCSI* art 12 — absent that clause, it would be misleading to use the term 'territorial tort' in respect of the foreign States immunities statutes of the US, UK, or Australia: Foakes and O'Keefe (n 58) 221–2.

70 *Firebird* (n 2) 86 [189] (Nettle and Gordon JJ).

71 *Garuda* FCA (n 34) 415 [107] (Rares J); *FSIA* (n 3) s 9 concerns 'general' immunity: *Firebird* (n 2) 42 [7] (French CJ and Kiefel J).

72 *Garuda* HCA (n 26) 245 [8] (French CJ, Gummow, Hayne and Crennan JJ); *Firebird* (n 2) 42 [5] (French CJ and Kiefel J). It was anomalous for the sole judge of the Victorian Supreme Court in *Vale v Daumeke* (2017) 323 FLR 418 ('*Vale*') to have entertained the possibility of a residual common law of State immunity: at 423 [40]. The *FSIA* may have narrowed the scope of the former common law rule: *Rosa v Venezuela* [2019] ACAT 33, [7] ('*Rosa*').

73 *SIA* (UK) (n 67) s 1.

To enjoy general but conditional immunity from Australian legal process as a 'foreign State', a country outside of Australia must be 'an independent sovereign state; or … a separate territory (whether or not it is self-governing) that is not part of an independent sovereign state'.[74] The reference to 'foreign State' includes both legal persons (political sub-divisions, the executive government or part thereof) as well as the head of the State or of a political sub-division acting in their public capacity.[75] For example, the Attorney-General of Fiji has been found to fall under s 3(3)(c) of the *FSIA* and attained immunity under s 9.[76] A 'separate entity' of a foreign State is defined as a natural or corporate person acting as 'an agency or instrumentality of the foreign State' but not part of its executive government.[77] The Commissioner of Police of Fiji was a 'separate entity' for these purposes.[78] Under s 40 of the *FSIA*, the Minister for Foreign Affairs may determine under certificate the status of a certain foreign person or entity under s 3(3).[79]

B FSIA*: Immunities under Part II*

Provision is made for exceptions to the *FSIA* s 9 immunity. Exceptions include submission to jurisdiction[80] as well as commercial transactions[81] and, separately, contracts of employment.[82] Thus, as considered by the High Court in *Firebird*, *FSIA* s 11 provides that '[a] foreign State is not immune in a proceeding in so far as the proceeding concerns a commercial transaction'.[83] At s 11(3) it is provided that 'commercial transaction' refers to

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74 *FSIA* (n 3) s 3(1) (definition of 'foreign State').

75 Ibid s 3(3).

76 *Vale* (n 72) 422 [34].

77 *FSIA* (n 3) ss 3 (definition of 'separate entity'), 22. With three exceptions, the term 'State' in relation to immunity within *FSIA* ostensibly includes those separate entities. A separate entity may be a 'natural person other than an Australian citizen': *Garuda* FCA (n 34) 400 [26] (Lander and Greenwood JJ), or the 'central bank or monetary authority': *FSIA* (n 3) s 35(1). Commercial conduct in a separate entity will nullify any immunity: *Garuda* FCA (n 34) 419 [120] (Rares J), citing Commonwealth, *Parliamentary Debates*, House of Representatives, 21 August 1985, 142 (Lionel Bowen, Attorney-General). In the later High Court decision, Heydon J endorsed the observation by ALRC 24 (n 2) 37 [69] that '[i]n practice, it is unlikely that claims to immunity by separate entities will succeed': *Garuda* HCA (n 26) 262 [65].

78 *Vale* (n 72) 422 [35]: the Police Commissioner is 'an agent or instrumentality of the Republic of Fiji and not a department or organ of [its] executive government' — note the Commissioner was granted immunity in *Vale* on the basis of the Fiji location.

79 Where applicable, the certificate from the Minister is 'conclusive as to those facts and matters': *FSIA* (n 3) s 40(5). However, the Minister is not empowered to determine the status of a separate entity: *Garuda* HCA (n 26) 246 [12] (French CJ, Gummow, Hayne and Crennan JJ).

80 *FSIA* (n 3) s 10.

81 Ibid s 11.

82 Ibid s 12.

83 Ibid s 11(1); *Firebird* (n 2) 42 [8] (French CJ and Kiefel J).

> a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged and, without limiting the generality of the foregoing, includes [a contract, a loan agreement, a guarantee or indemnity].[84]

The geographical location of a commercial transaction, even if established on the facts, is not salient so long as a sufficient territorial nexus is found. Thus, in *Garuda* HCA, the High Court rejected the appellant's proposal that s 11 might not apply on the basis that its (airline) business activity took place 'outside Australia'.[85] It was conduct 'which allegedly affected markets in Australia' thereby falling within the scope of s 11.[86] A broad understanding of commerce in the context of s 11 is called for.[87]

With reference to the further exceptions provided in *FSIA* ss 12, 13, 15, 16 and 20, the High Court has observed that the recommendation of the ALRC was that

> proceedings concerning certain other matters be the subject of exceptions to the general immunity from the jurisdiction of Australian courts. … The proceedings the subject of these exceptions are also expressly required to have a territorial nexus with Australia.[88]

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84 *FSIA* (n 3) s 11(3).

85 *Garuda* HCA (n 26) 260 [62] (Heydon J).

86 Ibid. Effects on markets in Australia are such that a jurisdictional connection is not in doubt, irrespective of geographical considerations as such: at 255 [50]. The meaning of a 'market in Australia' was rigorously examined in *Air New Zealand Ltd v Australian Competition and Consumer Commission* (2017) 262 CLR 207 — here it was observed that (1) 'market identification depends upon the issues for determination' (rather than being a stand-alone, preliminary determination): at 235 [59] (Gordon J) (citations omitted); (2) a market is not a physical entity: at 222 [14] (Kiefel CJ, Bell and Keane JJ); and (3) substitutability may be significant in determining the presence of competition and of a market: at 226 [27]–[28] (Kiefel CJ, Bell and Keane JJ). The supply of what might be termed 'faith services' to consumers across borders by religious organisations, might loosely be said to represent a market in which substitutability and consumer choice play a role. Opportunities and costs for nationals of a State are substantially governed by decision processes beyond borders.

87 See *Garuda* HCA (n 26) 264 [73] (Heydon J), emphasising that commercial activities under s 11 are not required to have contractual force nor to be transactions that 'promote trade'. Importantly in *Firebird* (n 2) 59 [80], French CJ and Kiefel J observed that

> [c]onsistently with the approach taken to the construction of s 9, where 'proceeding' is given its widest meaning in order to give effect to the general immunity from the jurisdiction of Australian courts, a wider meaning should be given to 'the proceeding concerns a commercial transaction' in order to give effect to the restriction on immunity which s 11(1) seeks to achieve. Such a construction of the two provisions gives effect to Australia's international obligations.

88 *Firebird* (n 2) 43 [10] (French CJ and Kiefel J), citing ALRC 24 (n 2) xviii–xx.

The nature of such a 'territorial nexus with Australia' requires scrutiny. That nexus is not all of one kind. It is indeed the case that, unlike s 11, each of ss 12–16 (and s 20) makes some explicit reference to Australia in defining grounds for exceptionality. It should be noted that few of the exceptions in ss 12–16 and 20 require concrete, physical presence of something or somebody geographically within Australia's sovereign borders as a precondition for exception to immunity.[89] Illuminated by these contextual matters, s 13 requires particular attention as attempted below. To anticipate, the common thread connecting these exceptions is that they concern 'acts and omissions and some forms of property *which are so closely connected to Australia* that it is appropriate that a foreign State be amenable to the jurisdiction of Australian courts in proceedings concerning such matters'.[90] In this formulation, close connection is not expressly tied to territory as such even if the nuance is a subtle one.

Of particular significance for claims in tort, at s 13 of the *FSIA* it is provided that:

> **13 Personal injury and damage to property**
>
> A foreign State is not immune in a proceeding in so far as the proceeding concerns:
>
> (a) the death of, or personal injury to, a person; or
>
> (b) loss of or damage to tangible property;
>
> caused by an act or omission done or omitted to be done in Australia.

As explained by Nettle and Gordon JJ in *Firebird*:

> In the case of personal injuries and property claims dealt with in s 13, the basis of the exception to immunity is that, where a foreign state wrongfully causes death or injury or damage to tangible property in Australia, there is no merit in requiring the plaintiff to litigate in the defendant's national courts when Australian courts can provide the obvious and convenient local remedy.[91]

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89 For *FSIA* (n 3) s 12, a contract of employment may have been made in Australia yet performed only partly, or not at all, therein. Under s 13, a failure to act can attract the exception. Under s 15, ownership, registration or protection of intellectual property 'in Australia' or an infringement of such rights 'in Australia' clearly has an extended or conceptual sense cognate with the 'effects on Australian markets' discussed above in the context of s 11. For s 16, membership of a body corporate 'controlled from Australia', even if not established under the law of Australia, may bring a foreign State into jurisdiction regarding disputes between it and other members of the body corporate.

90 *Firebird* (n 2) 89 [199] (Nettle and Gordon JJ) (emphasis added).

91 Ibid 89 [198], citing ALRC 24 (n 2) 55–9 [94]–[100].

Here it is the effect in or relating to Australia that is the focus. There is no doubt that geographical or territorial location can be a determinative factor. In *Vale*, the complainant was severely injured by a motor vehicle driven by a police officer in Fiji. All relevant conduct and harm (other than any continuing and consequent harm) had occurred in Fiji and the defendants were Fijian persons or entities. As a result, s 13 clearly did not counter the immunity provided to either the Attorney-General or the Police Commissioner of Fiji under s 9.[92] Yet on other facts, there is room for the view that harm to Australian nationals, in Australia, might suffice to satisfy the s 13 exception irrespective of ambiguities around the geographical location of a perpetrator or 'author'.[93]

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92 *Vale* (n 72) 423 [39]; nor did the respondent submit to Australian jurisdiction which would likewise have lifted immunity.

93 The ALRC observed in ALRC 24 (n 2) 67 [114] (emphasis added):

> Difficulties occur where some acts occur in one jurisdiction, some in another or where the acts occur in one jurisdiction and the damage in another. … Since the primary justification for asserting jurisdiction in this case is that the foreign state has no privilege to commit local physical injury or property damage, and since determining the place where the wrongful act or omission occurred is *usually* simpler than determining *where* damage occurred *or the cause of action arose*, it is recommended that Australian legislation follow the United Kingdom provision to this effect.

It might be glossed that on some facts, it is the determination of where damage occurred that is 'simpler' than determining a location of wrongful conduct. The latter is difficult with a distributed actor. If that is so, location of harm might be in effect determinative of a decision on jurisdiction under s 13. It should be noted that private international law was found unhelpful as to discerning 'any clear, agreed rule as to the appropriate forum in … transboundary tort cases': at ALRC 24 (n 2) 67 [114]. Clarity over somewhat analogous conflict of laws questions might have contributed to the design of Australia's *FSIA*. The question of territorial location of tortious conduct relative to jurisdictional boundaries, has been an issue *within* the Commonwealth of Australia, that is to say across the boundaries of states and territories. In *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, a conflict of laws question arose when Rogerson, an employee of Pfeiffer whose residence and connections with Pfeiffer were located in the ACT, was injured while working for Pfeiffer in NSW. A new rule of *lex loci delicti* was identified, according to which the place where a person is exposed to risk of injury shall determine the proper applicable law: at 544 [102]–[103] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). See also Gary Davis, '*John Pfeiffer Pty Ltd v Rogerson*: Choice of Law in Tort at the Dawning of the 21st Century' (2000) 24(3) *Melbourne University Law Review* 982. Turning to international conflict of laws questions, in *Regie Nationale des Usines Renault SA v Zhang* (2002) 187 ALR 1 it was found that *lex loci delicti* also applies: at 520 [75] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 539 [133] (Kirby J). See also Geoffrey Lindell, '*Regie Nationale des Usines Renault SA v Zhang*: Choice of Law in Torts and Another Farewell to *Phillips v Eyre* but the *Voth* Test Retained for *Forum Non Conveniens* in Australia' (2002) 3(2) *Melbourne Journal of International Law* 364. This position in Australian private law is consistent with the position discussed above in *Vale* (n 72).

C *Immunities under* FSIA *Part V and the* DPIA

Any application of immunity for an incumbent foreign head of State arising from his or her public functions is to be found in pt II of the *FSIA* as discussed above.[94] With respect to private conduct for an incumbent head of State, extension of a form of diplomatic protection — derivative of foreign State immunity — is provided in pt V 'Miscellaneous' at s 36. This provision was closely modelled on s 20 of the *SIA* (UK).[95] However, while incumbency may be read into *SIA* (UK) s 20 (since it refers to the head of State and his or her household in the present tense), it is made express in the *FSIA*. Section 36 provides that the *DPIA* is extended 'with such modifications as are necessary in relation to the person who is for the time being' head of State (or spouse thereof); and 'as that Act applies in relation to a person when he or she is the head of a diplomatic mission'.[96] Just as pt II of the *FSIA* provides no guidance as to Australian law on criminal conduct in public office for an incumbent head of State, so pt V is silent on the question of any immunity for private conduct surviving incumbency. The immunity that is conferred by recourse to the *DPIA*, and hence the *VCDR*, is an unqualified immunity with respect to criminal matters and a qualified immunity with respect to civil matters.[97] Notwithstanding the element of continuing immunity *ratione materiae* provided for diplomatic personnel directly under the *DPIA*, which arises solely in relation to their official conduct, it is not yet

94 '[A] head of a foreign state, in his or her public capacity, generally enjoys the same immunity as does a foreign state': *Thor* (n 25) 37 [61].

95 ALRC 24 (n 2) 103 [163]: with the benefit of hindsight, more specification might have been recommended therein in relation to private conduct of heads of State. The ALRC report indicates that such matters are 'rarely litigated': at 103 [163]. The application of the analogue to diplomatic protection is not without unwelcome consequences, as interrogated by Judge Dowsett in *Thor* (n 25) 39–40 [66]–[68].

96 *FSIA* (n 3) s 36(1) provides (emphasis added):

> the *Diplomatic Privileges and Immunities Act 1967* extends, with such modifications as are necessary, in relation to the person *who is for the time being*:
>
> (a) the head of a foreign State; or
>
> (b) a spouse of the head of a foreign State;
>
> as that Act applies in relation to a person *at a time when he or she is* the head of a diplomatic mission.

Further, s 36(3) provides '[t]his section does not affect the application of any other provision of this Act in relation to a head of a foreign State in his or her public capacity'.

97 *DPIA* (n 15) s 7, sch. Under *VCDR* (n 14) art 31(1)(c), State-based immunity *ratione personae* is not available for (diplomats') real estate dealings; actions in relation to succession; or to an action relating to any professional or commercial activity exercised by the diplomatic agent 'in the receiving State [but] outside his official functions'.

clear what conduct of a head of State, either public or private, attracts protection under Australian law beyond their incumbency.[98]

In *Thor Shipping A/S v Ship 'Al Duhail'* ('*Thor*') the Amir of Qatar (an incumbent foreign head of State) was the private owner of a fishing vessel which was the subject of a dispute in rem relating to charterparty.[99] *FSIA* s 36, linking to the *DPIA* and hence *VCDR*, was the only route for immunity from suit for a head of State acting in his private capacity.[100] However, for Judge Dowsett the salient questions concerning immunity, and exceptions thereto, are not exhaustively resolved by reference to the *FSIA*. His Honour refers to an observation in the 1984 ALRC report that the applicable law (either international law or common law) concerning the scope of immunity for private dealings of an incumbent head of State was unclear at that time.[101] Determining that despite the enactment of the *FSIA* he could not restrict his reasoning to Australian law, English law was therefore consulted. This consisted of the *SIA* (UK) and the case law concerning the extradition proceedings against Pinochet Ugarte (see Part II(B) above).[102] In relation to immunity, art 31(1) of the *VCDR* was found in *Thor* to be applicable via s 36 of the *FSIA* and its extension of the *DPIA*, insofar as they together conferred qualified civil immunity on the Amir for private acts.[103] Exceptions to that immunity under *VCDR* art 31(1)(a)–(c) were found non-applicable.[104]

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98 In relation to allegations made against the former King of Spain Juan Carlos, the UK High Court found that *SIA* (UK) (n 67) s 20 provides no protection to a former sovereign either in civil or in criminal proceedings: *Zu Sayn-Wittgenstein-Sayn v HM Juan Carlos de Borbón y Borbón* [2022] 1 WLR 3311, 3333 [60]. It should be noted that on appeal, protection for those of the former King's actions that were carried out during his incumbency, was in fact found: *Zu Sayn-Wittgenstein-Sayn v HM Juan Carlos de Borbón y Borbón* [2023] 1 WLR 1162, 1188 [76] (Simler LJ, Popplewell and King LJJ agreeing).

99 *Thor* (n 25) 21 [1].

100 It was 'common ground', and not further enquired into, that 'for present purposes, any relevant immunity is that which the Amir enjoys in his private capacity. Section 36 regulates that matter': *Thor* (n 25) 37 [61].

101 Ibid 34–5 [52]–[55].

102 Judge Dowsett draws from *Pinochet No 3* (n 43) the questionable result that under the common law of UK and the *SIA* (UK) (n 67), an incumbent head of State has complete immunity for private and public conduct, with no attention paid to the (civil jurisdiction) exceptions under the *VCDR* (n 14): *Thor* (n 25) 35 [56]. Judge Dowsett also asserts that the *SIA* (UK) and *FSIA* are sufficiently similar that the bench may read across from the case-law of the former, to the latter: at 37 [59].

103 *Thor* (n 25) 37–8 [61]–[63], 39–40 [67]–[69].

104 Ibid 38–9 [64]–[67]. *VCDR* (n 14) art 31(1) provides:

> A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

Article 31(1)(c) provides that immunity is unavailable in the case of 'an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions'.[105] Judge Dowsett found no basis for that exception on the facts.[106] The final clause seems otiose in the context of the private conduct of a head of State, and there certainly was commercial activity. However, Judge Dowsett found that the Amir did not carry out such (commercial) activity in Australia and '[i]ndeed, there is no suggestion that he has ever entered Australia'.[107]

That observation enabled interrogation by Judge Dowsett of the issue of presence in forum and, in this way, clarification of the role of the *VCDR* for immunity of a head of State via s 36 of the *FSIA* and *DPIA*. As explained by Judge Dowsett, the meaning of the *VCDR* in the context of diplomats (that is to say when the *DPIA* is applied directly) cannot be taken to be that protections for an incumbent diplomat are lost at any time that they leave the forum (the receiving State) even temporarily, while remaining in post.[108] Diplomats may spend some of their time in post in their home ('sending') State or a third country, whether for official or private purposes. Thus, '[t]he error in the plaintiff's submission is the characterization of [*VCDR*] Art 39 as a geographical limitation upon diplomatic immunity'.[109]

> (a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
>
> (b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
>
> (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

105 *VCDR* (n 14) art 31(1)(c).

106 *Thor* (n 25) 38–9 [64].

107 Ibid. Thus, '[i]t would seem to follow that as a head of state, he enjoys the same immunity, without exception, as is conferred upon diplomatic agents by article 31, that is, immunity from criminal, civil and administrative jurisdiction, including immunity from execution': at 38 [64].

108 '[Article] 39 [of the *VCDR*] does not deprive a head of mission, who remains in post, of his or her immunity during any temporary absence from the receiving state. It would be strange if a head of state were to lose such immunity upon departure': ibid 39 [66]. *VCDR* (n 14) art 39 provides:

> 1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post …
>
> 2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country … However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

109 *Thor* (n 25) 39 [67].

Following the same reasoning, incumbent foreign head of State protection for private conduct under pt V of the *FSIA*, with respect to judicial proceedings in Australia, appertains to and is in effect an incident of his or her incumbency. It does not rely on physical presence within the forum:

> The geographical references in [art] 39 reflect the nature of the diplomatic agent's duties which generally require that he or she be in the relevant country in order to perform them. However he or she enjoys immunity whilst in post, regardless of location. It is that degree of immunity which must be extended to heads of state pursuant to s 36 of the States Immunities Act.[110]

The scope of 'such modifications as are necessary' to the *DPIA* under *FSIA* s 36 has not yet been determined. It would seem unlikely for such necessary modifications to include the limiting of the protection of head of State's private conduct to such conduct carried out when the head of State is physically present on the soil of the forum State.[111] Of course a visit to the forum State might on occasion be for private purposes.[112] The immunity, when applicable, cannot be simplistically limited by geography in this sense. But if that is correct then on the same reasoning, and in this respect somewhat at odds with Judge Dowsett's remark noted above, physical presence cannot be required in order to satisfy *exceptions* to incumbent head of State immunity for private acts under *FSIA* pt V, that is to say based on the content of *VCDR* art 31.[113] This analysis supports the analysis above of pt II of the *FSIA*, in pressing the point that effects 'in' or 'on' Australia cannot be understood simplistically or uniformly as necessitating the physical presence of some foreign body.

Reference to such matters in pt II of the *FSIA*, while reflective of a generic requirement of effective connection to Australia, above all indicates the significance of various parameters of duty, of breach of duty and of causality or other threshold criteria in civil suit. Facts which would in any case go to the causation element of a claim in negligence would play a key role in such consideration. If facts otherwise support a finding in tort that a duty had been breached causing the harm in Australia complained of, then the *FSIA* s 13 exception to immunity may on its face be satisfied

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110 Ibid. According to Judge Dowsett, *VCDR* art 39 'is designed to give immunity whilst the relevant diplomatic agent is in post, whether or not he or she is in the receiving state. It commences upon arrival in that state for the purpose of taking up the post, and terminates upon completion of his or her functions and departure': at ibid 39 [67].

111 *Pinochet No 3* (n 43) 203 (Lord Browne-Wilkinson). See also: *Harb v HRH Prince Fahd Bin Abdul Aziz* [2014] 1 WLR 4437, 4448–9 [34]; and on geographical limitations conveyed by *VCDR* art 31(1)(c), *Apex Global Management Ltd v Fi Call Ltd* [2014] 1 WLR 492, 507–10 [44]–[58].

112 Pinochet Ugarte's physical presence in London in 1999 was for medical reasons: *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte [No 1]* [2000] 1 AC 61, 87 (Lord Lloyd).

113 The *Firebird* High Court's pertinent observation on interpretive consistency is noted above: n 87.

irrespective of what might be termed merely geographical as against truly jurisdictional factors.[114]

IV The Roman Catholic Church, the Holy See and Related Respondents in Overseas Courts: Selected Cases

A *The European Court of Human Rights*

The ECtHR has issued a number of judgments salient for the status of the Roman Catholic Church and its various emanations. In many cases the ECtHR disputes are between a natural person and the State of which they are a national, alleging breach of the complainant's rights under the *ECHR*.[115] While such cases, on their facts, are closely connected with the role of the Roman Catholic Church in its global infrastructure of education and spiritual guidance, in temporal jurisdictions far from Rome, they remain disputes between a national and her or his own State. The *ECHR* right to a private life was not violated in the treatment of a married priest hired to teach in a public funded Catholic school in Spain, and subsequently dismissed.[116] Similarly reasoned, the dismissal and disqualification of a lay teacher of religious education from Catholic Schools in Croatia, consequent on his divorce and re-marriage, did not constitute a violation of his *ECHR* rights at the hands of Croatia.[117] In both cases the ECtHR examined the balance of interests between the complainant and the Catholic Church itself, and found that State endorsement of Church decisions did not excessively shift that balance to the detriment of the complainant.

However, the ECtHR has not always viewed State management of actions by the Catholic Church administration so charitably. For example, Ireland's protection of its own national against inhuman or degrading treatment under *ECHR* art 3 was found insufficient in *O'Keeffe v Ireland*.[118] O'Keeffe had been the victim of sexual abuse by a teacher (who was not a priest) in a state-funded Catholic school. The ECtHR found that the court proceedings conducted in Ireland had resulted in a violation of art 13 of the *ECHR*, as the result was that the applicant did not have an

114 When the Commonwealth of Australia established and oversaw detention facilities on Nauru for alien persons refused entry to Australia, it arguably committed a tortious act: *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 168 [410] (Gordon J) — noting that Gordon J was in dissent. Were this hypothetically the case, geographical factors would play a role in curial deliberation of such an alleged tort but would not give rise to preliminary issues of jurisdiction over the defendant. A transnational tort would have been subjected to norms of civil wrongfulness applicable under Australian law.

115 *ECHR* (n 39).

116 *Fernández Martínez v Spain* [2014] II Eur Court HR 449, 491 [152]–[153].

117 *Travaš v Croatia* (European Court of Human Rights, Section II, Application No 75581/13, 4 October 2016) 35 [114]–[115].

118 [2014] I Eur Court HR 155, 199 [169].

'effective domestic remedy' available to her.[119] The Irish Government was therefore instructed to compensate the complainant under art 41 of the *ECHR*.[120]

The case of *JC v Belgium*, before the ECtHR, was likewise framed as a complaint under the *ECHR*. The appellants — who included Belgian, French and Dutch survivors of abuse — claimed that access to justice, as provided under art 6 of the *ECHR*, had been denied to them by Belgium.[121] Complaints had been made in the Belgian courts against Belgian bishops, superiors of religious orders and the Holy See, under the Belgian Civil Code art 1382.[122]

The applicants' evidence stated that instructions sent to Belgian Church authorities in 1962 by the Holy Office, under the title *Crimen Sollicitationis*, prescribed what has been termed a 'code of silence' for clergy over claimed abuse, and that this policy was in effect reaffirmed in 2001 with *Sacramentorum Sanctitatis Tutela*. That evidence had not been considered by the Belgian courts and in endorsing the Belgian courts' decisions, the majority in *JC* at the ECtHR likewise set that claim aside.[123] No principal and agent relationship was found as between the Holy See and the bishops in Belgium.[124] Instead, as the Court of Appeal of Ghent had found, the diocesan bishop was found to possess his own decision-making power. Moreover, the misconduct attributed to the Holy See had not been committed on Belgian territory but in Rome, with neither the Pope nor the Holy See present on Belgian territory when the misconduct attributed to the leaders of the Church in Belgium had been committed.[125]

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119 Ibid 204 [183]–[186].

120 Ibid 204–5 [196], 205–6 [199]–[203].

121 *JC* (n 6). On the issue of access to justice under art 6 of *ECHR*, see also Roger O'Keefe, 'State Immunity and Human Rights: Heads and Walls, Hearts and Minds' (2011) 44(1) *Vanderbilt Journal of Transnational Law* 999, 1002.

122 *JC* (n 6) 25 [14] (Judge Pavli).

123 Ibid 25 [15]; Cismas (n 4) 204.

124 *JC* (n 6) 18 [69].

125 Ibid (in French only):

> [L]es fautes reprochées directement au Saint-Siège, … n'avaient pas été commises sur le territoire belge mais à Rome … ni le Pape ni le Saint-Siège n'étaient présents sur le territoire belge quand les fautes reprocheés aux dirigeants de l'Eglise en Belgique auraient été commises.

The matter of the Pope's non-presence in Belgium, as a matter of evidence by way of judicial notice, itself raises some questions. Conceptual uncertainty as to 'presence' of a somewhat arcane kind may arise in the case of papal involvement in a civil suit. The canonical power of the pope is (purportedly) unlimited by human jurisdictional boundaries since he is 'Pastor of the universal Church on earth. Consequently, … he has supreme, full, immediate and universal ordinary power in the Church' and 'can always freely exercise' his universal power (Canon 331), suggesting administrative effect beyond temporal borders: Cismas (n 4) 210, quoting Knut Walf, 'The Roman Pontiff and the College of Bishops' in John P Beal, James A Coriden and Thomas J Green (eds), *New Commentary on the Code of Canon Law* (Paulist Press, 2000) 431, 431.

The assertion that the Holy See 'was not present on Belgian territory' at the relevant time also calls for comment.[126] As with the authority of the Pope, connections to geography are by no means territorial in the sense usually understood by international or municipal law. In any event the strong majority in *JC* held that the Belgian Court had, as proxy for the State (Kingdom) of Belgium, properly responded to the appellants in deferring to State immunity for the Holy See.[127] However, the point was made that different facts might give rise to a different outcome. The Court considered that it would require an additional step to conclude that the jurisdictional immunity of States no longer applied to the failure to act claimed against the Holy See in *JC*, which had not occurred on the basis of current State practice.[128]

In the sole dissent Judge Pavli points to the 'territorial tort' exception to statehood-based immunity as codified in art 12 of *UNCSI*, which he asserts to represent CIL.[129] According to Judge Pavli, that exception to immunity was applicable on the facts since what it requires is that 'a cause of action under the territorial exception must relate to the occurrence or infliction of physical damage occurring in the forum State'.[130] In Judge Pavli's view, the Belgian courts erroneously applied to the benefit of the Holy See a 'carve out' from that exception to immunity. This 'carve out', applied for acts *jure imperii*, in effect brought the conduct back into the protected zone. Judge Pavli found that the Court of Appeal of Ghent had saved immunity on the basis of the inappropriate extension of principles established in the ECtHR itself, such as in *McElhinney* and *Jones*, and by the ICJ in *Jurisdictional Immunities*.[131] His argument relies on the formulation of art 12 of the *UNCSI* being taken to define the default position for territorial exceptions to immunity.

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126 The State of Iran, named as respondent in civil suit over injuries to US nationals abroad, had been found not to have been present in the USA: *Heiser* (n 10) [187].

127 *JC* (n 6) 19 [75].

128 *JC* (n 6) 17 [65] (in French only):

> La Cour estime qu'il faudrait un pas additionnel pour conclure que l'immunité juridictionnelle des États ne s'applique plus à de telles omissions. Or, elle ne voit pas de développements dans la pratique des États qui permettent, à l'heure actuelle, de considérer que ce pas a été franchi.

129 Ibid 21 [2]. Judge Pavli suggests the general applicability of *UNCSI* and its 'territorial tort exception to State immunity' to States parties to the Council of Europe, with reference to *Oleynikov* (n 51): at 22 [6].

130 *JC* (n 6) 26 [17].

131 Ibid 22–3 [7]–[9]: for Judge Pavli, those decisions by the ECtHR and ICJ, declining to find an applicable CIL basis for a 'territorial tort exception', are strictly limited to their context of military activity or alleged torture, and in the case of *Jones* conduct which occurred outside the territory of the forum State. The applicable exception to immunity at *UNCSI* art 12 is not limited to *jure gestionis* in any case: at 23–4 [10]. Further, it might be glossed as vicarious liability: at 24–5 [13], the de facto convergence with which is also observed by Foakes and O'Keefe (n 58) 215, 220. For the majority in *JC* case law of both the ECtHR and ICJ straightforwardly manifested a proper deference to the equality of States by recourse to an immunity from jurisdiction: *JC* (n 6) 14–15 [59]–[61].

Judge Pavli further suggests that vicarious liability in tort might be an acceptable way of reading art 12 so as to impugn the incumbent Pope on the facts.[132] Article 12 includes the 'author present' clause, which for Judge Pavli is provided mainly to exclude such trans-border events as the export of fireworks or the firing of weapons across a border.[133] In any event, for Judge Pavli 'author' can here refer to a natural person herself or himself present in the forum territory and acting as representative or agent of the foreign entity. If harm was conveyed via such an agent of the vicariously liable foreign State or entity, which by definition would not itself have been 'in' the forum territory, then according to Judge Pavli *UNCSI* art 12 might be satisfied.[134]

To the extent that *UNCSI* art 12 does represent CIL, the observations of Judge Pavli are of value — despite their dissenting character — in relation to the concept of a 'territorial tort' exception to immunity more generally. As Judge Pavli observes, in this form of exception to a statehood-based immunity, harm must occur in the forum State, a factor emphasised by commentary of the ILC in its development of the *UNCSI* articles.[135] Thus art 12 provides that, subject to any applicable exceptions, relief should be available for those who suffer in their home State from an act or omission intentionally or negligently caused by a foreign State whether directly or by means of an agent, so long as the somewhat cryptic 'author present' clause is satisfied.[136]

B *United States*

In the US, as in other federal jurisdictions, parallel jurisprudence may emerge that reflects regional variations in the application or interpretation of uniform law.[137] For this reason among others jurisprudence from US courts is complex.[138] In *Doe v Holy See* ('*Doe*'), which originated in the federal District of Oregon and was heard by the Court of Appeals for the Ninth Circuit, the complainant alleged that

132 *JC* (n 6) 23–4 [13]. For an Australian court's perspective on vicarious liability in personal injury, see also *Bird v DP* [2023] VSCA 66.

133 *JC* (n 6) 26–7 [18] n 15; *UNCSI* (n 46) art 12.

134 *JC* (n 6) 26–7 [18].

135 Ibid 26 [17], citing *Report of the International Law Commission on the Work of its Forty-Third Session (29 April–19 July (1991)*, UN Doc A/46/10 (1991) ch II(D) 45–6 [9].

136 *JC* (n 6) 25 [14].

137 With the US Supreme Court ('USSC') decision in *Samantar v Yousuf*, 560 US 305 (2010) ('*Samantar*'), the US retains a globally exceptional position of procedural deference to the executive by the judicial branch concerning questions of foreign State immunity: Chimène Keitner, 'Immunities of Foreign Officials from Civil Jurisdiction' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 525, 540.

138 Cismas (n 4) 209; *Robles* (n 6) 23–5, 27–8. See also William Dodge, 'Jurisdiction, State Immunity, and Judgments in the Restatement (Fourth) of US Foreign Relations Law' (2020) 19(1) *Chinese Journal of International Law* 101, 134–5 [55]–[57].

the Holy See was liable for harms he had suffered from the conduct of a priest, Ronan.[139] In *O'Bryan*, originating in the federal District of Kentucky and heard by the Court of Appeals for the Sixth Circuit, a class action was initiated naming the Holy See, in which abuse by numerous clergy in the US was alleged.[140] In *Robles*, a first instance decision heard in the Southern District of New York, a victim of historic abuse by a parish priest took action against (among others) 'the Holy See, otherwise known as the Vatican'.[141]

In all three cases, a key statute was the United States *Foreign Sovereign Immunities Act* ('*FSIA* (US)').[142] It should be noted that attempts to bring international legal norms directly to bear in civil suit were of only limited success in *O'Bryan*[143] and unsuccessful in *Robles*.[144] In the latter it was observed that, although the US Supreme Court ('USSC') allows claims based directly on CIL, the bar is very high; generally speaking such norms do not of themselves generate causes of action under US law.[145] This does not vitiate the desirable convergence of the scheme of immunities, and exceptions thereto, with international norms; indeed, 'Congress had violations of international law by foreign states in mind when it enacted the *FSIA*'.[146]

Before addressing these cases, it is important to clarify the scope and limitations of the *FSIA* (US). This statute governs immunity from suit for foreign States and some other entities with cognate legal personality, but unlike the closest corresponding legislation in the UK and in Australia, is only incidentally concerned with the question of protection for natural persons (officials). The *FSIA* (US) provides that foreign States and their 'organs or instrumentalities'[147] are to be granted immunity from suit, with certain exceptions being specified. In 2010, the USSC confirmed that the exceptions to immunity provided by the *FSIA* (US) are the sole statutory

139 *Doe* (n 6) 1069–71 (Judge Wright).

140 *O'Bryan* (n 6) 369–70.

141 *Robles* (n 6) 1.

142 *FSIA* (US) (n 66) § 1605. Section 1605(a)(2) displaces foreign State immunity when

> the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

143 *O'Bryan* (n 6) 387.

144 *Robles* (n 6) 36.

145 '[T]he Supreme Court allows for the recognition of a claim based on violations of Customary International Law if: (1) there is a specific, universal, and obligatory norm at issue; and (2) the court finds it should exercise "judicial discretion" to create a cause of action': ibid 36.

146 *Argentine Republic v Amerada Hess Shipping Corp*, 488 US 428, 435 (1989) ('*Amerada Hess*').

147 *FSIA* (US) (n 66) § 1603(a).

avenue for civil claims over a foreign State.[148] Moreover, the *FSIA* (US) does not allow suit for damages against current or former senior foreign State officials as 'organs or instrumentalities' of a State.[149] Unless their conduct is assimilated to the conduct of a State, and hence governed as such by *FSIA* (US), the immunity of foreign officials is a matter for federal common law and in some circumstances for executive determination.[150] Some other statutes also play a role.[151] In any event, the *FSIA* (US) does not codify immunity for officials.[152] Further, immunity granted to natural persons *ratione materiae* based on the function or context of their conduct, and in principle persisting beyond their incumbency, is a matter of common law.[153] Under US common law, a former head of State therefore enjoys immunity to the extent that their past conduct is attributable to the State, thus excluding private acts or criminal acts.[154] Any blanket immunity for an incumbent head of a foreign State *ratione personae* is likewise provided by common law rather than statute law within the US.[155]

Returning to the three cases under examination, in which the *FSIA* (US) was invoked, relevant exceptions to immunity as argued by the plaintiffs were those

148 *Samantar* (n 137) 313–14 [5, 6]. See also *Amerada Hess* (n 146) 434.

149 Natural persons may not be treated as 'organs or instrumentalities' of a foreign State under the *FSIA* (US): Keitner (n 137) 534; O'Keefe, Restatement (n 51) 1486 n 6, 1491; *Samantar* (n 137) 315. The finding in *Samantar* differed from the majority of Circuits: Jennifer K Elsea, Congressional Research Service, *Samantar v Yousef: The Foreign Sovereign Immunities Act (FSIA) and Foreign Officials* (CRS Report No 7-5700, 16 December 2013) 4.

150 *Samantar* (n 137) 325; Dodge (n 138) 130 [48]. The advisory role of the executive branch in respect of immunity *ratione materiae* is to be distinguished from its determinative status in respect of immunity *ratione personae* for incumbent natural persons: Elsea (n 149) 14.

151 '[C]ivil proceedings against foreign officials in the United States … operate outside the US FSIA': Keitner (n 137) 538. A suit regarding aliens may in some circumstances be initiated under such statutes as the *Alien Tort Statute* 28 USC § 1350 (1948) as noted in *Amerada Hess* (n 146) 436–7. See also: Cismas (n 4) 208; *Torture Victim Protection Act of 1991*, Pub L No 102–256, 106 Stat 73 (1992) under which torture or extrajudicial killing by an alien, with sufficient nexus to US nationals, may be pursued against them: *Yousuf v Samantar*, 699 F 3d 763, 777 (4th Cir, 2012) ('*Yousuf*').

152 *Samantar* (n 137) 325.

153 Dodge (n 138) 130 [48]; *Samantar* (n 137) 325.

154 *Yousuf* (n 151) 775.

155 Ibid 768–9. This form of immunity *ratione personae* is 'a doctrine of customary international law' and survives questions of *jus cogens* violations: at 777. See also Dodge (n 138) 130 [48].

for commercial activity[156] and for tortious conduct in an official or employee.[157] The latter exception to immunity is routinely referred to by the US courts as the 'non-commercial tort' exception. As to the former, in *Doe* the Court of Appeals for the Ninth Circuit determined (Judge Berzon dissenting) that no consideration could be given to the question of commercial activity as grounding an exception to immunity.[158] The robust dissent from Judge Berzon expressed the view that commercial activity in the context of foreign State immunity must be interpreted broadly, so as to exclude truly sovereign conduct but not conduct that non-sovereign entities may also carry out. In the view of Judge Berzon,

> Ronan was not a civil service, diplomatic, or military employee — the types of employees that only sovereign states can employ … the Holy See hired Ronan to perform ecclesiastical and parochial services — [this] is not a peculiarly governmental function; it is something that non-governmental employers can do.[159]

In effect Judge Berzon was taking a similar position to that set out by Lord Wilberforce in *Playa Larga v I Congreso del Partido* — to the effect that within the restrictive theory of immunity, purportedly sovereign conduct must meet a high bar of exclusivity.[160]

In *Doe*, there was no direct negligence by the Holy See over its retention and supervision of Ronan despite awareness of his past conduct, because of the application of *FSIA* (US) § 1605(a)(5)(A) by which exercise or performance of a 'discretionary function' reverses any displacement of immunity.[161] However, there were sufficient grounds to maintain the question of jurisdiction under *FSIA* (US) § 1605(a)(5), in remitting the case back to District Court level, because of unresolved factors related to the employment status of Ronan.[162]

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156 *FSIA* (US) (n 66) § 1605(a)(2); *O'Bryan* (n 6) 370; *Doe* (n 6) 1071 (Judge Wright); *Robles* (n 6) 5.

157 *FSIA* (US) (n 66) § 1605(a)(5); *O'Bryan* (n 6) 370; *Doe* (n 6) 1071; *Robles* (n 6) 5. While the term 'non-commercial tort' is used by US courts with reference to the *FSIA* (US) tort exception (as in *O'Bryan* (n 6) 382), and in that respect contrasts with the commercial exception as such, the role played by employment in the tort exception should be noted and this term of art perhaps used with caution.

158 *Doe* (n 6) 1069, 1075.

159 Ibid 1091 (Judge Berzon) — thus at 1092 [76]–[77] (emphasis in original):

> The FSIA's purpose is not to insulate religious institutions from suit; it juxtaposes commercial activities not to *religious* activities, but to *governmental* activities. The Holy See … is like other sovereigns in the respect essential here: It engages in a range of non-sovereign activities in the United States, and the FSIA's commercial activity exception lifts the shield of immunity from such non-sovereign activities.

160 *I Congreso del Partido* (n 32) 262 (Lord Wilberforce).

161 *Doe* (n 6) 1081 (Judge Wright).

162 Ibid 1069. *Doe* was the first occasion on which such suit was allowed to proceed in the US: Cismas (n 4) 202. It should also be noted that certiorari was denied by the USSC in *Doe*: *See v Doe*, 561 US 1024 (2009); Robertson (n 4) 157.

In a somewhat similar manner, the plaintiff in *Robles* alleged a relevant employment relationship with sufficient evidence that a Holy See motion to dismiss was denied and discovery was allowed.[163] Judge Caproni noted, with reference to *Doe* and *O'Bryan*, that '[i]n two similar cases' the Courts of Appeal for the Ninth and Sixth Circuits had decided to similarly accept that plaintiffs 'had alleged facts sufficient to survive a motion to dismiss'.[164] It might also be noted that the Holy See was unsuccessful in seeking to show that the plaintiff's appeal in argument to religious doctrine violated the Establishment Clause (the First Amendment) in the *United States Constitution*.[165] The Holy See in *Robles* also argued a lack of causal nexus, but it was found that the alleged abuse was indeed 'fairly traceable' to the alleged negligence of supervising clergy and the Archbishop.[166]

Headway has therefore been made, from the point of view of plaintiffs, with preliminary phases of litigation: if not yet a glass half full, still a glass not completely empty. The significance of details within the factual matrix should also be noted. Thus a timely and appropriate response by the Vatican, in relation to a request for laicisation, was pointed to by its own counsel in an extra-curial context as evidence of the proper and responsible conduct of the Holy See in relation to *Doe*.[167] The complainant had alleged that the Holy See had negligently retained the offender and had failed to warn those coming into contact with him despite knowing of his history of offending.[168] Consideration of this allegation was barred by reason of the 'discretionary functions' test in the *FSIA* (US) and for this reason left undecided on its merits as making out the tortious act exception to immunity under the *FSIA*.[169] In many ways then, the course of litigation in the US over such harms is characterised

163 *Robles* (n 6) 25:

> While further fact-finding may demonstrate that the Holy See did not at the relevant time exert sufficient control for American clergy to be 'employees' of the Holy See as a matter of federal common law, at the motion to dismiss stage, Plaintiff has adequately alleged an employment relationship. … [A]t this stage Plaintiff has alleged sufficient facts to allow discovery on this issue.

164 Ibid 18–19.

165 Ibid 39. See also Cismas (n 4) 203.

166 *Robles* (n 6) 37–8.

167 Ronan, the offender in *Doe* (n 6), had been laicised in 1966. On the advice of counsel for the Holy See Jeffrey Lena, the Vatican in 2011 published documentation concerning its related decisions and actions. Lena is reported as saying:

> What the documents show, very clearly, is that the Holy See did not have any knowledge of this priest's propensity for abuse until after the abuse occurred, when it was notified by the petition for laicization that arrived from the priest's religious order. And when that petition arrived, it was granted by the Holy See without delay.

Cindy Wooden, 'Appeals Court Dismisses Sexual Abuse Lawsuit Against Vatican', *National Catholic Reporter* (online, 7 August 2013) <https://www.ncronline.org/news/accountability/appeals-court-dismisses-sexual-abuse-lawsuit-against-vatican>.

168 *Doe* (n 6) 1083.

169 Ibid.

by curial scrutiny of the facts as contrasted with early dismissal of complaints as the Holy See, in common with most defendants, might request.

In the context of the 'non-commercial' tort exception to State immunity, the issue of what is termed in *Robles* the 'situs requirement' at *FSIA* (US) § 1605(a)(5)[170] must be addressed. This limits the exception to 'personal injury or death, or damage to or loss of property, occurring in the United States'. According to *Robles*, relevant jurisprudence of the Second Circuit (which incorporates New York courts) 'requires that the "entire tort" must have 'occurred within the United States'.[171] On the facts of *Robles*:

> The Holy See's alleged conduct, such as promulgating policies and supervising its employees and officials, occurred in large part in the Vatican. … As a result, the Holy See is immune from Plaintiff's claims arising from the Holy See's conduct that occurred outside the United States — such as the Holy See's own negligent supervision or its promulgation of the 1962 Policy.[172]

Consistent with this interpretation of the *FSIA* (US) by the District Court in New York, and referred to in *Robles*, the Court of Appeals in *O'Bryan* had found an 'entire tort' requirement in the *FSIA* (US).[173] Yet the reasoning of the superior level bench is nuanced. In *Amerada Hess*, the USSC had resolved a dispute respecting damage to property on the high seas which resulted from foreign military bombardment. It was determined by the USSC that an exception to State immunity could not be found in the *FSIA* (US) '[b]ecause respondents' injury unquestionably occurred well outside the … territorial waters of the United States'.[174] Thus an allegedly tortious act merely having 'direct effects' in the US, fails to meet the criteria operative for the non-commercial tort exception.[175]

There is little room for doubt that an 'entire tort' requirement represents the current common law position within the US in respect of the non-commercial tort exception in *FSIA* (US).[176] A note of circumspection may perhaps be detected in the Sixth

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170 *Robles* (n 6) 28.

171 Ibid 28–9.

172 Ibid 29.

173 '[I]t seems most in keeping with both Supreme Court precedent and the purposes of the FSIA to grant subject matter jurisdiction under the tortious activity exception only to torts which were entirely committed within the United States': *O'Bryan* (n 6) 382. See also Cismas (n 4) 205.

174 *Amerada Hess* (n 146) 441. The 'injury' was the scuttling of an oil tanker subsequent to bombing by Argentinian military during the 1982 Malvinas conflict: at 432.

175 Cismas (n 4) 205. Consequential effects such as economic flow-on effects may suffice for the fulfilment of the commercial exception to immunity, even if insufficient for the non-commercial tort as such: ibid 441.

176 The entire tort requirement in non-commercial tort claims has no USSC endorsement: John J Martin, 'Hacks Dangerous to Human Life: Using JASTA to Overcome Foreign Sovereign Immunity in State-Sponsored Cyberattack Cases' (2021) 121(1) *Columbia Law Review* 119, 145–6 n 172.

Circuit's disposition on this point when noting decisions from other Circuits to the effect that just one 'entire' tort among the torts claimed by plaintiff suffices for the claim under the *FSIA* (US) to proceed.[177]

It was in the context of property loss (rather than personal injury), that the USSC in *Amerada Hess* was able to say that '[s]ection 1605(a)(5) is limited by its terms … to those cases in which damage to or loss of property occurs *in the United States*'.[178] Harm or damage occurring within the US is clearly non-negotiable as a requirement, but the concept of 'entire tort' seems less impregnable and is in any case a creature of common law, not of the *FSIA* (US) itself. As cautiously noted by Jennifer Elsea, writing on behalf of the Congressional Research Service, '*some* courts have limited the [non-commercial] tort exception to the FSIA to torts that occur entirely inside the United States, for example, traffic accidents'.[179]

Without doubt an 'entire tort' requirement is a challenge for complaints regarding conduct of the Holy See in Rome or another foreign State, and having substantive harmful effects in the US. The challenge is conceptual as much as factual. It is not clear 'where' a failure to warn took place, in the Vatican or in Portland, Oregon.[180] When an institution with global reach like the Roman Catholic Church exercises administrative powers, the question of the geographical localisation of conduct loses some of its validity. A relevant comparison, albeit to be drawn with caution, is with the components of the tortious conduct of terrorism that causes such conduct to be excluded from State immunity under *FSIA* (US).[181] The distributed nature of terrorism gives rise to jurisdictional complexities. After the enactment of the *Justice Against Sponsors of Terrorism Act* ('*JASTA*'), the component acts need not all have

177 *O'Bryan* (n 6) 382. Judge Mosman in the District Court level of *Doe* also seemed reluctant to conclude that the 'entire tort' proposition requires both 'acts and injury occurring in the United States': *Doe v Holy See*, 434 F Supp 2d 925, 952–3 [30]–[31] (2006) ('*Doe* D Or'); Cismas (n 4) 208. In *Doe* (n 6), it was observed that with the finding of inapplicability of the tortious act exemption to immunity, there was no occasion to consider 'whether the *entire* tort must occur in the United States': at 1085 (emphasis in original).

178 *Amerada Hess* (n 146) 439 (emphasis in original).

179 Elsea (n 149) 4 n 20 (emphasis added).

180 *Doe* (n 6) 1092–3; *Doe* D Or (n 177) 953 [30]; Cismas (n 4) 208.

181 Enacted under the *Justice Against Sponsors of Terrorism Act of 2016*, Pub L No 114-222, 130 Stat 852 (2016) ('*JASTA*'). *JASTA* s 3 amends *FSIA* (US) (n 66) by creating a new exception for States providing financial support to terrorists, even where they have not been formally designated as sponsors of terrorism by the State Department: Martin (n 176) 129–30; AJIL Contemporary Practice of the United States, 'US Supreme Court Rules That Victims of State-Sponsored Terrorism Can Sue Foreign States For Retroactive Punitive Damages Under the Foreign Sovereign Immunities Act' (2020) 114(4) *American Journal of International Law* 761, 764; El Sawah (n 38) 154–5; Rachael Hancock, '"Mob-Legislating": JASTA's Addition to the Terrorism Exception to Foreign State Immunity' (2018) 103(5) *Cornell Law Review* 1293, 1309–10.

taken place within the US.[182] This adjustment of course recognises the complexity and the distributed nature of the transnational funding and infrastructural features that may causally underlie the harming of US nationals at home.[183]

Writing when the *JASTA* legislation was still at Congress level, Elsea observed that in the absence of an entire tort requirement, the proposed legislation

> would not alter the [non-commercial] tort exception's requirement that the tort be committed within the United States, but would clarify that it is the place where the injury occurs that matters, regardless of where the underlying tortious act or omission was committed.[184]

It is possible that the more inclusive criterion deemed applicable in the case of terrorism may assist in the clarification of the general provision. Indeed, terrorism is not unique in the distributed nature of its infrastructure of harmfulness. This is an essential feature of cybercrime. It is also essential to worldwide administrative systems that are designed for benevolent or at least lawful purposes, yet on occasion give rise to harm**.**

Jurisprudence of the commercial act exception to State immunity under the *FSIA* (US) may also be of relevance here. It suffices for the purposes of this exception to immunity, that 'commercial activity of the foreign state … causes a direct effect in the United States'.[185] Despite this generosity of criteria, the role (if any) of geographical location ('in the United States') has been said to remain problematic even with the *Restatement (Fourth) of Foreign Relations Law of the United States*; according to William Dodge, 'questions of geographic scope will arise in future cases'.[186]

As shown by the variations in geographical criteria for the tort exception introduced in the terrorism context by *JASTA*, and by features of the commercial conduct exception, conceptual alternatives to an all or nothing approach to liability in non-commercial tort are available within the US jurisprudence. To that extent the 'entire tort' requirement in US law is less of a monolith than may have formerly been thought. Abuse by priests is not like a traffic accident, spatiotemporally

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182 Martin (n 176) 145–6. In *Heiser* (n 10) [87], a suggestion that the state of Iran was substantively 'present' in the USA as a consequence of its seat at the (New York located) UN, was given short shrift, yet serves as a reminder of the legal and conceptual complexities of location.

183 The locational complexities of cyberattack scenarios, for example, render an 'entire tort' approach inappropriate: Samantha Sergent, 'Extinguishing the Firewall: Addressing the Jurisdictional Challenges to Bringing Cyber Tort Suits against Foreign Sovereigns' (2019) 72(1) *Vanderbilt Law Review* 391, 407. In respect of analogies with terrorism, a State's capacity to prevent foreseeable harm beyond its borders may give rise to liability: Cismas (n 4) 234.

184 Elsea (n 149) 17.

185 *FSIA* (US) (n 66) § 1605(a)(2).

186 Dodge (n 138) 114 [19].

circumscribed in its key features, but distributed. As has been said in the context of cybercrime, 'a fixation with geography is not appropriate in relation to complex acts involving a multitude of actors'.[187] In what may be a straw in the wind, the District Court for the District of Columbia discussed the role of conduct outside the US as 'precipitating' harm to a US citizen within the US (in the form of cyber surveillance), although ultimately finding State immunity for Ethiopia.[188] It was observed that the 'entire tort' doctrine could not be understood as absolute since liability could not be evaded simply on the basis of any minimal overseas component to the relevant conduct.[189]

The interjurisdictional distribution of tortious conduct, including reflection on the US 'entire tort' approach, has been examined in two recent overseas decisions more significant for Australian law. In *Al-Masarir v Saudi Arabia*, the High Court of England and Wales confirmed that the personal injury exception to State immunity under *SIA* (UK) s 5 requires no more than that some relevant act or omission took place within the UK.[190] Cyber surveillance controlled from overseas reached this threshold, and the defendant's claim to immunity was declined.[191] An 'entire tort' interpretation of s 5 was rejected as inappropriately limiting grounds for the exception. Similarly, in *Shehabi v Bahrain*, the Kingdom of Bahrain installing 'spyware' on the computers of two political dissidents now resident in England was 'an act done in the UK for the purposes of [*SIA* (UK)] s 5'.[192] Moreover, under UK law psychiatric harm sufficed to satisfy the 'personal injury' requirement in the *SIA* (UK) s 5 exception to immunity.[193]

V Conclusions

Space precludes detailed examination of further grounds and case law relevant to potential liability of the Holy See in civil suit. The Italian courts have approached disputes involving the Holy See or Vatican as calling for interpretation of the Lateran agreements of 1929, under which an independent Vatican City was recognised by the Kingdom of Italy, and have narrowed the scope for immunity from Italian law. For example the operation of Radio Vaticana, found to have transmitted harmful

187 Hernández (n 20) 214.

188 *Kidane v Ethiopia*, 189 F Supp 3d 6, 28 (DDC, 2016).

189 Ibid 25. Judge Moss notes that in the modern world 'the Internet breaks down traditional concepts of physical presence': at 21.

190 *Al-Masarir v Saudi Arabia* [2023] 2 WLR 549, 557 [30] ('*Al-Masarir*').

191 Ibid 582–4 [144]–[151].

192 *Shehabi v The Kingdom of Bahrain* [2023] EWHC 89 (KB), [144]. Indeed, unless the personal injury exception were to be limited in application to 'the most straightforward of cases (eg, a road traffic accident involving a vehicle driven by an employee of a foreign embassy)', then it must be recognised that 'many, if not most, of the cases where a foreign state ought not to be immune will involve some tortious activity outside the UK': at [131].

193 Ibid [190]–[192].

electromagnetic emissions, was not such as to attract special dispensation.[194] Italian employment law applies to employees of the Pontifical Lateran University ('PLU'), an institution created by decree of the Holy See and housed, outside Vatican City, in an annex to the patriarchal Basilica of St John Lateran. No sovereign immunity arises on behalf of the Holy See in a PLU employment related dispute: the functions of PLU are not sovereign functions and PLU is not a 'central body' of the Church.[195] It might also be suggested that other exceptions to immunity under the *FSIA* might prove salient even if a relevant statehood connection be recognised. An argument might be made, along the lines indicated in the dissent of Judge Berzon in *Doe*,[196] that the administration of a religious organisation on foreign soil could not be categorised as a sovereign act *jure imperii* in which case the *FSIA* s 11 (commercial conduct) exception to immunity might apply. That conclusion would not depend on a relationship of employment being found between a Church administrative hierarchy in Rome and priests in Australia. It might be found on the basis of decisions made in the Vatican concerning the status in Australia of persons purporting to be priests. Further, a foreign State is not immune in relation to a proceeding concerning an interest of the State in immovable property in Australia[197] or an obligation that hence arises,[198] or in property that arose as a gift or by succession[199] or the administration of a trust or of an estate.[200] The administration of the Roman Catholic Church in the states and territories of Australia, including its administration directed from Rome, is intimately interconnected with such interests.

So far as *FSIA* s 13 (personal injury) is concerned, while sufficient nexus with Australia is required, doubt is cast on any reading-in of a strict requirement of physical presence in the forum on the part of a tortfeasor. It is submitted that if facts otherwise support a finding in negligence under Australian law, such that a duty has been breached by a named party causing the harm in Australia complained of, then the *FSIA* s 13 exception to immunity would on its face be satisfied.

In this respect a focus on the term 'territory' has the potential to be misleading. It would be unhelpful to refer to Australia's *FSIA* s 13 as a 'territorial tort'. 'Territory' is not determinative of jurisdiction at the fine-grained level of civil suit but is rather a 'molecular' matter going to a presumption of jurisdiction. Rather, the attention of the court should be primarily on the factual matrix. Matters of causation, which connote foreseeability and other parameters of liability in tort, will often be of the

194 Zambrana-Tévar, 'Reassessing' (n 19) 37–8.

195 Pierfrancesco Rossi, '*Migliorini v Pontifical Lateran University*, Preliminary Order on Jurisdiction, No 21541/2017, ILDC 2887 (IT 2017), 18th September 2017, Italy' in André Nollkaemper and August Reinisch (eds), *Oxford Reports on International Law* (Oxford University Press, 2019) [41], [42].

196 See above nn 159–62 and accompanying text.

197 *FSIA* (n 3) s 14(1)(a).

198 Ibid s 14(1)(b).

199 Ibid s 14(2).

200 Ibid s 14(3)(b).

essence. Causal connectivity would seem to instantiate the kind of additional step ('*un pas additionnel*') to which the ECtHR alluded in *JC*.[201] Factual details and timelines around administrative decision-making in the Vatican might be relevant, as noted above in the account of *Doe*.[202] It should also be observed that while the question has not been tested in Australia via application of *FSIA* s 13, there is no reason to think that a distinction of sovereign versus private acts on the part of a foreign State, would disturb the application of s 13 if other requirements were met.[203] In the English High Court, the plain terms of the corresponding provision in *SIA* (UK) were found to afford no space for the introduction of such a distinction.[204]

More generally, this examination of civil suit in Australian courts in circumstances when a respondent party might point to a statehood-based immunity has shown the significance of the presumption of local (forum) jurisdiction. The curial respect due to foreign sovereigns or presumptive foreign sovereigns is not unlimited and must defer to proper process.[205] As Richard Garnett has observed, consideration must be given to the possibility that 'it is now time for Australian courts to treat foreign states more akin to fellow players in the litigation process rather than a unique species worthy of exemption from ordinary adjudication'.[206] As expressed by O'Keefe, it is time for reflection on

> whether the territorial conditions found in the exceptions to state immunity generally recognized in national and international law are merely pragmatic, comity-inspired limitations on the forum state's exercise of jurisdiction over another state's non-sovereign acts or instead manifestations of a positive concern for the territorial sovereignty of the forum state that is perhaps as essential a justification for the restrictive doctrine of state immunity as the non-sovereign character of certain foreign-state activity and use of property.[207]

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201 See above n 128 and accompanying text.

202 Judicial interpretation of 'caused by an … omission … omitted to be done in Australia' might also be salient on the facts: *FSIA* (n 3) s 13.

203 '[W]hen the forum's courts provide the obvious and convenient local remedy … [t]his … applies to *all* torts properly within the jurisdiction irrespective of whether they originate in an act which might be described as "sovereign", "governmental" or *jure imperii*': ALRC 24 (n 2) 66 [113] (emphasis in original).

204 *Al-Masarir* (n 190) 575 [116].

205 'I do appreciate that [Venezuela] may be placed in a difficult, and perhaps even diplomatically embarrassing, situation by being required to respond to proceedings in this tribunal. … That alone is not a basis upon which this Tribunal can or should dismiss these proceedings': *Rosa* (n 72) [56].

206 Garnett (n 9) 705. 'Where cross-border litigation was rare and exceptional, little harm was done to private litigants by the preservation of unique protections for states — but these are harder to justify today … [D]octrines that continue to confer special treatment upon states must be closely scrutinised and clearly justified to be worthy of retention': at 705.

207 O'Keefe, 'Review' (n 25) 711.

It has been argued above that a well-founded claim in tort will ipso facto satisfy the requirements in the *FSIA* for exceptions to statehood-based immunity. The effect would be that claims in tort would be able to proceed by way of service such that the process of judicial determination would not be derailed as a consequence of putative foreign statehood status even where the validity of that status may be disputed. Developments in international law including overseas case law may be drawn upon by an Australian court to inform itself on these matters. The issue of foreign military conduct is best thought of as an extrinsic limit on the application of art 12 of the *VCDR*.[208] But while both the not in force *UNCSI* and the *ECSI* refer to the author of an injury being present in the forum, in neither case is the interpretation of that clause clarified by case law. Overseas statutes make no such demand and the territorial criteria for the *FSIA* (US) in this respect are still evolving with the inadequacies of an 'entire tort' reading becoming apparent. As Ioana Cismas observes in relation to *O'Bryan*, '[t]he strict territorial lens of the courts concerning jurisdiction therefore affected the heart of the case'.[209] The cross-border complexities of the infrastructure enabling harm in today's interconnected world are becoming patent in such criminal contexts as cyberattacks and terrorism, to which one could add trafficking of persons in its myriad forms. Some similar issues arise with any cross-border organisation that in any way facilitates harm or fails to guard sufficiently against foreseeable harm.

Hypothetical questions relating to the naming of natural alien persons in civil suit should be briefly entertained. The incumbent Pope might be found to be a head of State and hence in principle protected by *FSIA* s 36. Such protection along with its exceptions, as provided in the *VCDR*, would seem to relate to private conduct, with conduct in his public capacity being subject to other provisions of the *FSIA* (as per s 36(3)). If categorised as private conduct, administrative decisions taken by the Pope having effects in Australia would receive no protection from civil suit to the extent such conduct satisfies any of the exceptions to 'immunity from … civil and administrative jurisdiction' under *VCDR* art 31(1)(a)–(c). Thus the Pope would not have immunity from civil process with respect to 'any professional or commercial activity exercised in the receiving State outside his official functions'.[210]

208 Roger O'Keefe, 'The "General Understandings"' in Roger O'Keefe, Christian Tams and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press, 2013) 19, 22–3; Foakes and O'Keefe (n 58) 215.

209 Cismas (n 4) 206.

210 Administrative control over religious personnel and their status patently relates to a profession, defined as 'a vocation requiring knowledge of some department of learning or science, especially one of the three vocations of theology, law, and medicine': *Macquarie Dictionary* (online at 20 June 2023) 'profession' (def 1). '[E]xercised in the receiving state' would need interpretation along the lines indicated above in relation to *FSIA* s 13. 'Outside his official functions' would arguably be satisfied a priori since conduct within official functions is dealt with elsewhere in the *FSIA*. As observed above, the position of a former Pope under Australian law is not entirely clear and may depend on judicial recognition of obligations based directly on international law.

In relation to international norms, CIL relating to statehood-based protections is built primarily on the aggregated decisions of national courts. For better or worse, the courts of some nations, such as the courts of economically powerful English-speaking jurisdictions, exert more influence on this process than others. In straightforwardly applying Australian law, the Australian courts would be contributing in the most effective manner possible to the engendering of an international regime of accountability for any institutions or natural persons who seek to cloak under colour of sovereignty their territorially distributed conduct causing harm in Australia. Perhaps they have a duty so to do. In the words of the late James Crawford, the question of

> sovereign immunity … is *about* the operation of domestic courts in matters involving foreign States. In such cases, municipal courts … are the primary forum, and their practice must be regarded as primary rather than subsidiary.[211]

And, 'by and large, national courts have treated State immunity seriously and sometimes with distinction'.[212]

211 Crawford, 'A Foreign State Immunities Act' (n 1) 77 (emphasis in original).

212 Crawford, 'Foreword' (n 29) v.

*David Tan**

THE THOUGHT PROBLEM AND JUDICIAL REVIEW OF ADMINISTRATIVE ALGORITHMS

Abstract

The issue of whether algorithms can be characterised as thinking or having properties of thought has arisen in both judicial decisions like *Pintarich v Deputy Commissioner of Taxation* and scholarly discussion regarding issues like bias. This article refers to this issue as the 'thought problem' and introduces three principles for how to resolve it: (1) the manifestation principle; (2) the implementation principle; and (3) the equivalent treatment principle. The manifestation principle states that algorithmic outputs can be considered decisions where the manifestation of conduct of the agency supervising the algorithm would be understood to the outside world as a product of a thinking person. The implementation principle states that the humans in the executive who implemented the algorithm have responsibility for the algorithm. The equivalent treatment principle proposes to treat algorithms and humans who reason similarly as equivalent before the eyes of administrative law. The article does not try to conclusively resolve which principle is best, but rather suggests that the equivalent treatment principle is the most complete one for dealing with the thought problem.

I Introduction

A prominent feature of contemporary life is an increased use of automated processes in almost every aspect of our daily activities, including how we are governed. This has led to a worry among both administrative law academics and practitioners about a certain feature of automated decision-making, which this article calls the thought problem: that some aspects of judicial review — for example, determining whether a decision-maker is actually biased — assume

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that statutory powers will be exercised by thinking persons, but machine algorithms might not 'think'.[1]

Three principles will be considered for dealing with the thought problem in relation to administrative judicial review. The first is the manifestation principle, which asserts that if it appears that an agency has issued a decision, then the agency is taken as having made the decision.[2] The second is the implementation principle, where a human (in the government) implemented an automated system that is not compliant with some statute, responsibility should be attributed to the human. The third is the equivalent treatment principle, where a human (in the government) who implemented the machine algorithm should be treated as if that human personally followed all the rules of the machine algorithm. All three principles are differently motivated and so will be presented as independent alternatives, although the article does not exclude the possibility of a mixture of principles.

As a preliminary remark, it is important to separate the policy issue from the judicial review issue arising out of the use of machine algorithms. The policy issue is executive-facing: how should the government use machine algorithms?[3] The judicial review issue is judge-facing: if machine algorithms have been implemented, what is the role of the judge in reviewing them? This article only discusses the judicial review question and not the policy question. The judicial review issue can be further divided into a normative and a descriptive question. The normative question asks how judges should deal with machine algorithms supposing that new rules could be introduced into administrative law. The descriptive question queries how judges can review machine algorithms given the current rules of the legal

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1 See generally: *Pintarich v Deputy Commissioner of Taxation* (2018) 262 FCR 41 ('*Pintarich*'); Yee-Fui Ng and Maria O'Sullivan, 'Deliberation and Automation: When Is a Decision a "Decision"?' (2019) 26(1) *Australian Journal of Administrative Law* 21; Sarah Lim, 'Re-Thinking Bias in the Age of Automation' (2019) 26(1) *Australian Journal of Administrative Law* 35; Justice Melissa Perry, 'iDecide: Administrative Decision-Making in the Digital World' (2017) 91(1) *Australian Law Journal* 29, 31; Katie Miller, 'The Application of Administrative Law Principles to Technology-Assisted Decision-Making' (2016) 86(1) *AIAL Forum* 20, 22; Lawrence B Solum, 'Legal Personhood for Artificial Intelligences' (1992) 70(4) *North Carolina Law Review* 1231, 1248, 1267; Will Bateman 'Algorithmic Decision-Making and Legality: Public Law Dimensions' (2020) 94(7) *Australian Law Journal* 520, 523–5; Anna Huggins, 'Addressing Disconnection: Automated Decision-Making, Administrative Law and Regulatory Reform' (2021) 44(3) *University of New South Wales Law Journal* 1048, 1061–70.

2 *Pintarich* (n 1) 49–50 [52]–[55] (Kerr J).

3 See, eg: Tania Sourdin, *Judges, Technology and Artificial Intelligence: The Artificial Judge* (Edward Elgar Publishing, 2021) ch 3; Yee-Fui Ng et al, 'Revitalising Public Law in a Technological Era: Rights, Transparency and Administrative Justice' (2020) 43(3) *University of New South Wales Law Journal* 1041; Bateman (n 1) 525; Miller (n 1) 31–2. Many of the chapters in the excellent edited collection from Janina Boughey and Katie Miller are also targeted at the policy side: Janina Boughey and Katie Miller (eds), *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021).

system. This article discusses the three principles as normative strategies and will only briefly comment on their descriptive fit in closing.[4]

There are five Parts to this article: Part II provides an overview of algorithms; Part III introduces the thought problem; Part IV then introduces the manifestation, implementation, and equivalent treatment principles; and finally, Part V shows how the principles can be used to resolve the thought problem.

II What Are Algorithms?

An algorithm, informally described, is a well-defined procedure for solving some problem or producing some output.[5] To illustrate with a basic example, consider a sorting procedure for arranging playing cards.[6] Suppose we have five cards of the same suit in five positions A–E:

Position A	**Position B**	**Position C**	**Position D**	**Position E**
Card 1	Card 2	Card 3	Card 4	Card 5

The problem is how to arrange these cards such that the card in position A has the lowest value out of the five, and that the card in position B has the second lowest value and so on. A simple sorting algorithm[7] would have a machine start with the card at B, compare that card to the one in A, rearrange the cards if the card in B has a lower value than the card in A, and then subsequently move to position C. If the card in B has a higher value than the card in A, then the machine would move to position C directly. Once at position C, it will compare the card in C with the card in B and swap the order if the card in C has a lower value. Then the machine will do the same with the cards in positions B and A again. Having done this, it will then move to position D and carry out the same process with comparing the cards in positions A, B and C. Finally, it will move to position E and make the same comparisons with the cards in positions A–D. The algorithm above will always output cards of the same suit in the right order no matter what the input (ie initial cards) is. In essence, the point is that all algorithms — from simple ones to complex machine learning algorithms — follow step-by-step procedures in a mechanical manner.

An important aspect of this definition is that an algorithm is not identical to a computer or machine — an algorithm is a sequence of rules executable by an entity.[8]

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4 I do not necessarily invoke Ronald Dworkin's concept of 'fit': see generally Ronald Dworkin, *Law's Empire* (Hart Publishing, 1998) 230–1; but simply the idea of comparing the principles to their consistency or coherence with existing legal doctrine (where coherence is neutral between Dworkinian fit or any other descriptive view of law).

5 Thomas H Cormen et al, *Introduction to Algorithms* (MIT Press, 3rd ed, 2009) 5.

6 This example draws on the discussion in ibid 16–18.

7 Ibid 16–18.

8 See ibid 5.

Notice that the sorting algorithm above could have been executed by a human rather than a machine. In this article, the term *algorithm* will be used in this abstract sense of being a sequence of rules that could be executed by some entity whether it is a machine or, at least in theory, a human. The term *machine algorithm* will be used when specifically referring to an algorithm executed by a machine. This distinction becomes important for the equivalent treatment principle (although it is not pertinent for the other two principles discussed). Another implication of this distinction is that issues surrounding automated decision-making can also arise where humans blindly execute an algorithm set up by another without thinking. Hence, in my view, the difficulties associated with reviewing automated decision-making are really a special case of the more general problems associated with reviewing decentralised decision-making where one person sets the rules and another executes it.[9] The principles discussed in this article are thus potentially generalisable to other issues in administrative law that involve complex decentralisation (eg with outsourcing).

There are of course many types of machine algorithms ranging from the simple one mentioned above to sophisticated neural networks.[10] As a matter of taxonomical simplification, this article will only distinguish between predictable and unpredictable algorithms,[11] and further, will not consider so-called black box algorithms. The arguments in this article apply to all other types of algorithms aside from black boxes. These two terms will be defined below.

This article defines unpredictable algorithms as algorithms where one is uncertain how the algorithm will achieve the target output. For example, in 1997, a graduate-level artificial intelligence ('AI') class was tasked with a project: to program computers to play tic-tac-toe with each other 'on an infinitely large board'.[12] One entry used an evolutionary algorithm — an algorithm that tries out all possible

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9 For similar views, see the comments on outsourcing in Matthew Groves, 'Fairness in Automated Decision-Making' in Janina Boughey and Katie Miller (eds), *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021) 14, 23.

10 For a summary of machine algorithms and some of their legal implications, see generally: Marc Cheong and Kobi Leins, 'Who Oversees the Government's Automated Decision-Making? Modernising Regulation and Review of Australian Automated Administrative Decision-Making' in Janina Boughey and Katie Miller (eds), *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021) 174; Christopher Markou and Simon Deakin, '*Ex Machina Lex*: Exploring the Limits of Legal Computability' in Simon Deakin and Christopher Markou (eds), *Is Law Computable? Critical Perspectives on Law and Artificial Intelligence* (Hart Publishing, 2020) 31.

11 It should be noted that the terms 'predictable algorithm' and 'unpredictable algorithm' as defined in this article are not technical terms used by computer scientists, but rather terms introduced here to aid with legal theorising.

12 Joel Lehman et al, 'The Surprising Creativity of Digital Evolution: A Collection of Anecdotes from the Evolutionary Computation and Artificial Life Research Communities' (2020) 26(2) *Artificial Life* 274, 284.

strategies and continually uses the ones that resulted in wins.[13] The optimal strategy used by the machine algorithm was to immediately place their X or O a far enough distance away from the other program, such that the other program would crash when making its calculations.[14] Despite knowing the initial evolutionary algorithm, the programmers could not have predicted that the algorithm would have won by choosing the strategy of crashing the other program.

On the other hand, this article does not consider black box algorithms. Black boxes are described by computer scientist Cynthia Rudin and historian Joanna Radin as follows: '[i]n machine learning, these black box models are created directly from data by an algorithm, meaning that humans, *even those who design them*, cannot understand how variables are being combined to make predictions'.[15]As noted by Rudin and Radin, even from a designer's perspective, it is intrinsically difficult to explain the classifications or predictions of black boxes.[16] Black boxes tend to be found in machine learning algorithms — algorithms that aim to make classifications by extracting patterns from data.[17] The problem is that these machine learning models make classifications based on what fits existing data — given millions of datasets, the algorithm classifies an object as likely being a hot dog — rather than using a precise set of necessary and sufficient features for their classifications (eg the black box does not operate upon pre-defined features, such as whether a sausage is present, for when something is a hot dog or not a hot dog).[18]

An algorithm can be unpredictable even if it is not a black box. Take the example above of the evolutionary algorithm: repeat different strategies and continue using the most successful ones. That algorithm is transparent — we have just explained how it works and one can understand how we arrived at the final strategy — nonetheless, such an algorithm is not predictable since we do not know ahead of time which strategies are successful (if we did, we would not need to use such an algorithm). However, all black boxes are unpredictable. We have defined predictability as having a high confidence in the method by which the algorithm will achieve the target output (before the achievement of that result). However, if black boxes are opaque then they are not predictable by definition, since we do not know how the black box is making its classifications. Do note that predictability as defined here is not the same as the reliability of the black box, that is, how accurate the output of the black box is. If one

13 More generally, programmers of an evolutionary algorithm will determine a 'fitness function' that determines which machine algorithm gets selected: see ibid 277. In the tic-tac-toe case the fitness function would have been wins in the game.

14 Lehman et al (n 12) 284.

15 Cynthia Rudin and Joanna Radin, 'Why Are We Using Black Box Models in AI When We Don't Need To? A Lesson From an Explainable AI Competition' (2019) 1(2) *Harvard Data Science Review* (emphasis added).

16 Ibid. See also Cheong and Leins (n 10) 183–6.

17 Danilo Bzdok, Martin Krzywinski and Naomi Altman, 'Machine Learning: A Primer' (2017) 14(12) *Nature Methods* 1119, 1119. However, not all machine learning methods are black boxes. For example, classifying data using decision trees is a machine learning method, but it is typically not a black box since one can explain the decision trees.

18 See Cheong and Leins (n 10) 184–6.

had a black box that could classify things as a hot dog or as not a hot dog 95% of the time, this would be a reliable black box despite being unpredictable.

To give some concrete examples, consider the algorithm for recovering overpaid social security payments, which was commonly known as the 'Robodebt system'.[19] The Robodebt algorithm used an 'income averaging' system for identifying debt owed to the government.[20] This algorithm was not a black box model. One just needed to understand how to use the right averaging formula. The algorithm was also predictable, as the debt notice was issued via the identification of debt owed through an averaging function.[21] As for a black box algorithm, consider for instance a machine algorithm that tries to predict the type of crime being committed.[22] It is possible to create such a machine algorithm based solely on input details being the time and location of previous crimes — where no rules for specific weightings of features were implemented into the machine algorithm (eg the programmer did not input a rule that the probability of a violent crime was more likely at night).[23] Since it is unclear what features of the data played the most important roles for determining the probabilities of the type of crime, this would be a black box. Note that not all algorithms trying to make predictions are black boxes. Rudin and Radin discuss a machine learning model that ultimately generated the following rule for predicting whether someone would reoffend within two years — reoffending would occur if the person either: (1) has more than three prior crimes; or (2) 'is 18–20 years old and male'; or (3) 'is 21–23 years old and has two or three prior crimes'.[24] This machine algorithm is not a black box and is predictable given that we know how the rule operates and how it seems to have some rational link to rates of reoffending.

While black boxes themselves raise important conceptual problems for administrative lawyers, a separate article of its own would be required to satisfactorily address the issues raised.[25] There are several reasons why such issues can be left for a different time. First, even if black boxes could be made transparent, the thought problem still remains — judicial review principles still often assume thinking entities. Hence, the thought problem needs to be addressed regardless. Second,

19 For a general overview, see: Terry Carney, 'Robo-Debt Illegality: The Seven Veils of Failed Guarantees of the Rule of Law?' (2019) 44(1) *Alternative Law Journal* 4; Darren O'Donovan, 'Social Security Appeals and Access to Justice: Learning from the Robodebt Controversy' [2020] 158 *Precedent* 34.

20 *Prygodicz v Commonwealth [No 2]* (2021) 173 ALD 277, 287 [38] ('*Prygodicz*').

21 Ibid 287–8 [38]–[41].

22 Steven Walczak, 'Predicting Crime and Other Uses of Neural Networks in Police Decision Making' (2021) 12 *Frontiers in Psychology* 587943:1–11, 6.

23 Ibid 6. Although admittedly the reliability of this algorithm was better than randomly guessing: at 8.

24 Rudin and Radin (n 15).

25 See generally: Cheong and Leins (n 10); Ashley Deeks, 'The Judicial Demand for Explainable Artificial Intelligence' (2019) 119(7) *Columbia Law Review* 1829; Lim (n 1) 42; Bateman (n 1) 526–8; Janina Boughey, 'Outsourcing Automation: Locking the "Black Box" inside a Safe' in Janina Boughey and Katie Miller (eds), *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021) 136.

the issues with the thought problem arise even in non-black box cases. It would be expected that a significant amount of administrative automation does not need powerful machine learning techniques and thus could be done through non-black box algorithms (eg in *Pintarich v Deputy Commissioner of Taxation* ('*Pintarich*') as will be discussed below).[26] Thus, addressing the thought problem for such cases is still an important endeavour. Third, black box cases raise very different questions from the thought problem: what counts as a reasonable administrative decision, and are reliable black boxes that are nonetheless opaque considered as reasonable decisions or can such black boxes count as evidence for decisions? This investigation into reasons and justifications is a somewhat different issue than whether decision-makers need to form certain mental states when making decisions.[27]

III The Thought Problem

The crux of this problem has been well summarised by Will Bateman:

> ensuring that exercises of power are justified on social and democratic grounds is a prime objective of public law. … that objective … require[s] that statutory powers be exercised by agents who: have certain *cognitive capacities* …[28]

The thought problem occurs because certain aspects of judicial review seem to require thinking entities and yet it seems like machine algorithms do not have thoughts or mental states.[29]

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26 *Pintarich* (n 1).

27 See generally: Maya Krishnan, 'Against Interpretability: A Critical Examination of the Interpretability Problem in Machine Learning' (2020) 33(3) *Philosophy and Technology* 487; Alejandro Barredo Arrieta et al, 'Explainable Artificial Intelligence (XAI): Concepts, Taxonomies, Opportunities and Challenges toward Responsible AI' (2020) 58 (June) *Information Fusion* 82.

28 Bateman (n 1) 520 (emphasis in original) (citations omitted).

29 While there is some debate among philosophers of mind as to this proposition, this article assumes machine algorithms do not think (otherwise the thought problem trivially disappears). For views that algorithms might instantiate mental properties, consider the once-popular computational theory of mind that posits that mental states are computational states. To oversimplify, this theory posits that how the human mind operates is similar to how a machine executes an algorithm. On such a view it seems like even primitive machine algorithms instantiate primitive mental states. For an early framing of the computational theory of mind see Hilary Putnam, 'Psychological Predicates' in WH Capitan and DD Merrill (eds), *Art, Mind, and Religion: Proceedings of the 1965 Oberlin Colloquium in Philosophy* (University of Pittsburgh Press, 1967) 37. For a general overview see, Michael Rescorla, 'The Computational Theory of Mind' *Stanford Encyclopaedia of Philosophy* (Web Page, 24 July 2023) <https://plato.stanford.edu/entries/computational-mind/>.

It is also the case that, in administrative law, many do accept that machine algorithms do not think: see, eg: *Pintarich* (n 1) 67–8 [143]–[145] (Moshinsky and Derrington JJ); Lim (n 1) 38; Bateman (n 1) 526.

Two subcomponents of the thought problem have arisen in the literature and case law: (1) the attribution issue; and (2) the illegality issue. The attribution issue asks whether an action can be attributed to the executive when the action was a result of a machine algorithm. The illegality issue arises in relation to established grounds of administrative law which assume that certain decisions are illegal because of the presence or absence of certain mental states. The question is whether these grounds are still relevant in the context where a machine algorithm is used. These issues arise regardless of the level of discretion provided to the decision-maker; as will be seen below, existing administrative law doctrine assumes that decision-makers have cognitive capacities even in the most mundane of tasks. It is also noted that these problems are exacerbated where unpredictable algorithms are utilised.

A *Attribution*

The attribution issue was most prominently illustrated in *Pintarich*, which was an *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*AD(JR) Act*').[30] case. A formal letter had been sent to Pintarich stating that he owed a certain amount of money to the Australian Taxation Office.[31] The letter was produced when a delegate of the Deputy Commissioner inputted numbers into a computer program (the ensuing letter was not checked by the delegate).[32] Later, Pintarich was informed that the letter was sent incorrectly and that instead a different, larger amount of money was owed.[33] The Court ruled that the definition of a decision necessarily included 'the reaching of a conclusion as a result of a mental process'.[34] The court then found that since the human delegate had not turned their mind to the calculations in the letter no decision had been made,[35] a logical consequence of which is that the operation of the machine algorithm did not count as being a mental process leading to the letter being issued. Hence the initial letter was not a decision and thus had no legal effect. As Yee-Fui Ng and Maria O'Sullivan note, this decision potentially means that any automated finding (with no further human intervention) would not count as a decision.[36] This raises concerns whether such outputs can ever be reviewed under the *AD(JR) Act*, since it requires the existence of a decision or possible decision for the availability of review.[37]

Ng and O'Sullivan also note that the Administrative Appeals Tribunals in *Re Bowron and Secretary, Department of Social Security* ('*Re Bowron*')[38] and *Re Dimitrievski*

30 *Pintarich* (n 1) 61 [117].

31 See ibid 58 [101].

32 See ibid.

33 Ibid 60 [110].

34 Ibid 67–8 [143] (Moshinsky and Derrington JJ).

35 Ibid 68 [144]–[145].

36 Ng and O'Sullivan (n 1) 30.

37 See *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 3(1) (definition of 'decision to which this Act applies'), 5–7 ('*AD(JR) Act*').

38 (1990) 21 ALD 333, 336 ('*Re Bowron*'), cited in Ng and O'Sullivan (n 1) 30.

and Secretary, Department of Social Security ('*Re Dimistrievski*')[39] came to similar conclusions about decisions.[40] The issue from *Re Bowron* and *Re Dimitrievski* has now been resolved in the social security context since s 6A of the *Social Security (Administration) Act 1999* (Cth) ('*SSA Act*') deems outputs of computer programs as decisions of the Secretary.[41] However, Justice Melissa Perry has queried whether provisions like s 6A are conceptually coherent.[42] Her Honour notes that this is tantamount to 'delegating' authority to machine algorithms, but it is not quite clear whether delegation makes sense in the context of automation (eg who is the decision-maker and to whom has authority been delegated?).[43]

Even if we looked beyond the *AD(JR) Act*, similar issues might arise where applicants seek certiorari for quashing a 'decision' — which is an ancillary remedy for s 75(v) of the *Constitution*.[44] Certainly, *Pintarich* was an *AD(JR) Act* case, but it is not obvious that the characterisation of what a 'decision' is should be different across different types of review. It might be said that the appropriate target of certiorari is something like an 'exercise of power', but it is unclear how an exercise of power is substantively different from a decision. Even outside of the idea of decision-making, other jurisdictional issues arise. When considering the jurisdiction of the High Court under s 75(v), it is similarly unclear whether a non-thinking machine algorithm could be an 'officer of the Commonwealth'.[45] However, this problem is not as intractable since s 75(v) might be sidestepped by using s 75(iii), which does not have an 'officer of the Commonwealth' requirement and does not require any human involvement in the process.[46]

B *Illegality*

In certain cases, a decision may be taken to be illegal if certain mental states are absent or present in the decision-maker. Bateman notes that public law typically assumes that decision-makers reason in a linguistically sophisticated and environmentally sensitive way when exercising their powers under a statute.[47] As he further notes, no currently existing algorithm can reason in such a manner.[48] For example, take statutes which, whether explicitly or implicitly, place constraints on the

39 (1993) 31 ALD 140 ('*Re Dimistrievski*'), cited in Ng and O'Sullivan (n 1) 30.

40 Ng and O'Sullivan (n 1) 30.

41 See also ibid 30–1.

42 See Perry (n 1) 31.

43 Ibid.

44 See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 90–1 [14] (Gaudron and Gummow JJ).

45 Ng et al (n 3) 1058–9.

46 See also *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 345 [51].

47 Bateman (n 1) 523–4.

48 Ibid 525–6.

relevancy of considerations that decision-makers can take into account.[49] In *Tickner v Chapman,* the consideration of a factor was defined as an 'active intellectual' engagement.[50] This raises the question of how relevancy analysis can be applied if no entity has had an active intellectual engagement with the requirements of statute.

More generally, it can be said that in many cases statutes require that certain mental states must be present (eg relevant considerations) or excluded (eg irrelevant considerations) — thus giving rise to grounds of review that focus on mental states. The question is how to analyse such assumptions and grounds in the context of automation. To give a further example where grounds assume mental states, Sarah Lim has argued that actual bias as currently conceptualised has difficulties being applied to machine algorithms — a decision is unlawful if there is a 'pre-existing state of mind' which affects a proper consideration of the matter.[51] Nonetheless, since machine algorithms do not think or have states of minds, actual bias cannot, as it is currently understood, be attributed to machine algorithms — even if the machine algorithm seems to disproportionately produce certain outcomes over others in a way inconsistent with the purpose of a statute.[52]

It might be contended that, even if actual bias cannot be relied upon, apprehended bias might be used.[53] Since apprehended bias relies on what the 'lay observer' would perceive to be biased,[54] an output may be unlawful even if the source of the output has no mental state. This article does not try to contest this specific point since, as noted above, other grounds such as relevant and irrelevant considerations might also have mental element conditions. Nonetheless, an appeal to apprehended bias is not an easy solution. First, Lim notes that when deciding whether there is apprehended bias courts typically consider the 'prejudices, influences and frailties of human actors' and the extent to which humans can discard those prejudices (often allowing for some inevitable human frailty).[55] It is unclear how such considerations of ulterior interests and frailties could occur, or would be regarded as having occurred, with automated systems.[56] Second, if one tries to attribute these ulterior interests to

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49 See generally *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39–42 (Mason J).

50 (1995) 57 FCR 451, 462 (Black CJ). See also Bateman (n 1) 523.

51 Lim (n 1) 37, quoting *Jia v Minister for Immigration and Multicultural Affairs* (1998) 84 FCR 87, 104. While Lim does spend most of her article on apprehended bias, she does argue that the rule against bias (as encompassing both actual and apprehended bias) in general faces difficulties since our doctrine refers to 'states of mind': at 37.

52 For some of the issues related to attributing bias to machine algorithms, see generally Lim (n 1) 38.

53 See generally *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 344–5 [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ) ('*Ebner*').

54 Ibid.

55 Lim (n 1) 38 (emphasis omitted).

56 See also ibid 38–9.

programmers, Anna Huggins suggests that such an attribution may be difficult since they are far removed from the ultimate output of the machine algorithm.[57]

C *Predictability*

Both the attribution and illegality issues deepen when we consider unpredictable algorithms. If the output of a machine algorithm could be predicted by a human, who proceeded to use that algorithm, it could be plausibly argued that responsibility for the machine algorithm's outputs along with non-compliance should be attributed to them (as will be claimed under the implementation principle). For example, the 'biased' outcome of a machine algorithm could also be attributed to a human if that outcome was predictable when the human implemented the machine algorithm. However, where the machine algorithm is unpredictable, these claims seem difficult to defend since the human would not have known what the machine algorithm would do.

D *Existing Recommendations*

Given the increased use of machine algorithms, several organisations have made recommendations or practice guides for dealing with automated decision-making.[58] It should be noted that these proposals do not discuss the thought problem at length and, where it is canvassed, only the attribution issue is covered.

On the attribution issue, current recommendations are for legislative change to ensure the applicability of judicial review. The Law Council of Australia suggests that, in response to the judgment in *Pintarich*, there should be a 'comprehensive legislative response which ensures all [automated decision-making] is lawful and subject to judicial review'.[59] Other organisations suggest that this can be done through deeming provisions such as s 6A of the *SSA Act*. The Australian Human Rights Commission recommends that 'relevant legislation including s 25D of the *Acts Interpretation Act 1901* (Cth)' should be modified so that 'decisions' are interpreted as including 'decisions made using automation and other forms of artificial intelligence'.[60] Similarly, the Commonwealth Ombudsman suggests that the authority to make a decision using an automated process would 'only be beyond doubt' if specified by legislation.[61]

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57 See Huggins (n 1) 1067.

58 See, eg: Australian Human Rights Commission, *Human Rights and Technology* (Final Report, 2021) chs 4–5, 7–8; Commonwealth Ombudsman, *Automated Decision-Making: Better Practice Guide* (Practice Guide, 2019); Law Council of Australia, Submission to Digital Technology Taskforce, Department of the Prime Minister and Cabinet, *Positioning Australia as a Leader in Digital Economy Regulation: Automated Decision Making and AI Regulation* (3 June 2022).

59 Law Council of Australia (n 58) 20–2 [70]–[83].

60 Australian Human Rights Commission (n 58) 62, recommendation 6.

61 Commonwealth Ombudsman (n 58) 9.

This article does not take issue with these recommendations but, as noted by Justice Perry above, there is little justification for why such deeming provisions are conceptually coherent.[62] The Australian Human Rights Commission recommends, for non-governmental entities, that there be a presumption that private corporations or legal persons are responsible for all actions regardless of whether a machine algorithm was used:[63]

> As a general rule, whoever is responsible for making a decision is responsible also for any errors or other problems that arise in the decision-making process. Where this person has relied on a third party in the process of decision making, and the third party caused the error to take place, the first person remains liable for the error.[64]

It might be argued that the same presumption should be applied to government entities. In essence, this is the implementation approach that will be discussed below. As will be explained, however, this is not a magic bullet. The implementation principle deals with the attribution issue but has difficulties with the illegality issue.

Sceptics might say that this level of theorising is over-analysis and that deeming provisions are either legal fictions or are a pragmatic approach with little downside. It is not obvious that these sceptical responses resolve the thought problem. If the legal fiction route is taken, then more needs to be said about how and when the government can create legal fictions. Further, this article shows that there are other ways to justify such deeming provisions without just assuming a fiction. The pragmatic view on the other hand finds a natural home or ally in the equivalent treatment principle discussed below; nonetheless, the equivalent treatment principle does not mean everything goes, and clear boundaries for how and when the principle applies are discussed. Further, it is unclear if these statutory approaches would be able to deal with constitutional judicial review — assuming the proposed worries about the attribution issue above do apply to the s 75(v) case.[65] If that is the case, one cannot declare outputs of machine algorithms as decisions of the executive by fiat; some theoretical justification for that approach must be provided.

Given the lack of discussion of the illegality issue and the only brief survey of the attribution issue in these recommendations, there is still room for the development of theoretical principles for dealing with the judicial review aspects of automated decision-making.

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62 See above n 3 and accompanying text.

63 Australian Human Rights Commission (n 58) 78, recommendation 11.

64 Ibid 79.

65 I would like to thank an anonymous reviewer for highlighting this point.

IV Manifestation, Implementation and Equivalent Treatment

Three principles are introduced here as potential candidates for dealing with the thought problem: the manifestation, implementation, and equivalent treatment principles. It will be argued that the manifestation principle only deals with the attribution issue, and is a harder descriptive fit with existing administrative law. Hence, the focus of the article will primarily be on the implementation and equivalent treatment principles.

A *The Manifestation Principle*

In Kerr J's dissent in *Pintarich*, his Honour provided a method for dealing with the attribution issue:

> Its determination [of whether there is a decision] requires close assessment of whether the circumstances in which the conduct said to be, or not to be, a decision arose was within the normal practices of the agency and whether the *manifestation* of that conduct by an overt act would be understood by the world at large as being a decision.[66]

Call this the manifestation principle: if there is a manifestation of conduct that would appear to an ordinary person as a human decision, then it should be considered a decision. The idea is that it is undesirable if the executive could send official notices that appear to be finalised decisions but withdraw them any time after.

His Honour justified this principle as follows:

> It would undermine fundamental principles of administrative law if a decision-maker could renounce as 'not a decision' (and not even a purported decision) something he or she has manifested by an overt act taking the form of a decision simply by asserting there was a distinction between their mental processes and the expression of those mental processes in the overt act.[67]

Unfortunately, Kerr J did not spell out what fundamental principles would be undermined. Two normative suggestions are proposed here. One is a principle of legitimate expectations: a citizen having received a letter that appears to be a legal decision has formed a reasonable expectation that they can act on that legal decision. Another way to justify the manifestation principle is by rule of law-related reasons — eg stability and certainty. If citizens have to double-guess whether a decision was really made, this would reduce the predictability and stability of law.

Regardless of their attractiveness as normative justifications, it is doubtful that these justifications would fit with existing Australian law. First, the High Court has been fairly sceptical as to the doctrine of 'legitimate expectation'.[68] Second, as

66 *Pintarich* (n 1) 49 [52] (emphasis added).

67 Ibid 49 [55].

68 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 334–6 [28]–[30] (Kiefel, Bell and Keane JJ).

Lisa Burton Crawford notes, while the High Court talks about the rule of law as an assumption of the *Australian Constitution*, no theoretically substantive notion of the rule of law — independent of statutory and constitutional text — has yet been used to invalidate governmental action.[69] It might be highlighted that the ground of apprehended bias does take appearances seriously; however, it is justified because the integrity of tribunals and courts is so important that 'even the appearance' of bias would harm it.[70] It is unclear how this justification would translate to non-tribunal executive decision-making cases.

Finally, the manifestation principle only deals with the attribution issue. Given the points above, this article will not focus on the manifestation principle. This is not a criticism of Kerr J; judges are only allowed to address the issue before the court and so it would have been inappropriate for his Honour to have extended it further.

B *The Implementation Principle*

Another way to deal with machine algorithms is what I call the implementation principle: even if machine algorithms do not think, a human decided to implement the machine algorithm, and thus responsibility lies with the human. The relevant humans here would be members of government, not programmers, since it is the government which chooses to implement machine algorithms.

The implementation principle draws inspiration from the command responsibility test in international humanitarian law, the control test in Canadian public law, and vicarious liability in tort law. The command responsibility test states that a commander is responsible for the acts of their subordinates where the commander either 'knew' or 'should have known' that their subordinates were going to commit war crimes.[71] In terms of the Canadian control test, the Supreme Court in *McKinney v University of Guelph* stated that an entity was a government actor for the purposes of the *Canadian Charter of Rights and Freedoms*[72] where it could be shown that the government exercised substantial control over that entity.[73] Further, in tort law, an

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69 For the High Court's comments, see: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J); Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017) 80, 158.

70 *Ebner* (n 53) 345 [7].

71 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) art 28(a)(i). See also SC Res 827, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN Doc S/RES/1877 (7 July 2009) art 7(3).

72 *Canada Act 1982* (UK) c 11, sch B pt I.

73 [1990] 3 SCR 229. Janina Boughey and Greg Weeks have argued that the control test might be a useful way to think about the 'officer of the Commonwealth' requirement in s 75(v) of the *Australian Constitution*: Janina Boughey and Greg Weeks, '"Officers of the Commonwealth" in the Private Sector: Can the High Court Review Outsourced Exercises of Power?' (2013) 36(1) *University of New South Wales Law Journal* 316, 354–6.

employer can be held responsible for the tortious actions of an employee where the employer themselves might not personally be at fault.[74] In particular, responsibility can be attributed to the employer where the tortious action of the employee was 'committed in the course or scope of employment'.[75]

We can further divide the implementation principle into two subcategories. First, the control subprinciple states that where there was a predictable machine algorithm within the human's control, responsibility is attributable to the human. Second, when it comes to unpredictable algorithms or where the executive did not fully understand the machine algorithm, we invoke a recklessness subprinciple. Even if the human did not predict the effects of the machine algorithm but a potential error was reasonably foreseeable, responsibility is still attributable to the human. It is important to note that on both subprinciples the human is held as responsible.

1 *Tools versus Agents*

There is an important point from which the implementation principle departs from the areas of law discussed above (international humanitarian law, Canadian public law and tort law). In those existing areas of law there is some kind of supervisor–subordinate or principal–agent relationship between the person who committed the illegality and the person who is ultimately held liable. This is an agency model of implementation. One can immediately see the awkwardness of using the agency model — machine algorithms are not really subordinates or agents of the executive.

In contrast, the version of implementation proposed here is a tool model. Under the tool model there is no claim that the machine algorithm is an authorised actor making decisions for the principal. Instead, it establishes a much simpler link of responsibility that if a human either has control over the tools used, or is reckless in using them, while leading to an unlawful act, the human should still be responsible for the use of those tools.

The agency and tool models have different implications for whether a recklessness subprinciple is used (as proposed in Part IV(B)(3)) or whether a strict liability subprinciple should be used instead. On the agency model, the strict liability subprinciple is more appropriate. The debates over strict liability in tort law centre around justifying the liability of a person who is not at fault.[76] Vicarious liability is a form of strict liability since the employers are not personally at fault.[77] Thus, if the

74 *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, 148 [39] (French CJ, Kiefel, Bell, Keane and Nettle JJ) ('*Prince Alfred College*').

75 Ibid 148–9 [40].

76 See: Jules L Coleman, 'The Morality of Strict Tort Liability' (1976) 18(2) *William and Mary Law Review* 259, 269; Gregory C Keating, 'Strict Liability Wrongs' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press, 2014) 292, 297.

77 See: *Prince Alfred College* (n 74) 148 [39]; Joachim Dietrich and Iain Field, 'Statute and Theories of Vicarious Liability' (2019) 43(2) *Melbourne University Law Review* 515, 516.

implementation principle is seen analogously to vicarious liability, then it should be a strict liability subprinciple rather than a recklessness subprinciple.

On the tool model, however, recklessness seems like a more appropriate standard. Suppose someone turned on a defective oven and had no idea that this would lead to the house burning down. It is less obvious that this person should be held to a strict liability standard. Since under the tool model we view a machine algorithm more as the defective oven than as an employee, recklessness seems to be the more suitable subprinciple.

This is a cursory glance at somewhat complicated theories of responsibility, so I am not committed to the tool model being incompatible with strict liability, but this article will assume that recklessness is the appropriate standard as on the surface it seems more coherent with the tool model.

2 *The Control Subprinciple*

Suppose that a human has control over, and can predict, what a specific machine algorithm will do. In such circumstances, the machine algorithm would be no different from a normal tool. A machine algorithm that is subject to a high degree of control is no different from calculators or Microsoft Excel sheets which operate by algorithm. No one would think that any thorny conceptual issues arise if a tax officer inputs the wrong number into a calculator or uses the wrong function in Excel. While such an error might be considered factual in nature, it would still likely enliven grounds of review with factual aspects — for example, jurisdictional fact errors and unreasonableness.[78] Where machine algorithms are not black boxes, we can detect illegality in many cases (although not in all, as will be discussed in Part V(B)) — ie we can tell how the rules of the algorithm depart from the statutory requirement. Since the decision-makers using them had full knowledge of the output type, we can also attribute responsibility straightforwardly.

Note that the implementation principle can still operate even if the majority in *Pintarich* was correct that decisions require a mental process.[79] The implementation principle attributes the decision-making to humans since humans choose to use the machine algorithm. Justice Kerr and others have criticised the majority in *Pintarich* because the delegate of the Deputy Commissioner had input the numbers into the machine algorithm to initiate the process of sending a letter — and thus the delegate did make a decision.[80] This is in essence a version of implementation; by choosing to use the machine algorithm to calculate some output, the delegate implemented the machine algorithm and should be held responsible.

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78 On judicial review of factual errors, see generally Paul Daly, 'Facticity: Judicial Review of Factual Error in Comparative Perspective' in Peter Cane et al (eds), *The Oxford Handbook of Administrative Comparative Law* (Oxford University Press, 2020) 900, 906–7, 911–12.

79 See *Pintarich* (n 1) 67–8 [140]–[143] (Moshinsky and Derrington JJ).

80 See: ibid 49 [53] (Kerr J); Ng and O'Sullivan (n 1) 28.

The control subprinciple gives rise to two types of implementation. The first is system-implementation, where the human decides to set up an automated system and there is no further human intervention (everything else is automated). As an example of system-implementation, consider again the Robodebt system for collecting alleged overpaid social security payments.[81] In this system, the collection of data, requests for more information, and final notifications of debts were automated.[82] In *Prygodicz v Commonwealth [No 2]* ('*Prygodicz*'), there was no human intervention at the point when the final notice of debt was issued.[83] With system-implementation, it is the decision to implement the algorithmic system that is attributed to the government. Given that machine algorithms have no choice but to follow the process every single time, it is the implementer who is in control, even though they do not make every individual determination. Once the decision is attributed to the implementer at the systemic level, then whether something is unlawful is a matter of whether the algorithmic rule departs from the legal rule.

The second type of implementation is application-implementation, where the human uses the output of a machine algorithm in their decision, but it is still the human who makes the final decision. The implementation principle applies to application-implementation quite straightforwardly — the human chooses to use the output of the machine algorithm to assist in decision-making, just as how one might be assisted by a calculator. Hence, this is the human's decision and potential error.

3 *The Recklessness Subprinciple*

The recklessness subprinciple is required when dealing with unpredictable algorithms — if the decision-maker was not sure how the machine algorithm would operate, then they had little control over the machine algorithm. It is thus unclear if the output could be attributed back to those who implemented the machine algorithm. The recklessness subprinciple could also operate where there is a predictable machine algorithm, but the humans who implemented it did not take the time to understand how it would operate.

Under the recklessness subprinciple, addressing the use of unpredictable algorithms or addressing the ignorance of the executive regarding a predictable algorithm is unproblematic. This is because: (1) machine algorithms do not have minds of their own; (2) they were only set up because a human decided to do so; and (3) the human decided to ignore the fact that they were unpredictable. If a parent gave a child a box of matches, it is no excuse for the parent to say that they did not know what the child would have done. The same could be said about giving the ability to change

81 See above nn 19–21 and accompanying text.

82 See *Prygodicz* (n 20) 287–8 [38]–[41]. See also Order of Davies J in *Amato v Commonwealth* (Federal Court of Australia, VID611/2019, 27 November 2019) ('*Amato*').

83 *Prygodicz* (n 20) 287–8 [41]. The initial notice of a potential debt with a request for more information had no legal repercussions. It was the final debt notice under s 1229(1) of the *Social Security Act 1991* (Cth) ('*Social Security Act*') that had the legal effect: see *Prygodicz* (n 20) 287–8 [39]–[41].

or determine legal rights to an unpredictable algorithm. Hence, even in cases where members of the government did not know how a machine algorithm operates, or could not predict its outputs, the recklessness subprinciple still allows responsibility to be attributed where an error was reasonably foreseeable. Of course, not all cases are as simple as a child with a box of matches or cases of machine algorithms with clear risks of harm, and hence the proper application of the principle is to consider how likely harm is reasonably foreseeable in those harder cases.

4 *The Potential Problem with Illegality*

It is here foreshadowed, and discussed more carefully in Part V(B), that the implementation principle is limited in its ability to deal with the illegality issue. On traditional understandings of recklessness, one has to establish both that some event was reasonably foreseeable and that the event was unlawful or undesirable and yet the (liable) person went along with an action that causes the event anyway.[84] The implementation principle itself does not exactly give us a theory of when an act or omission should be a legal error; it only tells us that where such legal errors occur, they can be attributed to humans. This is the same even if one wanted to use a strict liability approach. The strict liability is on the human executive as a principal or supervisor, but it is the unlawful acts of the machine algorithm that are attributed to the human. Strict liability makes that attribution possible but does not provide resources for identifying what is unlawful with the machine algorithm's outputs.

C *The Equivalent Treatment Principle*

An early version of this principle was first stated by Lawrence B Solum in the context of a trustee relationship:

> The focus of the law's inquiry … [where an AI is a trustee] … ought to be on whether AIs can function as trustees. 'Can an AI do the job?' is the question the law should ask. 'Does the AI have an inner mental life?' is simply not a useful question in this context.[85]

The crucial slogan is as follows: what matters is what machines do, not whether they think.[86] Nonetheless, Solum does not develop this principle into a comprehensive theory applied to administrative law, which this article now attempts to do.

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84 Peter Cane, 'Mens Rea in Tort Law' (2000) 20(4) *Oxford Journal of Legal Studies* 533, 535.

85 Solum (n 1) 1281.

86 This is thus a weaker form of AM Turing's claim that the question of whether machines think is 'too meaningless to deserve discussion': AM Turing, 'Computing Machinery and Intelligence' (1950) 59(236) *Mind* 433, 442. Instead, for Turing, you test what the machine does by observing if it can pass the imitation game (ie it does well on a task): see at 422. This article does not claim that the question of whether machines think is meaningless, simply that it is not useful for administrative law. With some slight modifications, equivalent treatment can also be seen as a weaker

To show this more concretely, suppose that there is a commander that uses drones to attack a certain city. If you lived in that city, would the appropriate response be to stop and ponder if the drone has 'murderous intent'? Would it make a difference if it were human pilots who personally flew planes to attack the city? The answer proposed is 'no' for both questions and the right response is to run away. The underlying logic is that, for the purposes of survival, it does not matter whether a drone really thinks or has murderous intent. Similarly, the gist of the equivalent treatment principle is that it is arbitrary, when pursuing certain goals, to treat machine algorithms differently from a human who acts in a similar manner — both should be treated equivalently.

1 *Attributional and Illegality Treatment*

In administrative law, the principle proposed is that a court should treat the actual human who used a machine algorithm in the same way as a human who had personally executed the rules of the algorithm (ie as if the algorithm was the reasoning of that human). The analogy in the drone case is that it would be arbitrary, for the purposes of survival, to distinguish between a human piloting a plane with a strategy to kill people, from a drone using that same strategy to kill people.

Recall that an algorithm was defined above in Part II in an abstract sense as a sequence of rules (call this 'R'), which in theory can be executed by a human. A machine algorithm refers to the subset of cases where R is executed by a machine. Whether R is executed by a machine or a human, it functions as the reasons for why an output is arrived at. The core argument is that in both cases where a human or a machine executes R, these are functionally equivalent states of affairs for administrative law since in both cases the same output (usually a change, or a refusal to change, legal rights, duties and interests) is produced on the basis of R. As will be further elaborated in Part IV(C)(2), whether one's theory of administrative law focuses on statutory compliance or rights satisfaction, the distinction between a human or a machine executing R is arbitrary. Hence, we should treat the use of R where personally executed by the human in the same way as R being implemented by the human. Note that for extremely complex algorithms, this requires imagining that the person has superhuman abilities to personally execute the algorithm. Part IV(C)(3) explains why this is not a problem for the equivalent treatment principle.

There are two aspects as to how similar treatment can be conceptualised here that correspond to the attribution and illegality issues:

form of functionalism in the philosophy of mind. Functionalism posits that mental states are functional states — that is, the state of being in some complex causal relationship: see generally John Heil, *Philosophy of Mind: A Contemporary Introduction* (Routledge, 1998) 89–104. Equivalent treatment can be seen as a weaker claim: we are not sure if a machine being in the same functional state as a human means that they are both thinking. However, if they are both in that functional state then for the purposes of administrative law there is no difference. For a functionalist account that AI could be capable of thinking, see Christian List, 'Group Agency and Artificial Intelligence' (2021) 34(4) *Philosophy and Technology* 1213.

- attributional treatment: if the human personally executing R made a decision, the human using a machine to execute R should be treated as having made a decision; and
- illegality treatment: if it is unlawful for a human to personally execute R, it should be unlawful for a human to implement R using a machine.

As an illustration of both attributional and illegality treatments, let us return to the Robodebt system. First, the system utilised an 'income averaging' machine algorithm to identify overpayments.[87] Once a person was identified, the system automatically sent a letter to notify the person to update their information and warned that failure to do so might result in a debt.[88] Where no further or sufficient information was provided, the Robodebt system assumed that there had been an overpayment and sent a notice, on behalf of the Secretary, stating that the addressee owed a debt pursuant to the *Social Security Act 1991* (Cth) ('*Social Security Act*').[89] For many people, the averaging machine algorithm did not correctly identify debt under the *Social Security Act*.[90]

As noted in *Amato v Commonwealth* ('*Amato*') the use of the wrong machine algorithm meant the debt notice would be invalid as 'there was no material before the decision-maker capable of supporting the conclusion that a debt had arisen'.[91] Since there was no probative material that indicated a debt was due, the inference that a debt had arisen was irrational which meant that there was no foundation for a penalty and no basis for the notice sent to the alleged debtor.[92]

Neither *Amato* nor *Prygodicz* questioned whether the Robodebt debt notice was a 'decision', presumably because s 6A of the *SSA Act* deems outputs of computer programs to be decisions of the Secretary.[93] However, suppose that s 6A did not exist. There would be three legal issues here. The first two stem from the attribution issue: whether there was a decision and whether it was the decision of the Secretary. The third stems from the illegality issue: whether the use of the machine algorithm was lawful.

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87 *Prygodicz* (n 20) 287 [38].

88 Ibid 287 [39].

89 Ibid 287–8 [40]–[41]. The issuing of the notice was pursuant to s 1229(1) of the *Social Security Act* (n 83).

90 See *Prygodicz* (n 20) 281 [11]. A debt is owed for an overpayment as set out in s 1223 of the *Social Security Act* (n 83). See also *Prygodicz* (n 20) 281 [8].

91 *Amato* (n 82) 5–6 [8]–[10].

92 Ibid.

93 The debt notice was one of the 'decisions' being challenged in *Amato*: ibid 6 [10.2]. In an *AD(JR) Act* situation, s 1229 of the *Social Security Act* (n 83) is also the appropriate determination to review given that, once the notice is sent, then legal consequences follow: under s 1229(2), the 'debt is due' 28 days after the date of the notice, the debt is recoverable under s 1230C only once the 'debt is due'.

Applied to the Robodebt cases, attributional treatment tells us to imagine that the Secretary personally used the averaging function and personally sent out the letters. If that constituted a decision in this hypothetical case, then it would be arbitrary to treat the Robodebt situation differently. In such a case, the first two issues are answered affirmatively — we should treat it as if the Secretary had made the decision. This type of reasoning also provides the conceptual foundations for provisions like s 6A of the *SSA Act* which Justice Perry queried.[94] On the third issue as to unlawfulness, we compare a machine algorithm sending out debt notices based on a miscalculation and a hypothetical human who sent debt notices on that same miscalculation. Since such a debt notice sent by a human would lack evidence or be irrational, given *Amato*,[95] we should treat the machine notice the same — ie as being invalid as well (which is the illegality treatment).

Note that on both kinds of treatment it is assumed that there is a human actor and so there is some overlap with the implementation principle. Nevertheless, the equivalent treatment principle differs from the implementation principle in two important ways. First, the implementation principle requires a much broader notion of responsibility — it is premised in concepts of control or recklessness. By contrast, the principle of equivalent treatment mainly relies on very simple analogical[96] and (as will be elaborated in Part IV(C)(2)) practical reasoning. This is illustrated by the earlier drone thought experiment. The implementation theorist in that case has to attribute responsibility for drone attacks to the human commander's orders. However, from the equivalent treatment perspective, it is normatively much simpler: we compare whether being killed by a drone is analogous to being killed by a human pilot personally. Second, because the implementation principle is primarily a theory of responsibility rather than what counts as legal error, in some circumstances it will only be able to say that the outputs of machine algorithms are the responsibility of the executive — it cannot explain whether those outputs should be unlawful (this will be shown in Part V). The equivalent treatment principle, as noted above, does contain illegality treatment and so can deal with both the attribution and illegality issues.

It is also noted, speculatively, that the equivalent treatment principle acts as future-proofing for administrative law as well. This is supposing that we do ever reach a stage of development where we have artificial general intelligence ('AGI'), ie artificial intelligence systems able 'to solve a variety of complex problems in a variety of contexts, and to learn to solve new problems that they didnt [sic] know

94 See above nn 42–3 and accompanying text. Although it is noted that the need for a decision was not as crucial in *Amato* (n 82) as the *AD(JR) Act* was not used in that case and *Prygodicz* (n 20) was successfully run as an unjust enrichment case: at 279–80 [3].

95 See *Amato* (n 82) 6 [9]–[10].

96 See generally Cass R Sunstein, 'On Analogical Reasoning' (1993) 106(3) *Harvard Law Review* 741.

about at the time of their creation'.[97] The equivalent treatment principle potentially allows us to treat the AGI as if it were the decision-maker. At that level of sophistication, the AGI is functionally equivalent to a person. There is no need to consider complex questions of legal personality; if an AGI were to carry out illegal actions, those actions should be reviewed just as if that AGI were a human. For administrative law purposes it has done the same thing — changed legal rights and duties in a way inconsistent with law. Nonetheless, since we do not currently have AGIs, this potential situation is not covered in this article.

2 *Does Using a Machine Matter for Administrative Law Goals?*

The insight of the drone hypothetical is that, in certain circumstances, the appropriate kind of reasoning is not metaphysical — metaphysics being the reasoning about the nature of reality such as whether machines think — but rather practical reasoning, ie reasoning as to what actions should be taken in a given scenario.[98] A normative theory of judicial review more naturally falls under a theory of practical reasoning, since 'review' is a kind of institutional action. Seen in this light, as a species of practical or institutional reasoning, a normative theory of review concerns itself with administrative law goals.[99]

This does not mean that, outside of administrative law, it is never relevant to know whether it is a machine or human that is implementing an algorithm for practical reasoning. A crucial part of the drone example above was that the goal of survival made it arbitrary to distinguish between being attacked by a drone as opposed to a human pilot. Contextualised to a different goal, it might make sense to distinguish them (eg determining what mechanical parts need to be ordered for maintenance will depend on whether it is a plane or a drone being used). In order for equivalent treatment to be defended for administrative law, it must thus be shown that for administrative law goals it is arbitrary to distinguish between humans and machines executing certain algorithms. The argument here is that administrative law goals are very likely unaffected by the type of metaphysical questions surrounding machine algorithms — for example, the true nature of what 'thought' is, or what a 'decision' is.

Consider the contrast between rights and formalist approaches to judicial review.[100] While rights-based approaches focus on fundamental rights and liberties as the

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97 Ben Goertzel and Cassio Pennachin, 'Preface' in Ben Goertzel and Cassio Pennachin (eds), *Artificial General Intelligence* (Springer, 2007) v, vi.

98 See Robert Audi, 'A Theory of Practical Reasoning' (1982) 19(1) *American Philosophical Quarterly* 25, 25.

99 For an example of a system of administrative law goals, see Paul Daly 'Administrative Law: A Values-Based Approach' in John Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016) 23.

100 See generally Thomas Poole, 'Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 15.

normative goal of administrative law (leading to general principles legitimate expectations),[101] Thomas Poole suggests that formalist approaches focus on rules rather than general principles, statutory construction, and the sidelining of international law.[102] The Australian version of formalism displays a particular focus on statutory interpretation and ensuring statutory compliance.[103] This emphasis on statutory compliance is presumably justified on democratic grounds: it is the Parliament that creates statutory law, including law conferring power on the executive, and so any identification of executive powers in this context must derive from that statute. In contrast, the rights theorists accept that the statute is important, but it is not the entire picture. Neither rights nor formalist theories take a normative view of the administrative state which requires deep metaphysical commitments.

On the rights theory, as noted above, it is the rights and liberties of those affected by executive decision-making that are crucial. Whether machine algorithms think or have personhood is not pertinent; it is the effects of machine algorithms on the rights and liberties of the populace which are important. Thus, it should not matter whether it is a human or machine algorithm that is affecting those rights and liberties.

Formalist theories are slightly more complex because on such views, a major function of administrative law is to ensure compliance with statutory rules (putting aside non-statutory executive powers).[104] Hence, it appears that if statutory rules do make metaphysical distinctions, administrative law requires compliance with those distinctions. However, we can distinguish between three types of statutory rules that are relevant to judicial review:

- eligibility rules: explain when a review or remedy is available, even if a legal error really has been made. For example, but not limited to, s 3 of the *AD(JR) Act* limiting review to decisions under an enactment;
- substantive power rules: provide the scope of the power of the executive. For example, s 116 of the *Migration Act 1958* (Cth) ('*Migration Act*') outlining the Minister's personal power to cancel visas; and
- methodological rules: explain the method — of judges — by which we can determine if a substantive power rule has been complied with (ie whether there is a legal error). For example, but not limited to, ss 5, 6 and 7 of the *AD(JR) Act*.

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101 For one example, see David Dyzenhaus, Murray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1(1) *Oxford University Commonwealth Law Journal* 5, 5–7, 10.

102 Ibid 25.

103 See: Elizabeth Fisher, '"Jurisdictional" Facts and "Hot" Facts: Legal Formalism, Legal Pluralism, and the Nature of Australian Administrative Law' (2015) 38(3) *Melbourne University Law Review* 968, 972; Matthew Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32(2) *Melbourne University Law Review* 470, 500.

104 See Christopher Forsyth, 'Showing the Fly the Way Out of the Flybottle: The Value of Formalism and Conceptual Reasoning in Administrative Law' (2007) 66(2) *Cambridge Law Journal* 325, 328.

Using this tripartite distinction, statutory compliance for a formalist theorist requires compliance with substantive power rules. It does not mean that no one should ever change any rules about eligibility or methodology — if that were so, then statutes like the *AD(JR) Act* or the *Administrative Law Act 1978* (Vic) should never be amended.

Note that the rules above are statutory rules and not common law review rules since formalism as defined here is about statutory compliance. So, if the common law makes metaphysical distinctions, there are no logically tricky issues with a formalist saying they have to be changed (whereas they arise with statutory review rules since formalism is about statutory compliance). Additionally, it is accepted that there are of course borderline or hard cases between eligibility, substance, and methodology;[105] but such cases also abound in administrative law between other concepts like questions of fact and law, and between jurisdictional and non-jurisdictional error.[106] As noted by Murray Gleeson: '[t]wilight does not invalidate the distinction between night and day'.[107]

A formalist theory has nothing to say about the normative desirability of substantive power rules — eg whether or not Ministers should have wide-ranging personal visa cancellation powers is a matter for political philosophy or migration theory. Similarly, if substantive power rules do make distinctions about certain powers having to be exercised by humans, then a formalist will be committed to abiding by that. For example, suppose that s 116(1)(e) of the *Migration Act* was amended such that the Minister can only cancel a visa once they have consulted with a predictive machine algorithm for a risk assessment. A formalist will say that a judge reviewing s 116(1)(e) will require the Minister to have consulted such a machine algorithm as that is what the statute states. Whether or not that is the best way to cancel a visa is a policy question about immigration law — and not a judicial review question. In general, a formalist is unlikely to have anything to say about substantive power rules, as such rules generally fall under what the policy issues are surrounding executive use of machine algorithms.

On the other hand, a formalist theory would have a view on the desirability of eligibility and methodological rules — on the basis that they should maximise or satisfy compliance with substantive power rules. To give an example, suppose the *AD(JR) Act* was amended to add a ground of review such that any use of a machine algorithm would render a decision invalid unless explicitly allowed by the statute. It would be legitimate for a formalist to object to the addition of this ground as

105 For an example of some of the difficulties, see Solum's discussion of the difference between procedure and substance: Lawrence B Solum, 'Procedural Justice' (2004) 78(1) *Southern California Law Review* 181, 192–206.

106 Stephen Gageler, 'What is a Question of Law' (2014) 43(2) *Australian Tax Review* 68, 69.

107 Murray Gleeson, 'Judicial Legitimacy' (2000) 20(1) *Australian Bar Review* 4, 11.

a general rule — just as a formalist might object to liberal uses of the unreasonableness ground.[108] Methodologically, since formalists in Australia tend to think of judicial review in terms of statutory interpretation, it is really an examination of the statute on a case-by-case basis which would determine whether the statute would allow the use of a machine algorithm. For a formalist, a blanket ban would be inconsistent with proper rules of statutory construction.

Essentially, the normativity of eligibility and methodological rules for a formalist do not depend on deep metaphysical commitments about the nature of the mind. They depend on normative commitments to correct interpretive method and justiciability. Hence, illegality treatment is justified as long as the substantive power rule does not prescribe that the decision must be made only by certain entities. When it comes to eligibility, subject to complying with constitutional principles, a formalist would be concerned with satisfying or maximising statutory compliance while minimising legal error. As noted in Part III, the thought problem typically interferes with review, even where genuine legal errors may exist (having established that illegality treatment can assist to identify these errors). Consequently, for a formalist it should not matter if it is a machine or human executing an algorithm — if it leads to non-compliance, then review should be allowed. Accordingly, attributional treatment is also justified.

Of course, it is possible that legal systems will have a mix of formalist and rights-based elements.[109] However, even where combined there is unlikely to be a need for metaphysical theorising. The rights elements of the system will focus on promoting individual rights which will be balanced by formalism's emphasis on ensuring statutory compliance. The combination of the two does not seem to require an answer to questions in the philosophy of mind and consciousness.

3 *Can Humans Really Reason like Machines?*

Equivalent treatment asks us to imagine a human that can execute an algorithm R without machine assistance. It might be queried whether this is even possible. In cases of very complex algorithms, the answer is no. Hence, the comparisons in this article do sometimes require us to create a counterfactual with a superhuman who is immortal or can carry out the steps of an algorithm R in a much quicker time frame.

This does not undermine the comparisons made. The real point of the arguments in Part IV(C)(3) above is that it is irrelevant in administrative law whether a machine, individual human, group, alien or superhuman executes the algorithm.[110] The real inquiries are what rules R are being executed, regardless of the entity executing it, and what is R's function in administering the law. It is the function of the rules and

108 For an example of such an argument, see Timothy Endicott, 'Why Proportionality Is Not a General Ground of Judicial Review' (2020) 1(1) *Keele Law Review* 1, 4–6.

109 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 38 and 39 presents one such example.

110 See above n 86 regarding analogies with functionalism in philosophy of mind.

processes in place that is the primary object of inquiry. Nonetheless, for pragmatic reasons, this article uses the lawfulness of human action as the basis from which legality is assessed. Administrative courts and lawyers have long conceptualised what kinds of decision-making are lawful and unlawful. There is thus no need to reinvent administrative law.

More precisely, neither statutes nor the common law typically set out different administrative law rules based on the capabilities of those exercising statutory powers. For example, the availability of grounds of review depends on whether the decision-maker properly followed the statutory rules rather than the intelligence or physical strength of the decision-maker. Hence, a superhuman or genius employed by the Australian Public Service should follow the same administrative laws that a normal human would. Thus, comparing a machine algorithm with a superhuman does not distort the comparison since the superhuman plays the same role or function that a human would in decision-making (and in equivalent treatment it is their functions that are compared).

V Resolving the Thought Problem

The article now turns to consider how the implementation and equivalent treatment principles can apply to the thought problem. As noted above, the manifestation principle is limited in scope and so is not discussed further.

A *The Attribution Issue*

We can now illustrate how the attribution issue can be resolved by reference to *Pintarich*. Under the implementation principle, it is the human who decides to implement a machine algorithm. Thus, the thought problem creates no special difficulties with determining who makes a decision given that the humans implementing algorithms are capable of thought. With *Pintarich*, the letter was the result of a decision by the delegate to input the information into the computer.[111] Hence, the delegate made the decision.

Under the equivalent treatment principle, it can be argued that the automated letter in *Pintarich* was the decision of the human delegate using attributional treatment. Contrast what happened in *Pintarich* with a hypothetical where a human, without machine assistance but using the algorithmic rules of the machine algorithm, calculated the amount owed and sent the letter. Where a human had personally made calculations and sent the letter, there would be no doubt that a decision was made. As per attributional treatment, it would thus be arbitrary to treat it as if there were no decision in this case simply because the sending of the decision was automated.

111 See above nn 32, 79 and accompanying text. See also *Pintarich* (n 1) 50 [61]–[63].

B *The Illegality Issue: Mental Element Grounds*

As noted above, when examining the exercise of statutory power, it is often assumed that lawful exercises can only occur if certain mental elements are present or excluded. This can be seen in how certain grounds of review are only established once the presence or absence of such mental elements is shown. Four grounds will be considered here: (1) relevant and irrelevant considerations; (2) actual and apprehended bias; (3) improper purpose; and (4) bad faith. These grounds will be referred to as mental element grounds. The implementation and equivalent treatment principles discussed do not guarantee that all mental element grounds can be applied to machine algorithms, just as we should not be surprised that certain grounds do not operate in certain contexts. However, the approach below provides a principled way to distinguish which mental element grounds are suitable and which are not.

This article acknowledges that formalists would insist that the content of statutes determines legality.[112] Nonetheless, the claim that there is a category of mental element grounds would be consistent with such formalism; it is a claim that statutes can possess features that seemingly require certain mental states to be present or excluded when the power is lawfully exercised. For example, statutes may require certain considerations to be ignored or taken into account.[113] The question of whether mental element grounds are applicable to machine algorithms is thus a question of whether the typical features of statutes do necessarily require or exclude mental states when a power is exercised under those statutes. Where existing grounds can be applied to machine algorithms, this means certain types of exercises of power under certain types of statutes do not require the existence or exclusion of certain mental states to be lawful.

A general solution will be provided for the various mental state grounds mentioned above, but to illustrate let us first examine the specific case of grounds relating to irrelevant and relevant considerations. As indicated by Bateman, in *Tickner v Chapman*, 'consideration' is defined as an 'active intellectual process' which is a mental state (call this 'M').[114] Suppose that a law requires a work visa to be granted as long as the person has provided a skills assessment and there is a requirement that the criminality of the applicant must not be taken into account. Further suppose that the government intends to implement the following rule (call this 'R*') — if the candidate has provided a skills assessment and has no criminal record:

- then grant the work visa; or else
- deny the work visa.

R* above can be executed either by a human or machine. Notice that in R* there is an irrelevant step which is the condition that the applicant has no criminal record (the term 'step' is used to be neutral between being part of a mental process or a

112 See above n 104.

113 For an example of irrelevant considerations that are explicit, see the *Freedom of Information Act* (1982) (Cth) s 11B(4),

114 Bateman (n 1) 523; *Tickner v Chapman* (n 50) 462.

machine algorithm). The point of this hypothetical is that whether a machine or human executes R*, it will result in the same outcome (call this 'O') — work visas are denied because of an irrelevant step.

To resolve this issue on the implementation principle, consider the distinction between mental processes M and outcomes O. Where the executive is aware that the machine algorithm will result in visas being denied because of the irrelevant step, (outcome *O*), the implementation principle attributes that step to the executive since they implemented the machine algorithm with full knowledge of that outcome (the mental state of consideration *M* is attributed to the human). This constitutes an active intellectual process. If the executive is ignorant of the irrelevant step, however, the implementation principle stays silent. Recklessness does not quite help. As foreshadowed in Part IV, the foreseeable outcome that occurred must also be unlawful or undesirable in order for recklessness to apply. The implementation principle can tell us that the executive is responsible for a foreseeable outcome (ie that an irrelevant step is involved), but it does not tell us whether the presence or absence of an irrelevant step results in an unlawful outcome. Hence, the implementation principle does not provide resources to deal with cases of ignorance.

On the equivalent treatment principle, the question is whether the outcome of denying a visa due to an irrelevant step with no mental process is functionally different from the same outcome which is a result of an active mental process. Illegality treatment provides an answer here: imagine a human executing R* personally and whether this would be an unlawful decision. It is clear that a human who followed R* above would be making an irrelevant consideration error. Hence, it would be arbitrary, for the reasons discussed in Part IV(C), to treat the human who uses a machine that executes algorithm R* with the irrelevant step differently from a human who personally executes R* — both should be unlawful.

The above solutions can be generalised. For the implementation principle and grounds which require a mental element in order to lawfully result in some outcome, consider the machine algorithm equivalent that does not have M but results in the exact same O. If there is awareness by the human implementers that the machine algorithm will lead to O, then M can be attributed to the human implementer. On the equivalent treatment principle, we use illegality treatment; consider the algorithm R that is used by a machine as opposed to a human. If in the human case it would be illegal to use R to achieve O, then there are no normative reasons why we should not take it that it is illegal for a machine to use R to achieve O.

Let us consider how this can be utilised for actual and apprehended bias. With actual bias on the implementation principle, we might distinguish the actual mental state of being impartial M with the outcome of some kind of pattern of inequality O (it has been well-documented that machine algorithms can produce unequal outcomes).[115]

115 See, eg: Jon Kleinberg et al 'Discrimination in the Age of Algorithms' (2018) 10(1) *Journal of Legal Analysis* 113; Sourdin (n 3) 72–8. Although Kleinberg et al (n 115) also make the point that using machine algorithms can help to minimise discrimination since their rules are always discoverable: at 116.

On the implementation principle, where there is awareness that the machine algorithm would lead to this inequality O and the executive implemented the machine algorithm anyway, then arguably the executive was actually biased. With equivalent treatment, suppose some algorithm R leads to a pattern of inequality O. The question is whether this R, if personally executed by a human, would count as the state of bias. There can be cases where the answer would be in the affirmative. For example, consider an algorithm that never granted licences to people of a certain race (when race has nothing to do with the licence). Where the human executing this algorithm was aware that following the algorithm would lead to this outcome, functionally this is equivalent to a human directly trying to induce such discriminatory outcomes themselves. It is even arguable that if the human was not aware of the unequal O that this would still count as actual bias. As long as the human used the defective R which does not grant licences to certain racial ethnicities, this is functionally equivalent to a human who sat down and was actively discriminatory against those people (think of R as functionally playing the role of the mental state of the human). Hence, the decision of the human personally executing the algorithm would constitute actual bias and as such the human using a machine algorithm R should be similarly unlawful.

In Australia, apprehended bias occurs where it appears as if 'the decision-maker *might not* have brought an impartial mind to making the decision'.[116] It is unclear if this means the decision-maker must be capable of biased thought (ie in principle they are a thinking agent) even if they are not actually biased. If the law does not require an agent with a mind, then it turns out the apprehended bias rule is not a ground requiring a mental state to be present. If the law does require that the agent be capable of being biased, then the solution above can be applied. With the implementation principle, if the executive is aware that the machine algorithm's use would appear like it was the action of a biased agent and implemented it anyway, then the apprehended bias should be attributed to the executive. For equivalent treatment, we suppose a human used the same algorithm as the machine and consider whether it would breach apprehended bias. In cases where a human personally using the exact same algorithm would appear to be biased, then we should treat it as if the human using the machine algorithm is also acting unlawfully.

Lastly, consider grounds like improper purpose and bad faith. The implementation principle does allow for the grounds of improper purpose and bad faith where the executive is aware of how the machine algorithm operates. If the executive implemented the system for an improper purpose, there was an improper purpose for the output of that system. With bad faith, suppose a machine algorithm with bad programming and arbitrary outcomes was used and the executive was aware of these faults in setting up this machine algorithm. It can be argued that the executive here acted in bad faith. Equivalent treatment allows for a similar strategy. If the human intentionally uses a machine algorithm for an improper purpose or uses it maliciously, that is functionally equivalent to a human who personally implemented

116 *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 459 [68] (McHugh J) (emphasis added). See also Lim (n 1) 37–8.

the algorithm for an improper purpose or in bad faith. Hence, it is unlawful in both cases. It appears, however, that in cases of both implementation and equivalent treatment, that if the human is unaware of the outcomes of the machine algorithm (including with unpredictable algorithms), then it is unlikely improper purpose or bad faith can be established.

VI Concluding Remarks: Fruitfulness and Descriptive Fit

In this article, three ways of thinking about the judicial review of administrative machine algorithms have been provided: (1) the manifestation principle; (2) the implementation principle; and (3) the equivalent treatment principle. The manifestation principle is limited only to resolving the attribution issue. The implementation principle is perhaps the simplest and most intuitive to apply but has limitations when it comes to the illegality issue — it does not attribute responsibility in cases of ignorance (see above Part V(B)). The equivalent treatment principle is somewhat more complicated but has several benefits. First, it does not suffer from the aforementioned incompleteness of the manifestation and implementation principles. Second, the equivalent treatment principle does not require a thick theory of legal or moral responsibility,[117] unlike the implementation principle. While this article does not take a hard line on the appropriate principle, it is proposed that these benefits put the equivalent treatment principle in front.

This article has introduced these principles as normative ones and has largely left the question of their descriptive fit with existing laws untouched. At the very least, even if they do not quite fit current administrative law doctrines, they present a principled method for modifying the law of judicial review. Nonetheless it is arguable that some aspects of the implementation and equivalent treatment principles can be applied even now (as noted in Part IV(A), it is harder to argue this for the manifestation principle). At common law, differentiation is a fairly orthodox method: rules are not necessarily applied the same way with new factual situations. The use of machine algorithms presents a very different factual situation from the old administrative system and so differentiation might possibly permit some of the principles here. The implementation principle attributes responsibility to humans and so does not change concepts radically (except perhaps with the introduction of the recklessness subprinciple). Similarly, the equivalent treatment principle introduces a focus on administrative functions, but the point is to apply human doctrines to functionally equivalent uses of machine algorithms. Hence, it does not require drastic changes either since the frame of reference is always existing human doctrines. With the *AD(JR) Act* and constitutional review, both implementation and manifestation principles attribute either responsibility of the machine algorithm or its rules to humans and so some of the review obstacles might be surmountable as a human is still involved in the decision-making process. Lastly, as noted above in Part III(A),

117 We might say that one theory is thicker than another where the theory has more propositions to justify or explain the kind of moral or legal phenomena it is concerned with.

s 75(v) of the *Australian Constitution* requires an 'officer of the Commonwealth' and while this may prevent constitutional review, s 75(iii) is a potential alternative as it does not require humans in the process.

This is a rather limited comment on the descriptive fit of the implementation and equivalent treatment principles, but it gives some reason to think they are not completely foreign to Australian administrative law.

*Seung Chan Rhee**

THE WANDERING ARCH: A TOPOGRAPHICAL HISTORY OF THE HIGH COURT OF AUSTRALIA ON CIRCUIT

Abstract

This article examines the High Court of Australia's role as a travelling court, from Federation to its permanent installation in Canberra. Throughout its history, the Court faced major challenges to its circuit functions but ultimately retained its capacity to sit in various locations. The factors which militated against the continuance of circuits — (1) the cost to the Commonwealth; (2) accountability to the executive; (3) administrative centralisation; and (4) lessened prestige — were met with equally compelling aspects in favour of itinerancy: (1) the cost to litigants; (2) judicial independence; (3) the federal compact; and (4) institutional proximity. The ascendancy of the latter ensured the survival of the practice to the present day. Despite the advancement of communications and transportation, and with it, the falling away of more pragmatic justifications for the Court's circuits, they remain a unique feature of the Australian High Court which distinguishes it from its apex counterparts in other federal jurisdictions.

I Introduction

The High Court of Australia does not sit in one location but travels the country in the observance of a long tradition dating from the Court's first sitting in 1903. This represents something of an oddity amongst apex courts in federal jurisdictions. The United States of America ('US') abolished the 'circuit riding' of Supreme Court justices in 1911.[1] In Canada, the Supreme Court never sat on circuit, residing instead on Parliament Hill from 1876–1946 whereafter it moved into its

* BCom (Finance)/LLB (Hons I) (UNSW). The author would like to thank Keith Mason and Rosalind Dixon for their generous assistance with the initial drafts of this article, as well as the anonymous reviewers who kindly provided feedback. Any errors or omissions are the author's alone.

1 Joshua Glick, 'On the Road: The Supreme Court and the History of Circuit Riding' (2003) 24(4) *Cardozo Law Review* 1753, 1829, citing *Judicial Code of 1911*, Pub L No 61–475, ch 231, 36 Stat 1087 (1911).

present-day premises.[2] While the frequency of circuits in Australia has reduced since 1903, it remains a consistent, although not uninterrupted, practice.

Throughout its existence, the Court underwent numerous incidences of conflict militating against its mobility. These were the products of historical circumstances in three distinct institutional eras, lending itself to reasonably easy periodisation. The first, from 1903–28, spans the initial itinerancy of the Griffith Court amidst clashes between the competing visions of early federalists. The second, from 1929–50, covers the impact of the twin crises of the Great Depression and the Second World War on the Court's circuit functions. The third, from 1951–80, examines a mature institution coming to grips with post-war centralisation and expansion of the federal judicature. This article will explore each of these eras in Parts II(B), (C) and (D) below. The article at Parts II(A) and (E) will also provide background on the periods before 1903 and after 1980 to help contextualise the distant beginning and ultimate present of circuit sittings.[3]

Following this historical overview, the article analyses the rationales which have underpinned the Court's movements. These include financial concerns for litigants, judicial independence, the relations between the Court and the states and territories within the federal compact, and institutional proximity in both practical and symbolic terms. It will be shown that the survival of circuit sittings in each institutional era came down to the ascendancy of the foregoing factors against the manifold criticisms from the 'other side of the coin': (1) costs to the Commonwealth; (2) accountability to the executive; (3) administrative centralisation; and (4) institutional prestige. This has been borne out in the Court's successful resistance to recurrent rationalising pressures leading to the residual circuit practice of today. Ultimately, it is argued that the travelling Court was, and to a significant extent still is, necessary for the administration of justice throughout the Commonwealth.

The article aims to contribute to the literature in two ways. First, by putting together an interstitial history of an oft-overlooked feature of the Court's functioning, on which scholarship has been limited.[4] Secondly, by clarifying the merits of such circuit sittings in the Australian context — its modern persistence therein being

2 EK Williams, 'The Supreme Court of Canada Moves into Its "New" Building' (1946) 32(2) *American Bar Association Journal* 68, 70.

3 As a note on terminology, whilst individual members of the bench travelled to attend first instance and interlocutory hearings, references in this article to circuit 'sittings' are to Full Court hearings proclaimed in advance in Commonwealth notices, unless otherwise specified.

4 See, eg: JM Bennett, *Keystone of the Federal Arch: A Historical Memoir of the High Court of Australia to 1980* (Australian Government Publishing Service, 1980) 99–105; Crispin Hull, *The High Court of Australia: Celebrating the Centenary 1903–2003* (Lawbook, 2003) 35–9; Gim Del Villar and Troy Simpson, 'Circuit System' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 96; Rob McQueen, 'The High Court of Australia: Institution or Organisation?' (1987) 59(1) *Australian Quarterly* 43, 45–7.

of relevance to other Commonwealth jurisdictions considering implementation (or, it might be said, the reinstitution[5]) of circuits, on which there has been growing commentary.[6] Currently, the Court is undergoing further transformation due to the COVID-19 pandemic, increasing its reliance on video-link and alternative sitting practices.[7] With the resumption of in-person Canberra hearings, whether this modus vivendi will persist remains to be seen. No doubt this means there is scope for further research on the changing procedural practices of the Court. There are also discrete issues raised in this historical survey, such as the relationship of judicial independence with mobility, itinerant justice, and a politico-economic analysis of circuits, presenting additional avenues for research in this area. In any event, as the Court's current practices are in such a protean state, there is clear value in examining the origins, merits and challenges of the Court's circuits, which are now more than a century old.

II Topographical History of the High Court of Australia

A *Building the Arch: Origins, 1890–1903*

Alfred Deakin spoke prophetically when describing the High Court as the 'keystone of the federal arch' in 1902.[8] In his now well-known second reading of the Judiciary Bill 1902 (Cth) in the House of Representatives, Deakin forcefully campaigned for an independently Australian constitutional tribunal of the highest order.[9] This occasion was also where Deakin unfurled his grand vision for an itinerant court, bestriding the length and breadth of the nascent Commonwealth:

> When I speak of a High Court I mean a High Court for the people of Australia. I do not mean a High Court that is to sit at the federal capital alone, or at a State capital never to be seen outside it, and only known to the people of the States by report and hearsay. I mean a court whose Judges will undertake circuits, and be able to visit every State in the Union. If we have a federal court at all it must

5 See *Alexander E Hull & Co v M'Kenna* [1926] 1 IR 402, 403–4 (Viscount Haldane), in which his Lordship proclaimed that the Judicial Committee was not fixed in one location, but everywhere throughout the British Empire. See also Philip Joseph, 'Towards Abolition of Privy Council Appeals: The Judicial Committee and the Bill of Rights' (1985) 2(3) *Canterbury Law Review* 273, 282 n 49.

6 See below nn 310–17 and accompanying text.

7 See below Part IV.

8 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10967 (Alfred Deakin, Attorney-General).

9 Ibid 10989; Sir Anthony Mason, 'The High Court of Australia: A Personal Impression of Its First 100 Years' (2003) 27(3) *Melbourne University Law Review* 864, 865 ('The High Court of Australia'); Sir Gerard Brennan, 'Courts for the People — Not People's Courts' (1995) 2(1) *Deakin Law Review* 1, 1–3. See generally Alfred Deakin, 'Cricket … If There Were Three Elevens in the Field' in Sally Warhaft (ed), *Well May We Say...: The Speeches That Made Australia* (Text Publishing, 2014) 146.

> be a court sitting at State capitals, and, if possible, in other parts of the States, in order that the whole continent may be brought within touch.[10]

The notion of a travelling supreme court of appeal in Australia was by no means new. In 1856, South Australian Governor Richard MacDonnell had endorsed a scheme for an appellate panel of Supreme Court justices from the various Australian colonies, to visit each colony at least twice a year.[11] While this never materialised, the ghost of a superior 'scratch court' of Supreme Court Chief Justices would consistently rear its head over the several decades leading up to the *Judiciary Act 1903* (Cth).[12] In 1881, an Inter-Colonial Conference had recommended that the Imperial Government pass legislation to create an Australasian Court of Appeal, annexing a model Bill.[13] Clause 9 of the Bill stated that 'provision shall be made as far as practicable for hearing appeals at least once a year in the colony in which the judgment appealed from shall have been given'.[14] While this proposal withered, the High Court would end up eventually adopting this approach.

Surprisingly, the Australian federal conventions ('Convention Debates') shed little light on the itinerant Court's origins. The limited opinion expressed on the matter was sharply divided. Richard O'Connor noted the necessity of not legislatively fixing 'the place for circuit', to avoid the inconvenience of altering the locations depending on where the centre of government landed.[15] Joseph Carruthers assumed outright that the 'Court of Appeal would not be one that would go wandering about taking justice to the very doors of people' and that 'it … w[ould] sit in the capital city of the Federation'.[16] Josiah Symon, who would reiterate these reservations as Attorney-General, expressed doubt as to the efficacy of circuits.[17] Deakin was supportive of a system which would ensure the reach of federal judicial power across the entire

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10 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10984 (Alfred Deakin, Attorney-General).

11 Bennett (n 4) 4.

12 See: Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10986 (Alfred Deakin, Attorney-General); Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1903, 618 (Patrick Glynn); *Official Report of the National Australasian Convention Debates*, Adelaide, 31 March 1897, 368–9 (Edmund Barton).

13 JM Bennett and Alex C Castles (eds), *A Source Book of Australian Legal History: Source Materials from the Eighteenth to the Twentieth Centuries* (Law Book, 1979) 236. See Australasian Court of Appeal Bill 1881 (Imp), reproduced at 236–41.

14 Australasian Court of Appeal Bill 1881 (Imp) cl 9, quoted in Bennett and Castles (eds) (n 13) 238.

15 *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 990 (Richard O'Connor).

16 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 325 (Joseph Carruthers).

17 Ibid 298 (Josiah Symon).

Commonwealth, but did not point to circuits as a solution at this juncture.[18] Many of these views were ventilated in the course of discussing appeals to the Judicial Committee of the Privy Council ('Privy Council'), often criticised by the federalists for its geographical remoteness.[19] What is notable is that the founders in all likelihood considered that the Court would be 'the only general federal court',[20] but left the issue in the *Australian Constitution* to Parliament, enabling the emergence of the current Federal Court, and its consequent effects on the High Court's jurisdiction.[21]

Following Federation, both Deakin and Sir Samuel Griffith were in agreement on the necessity of an itinerant court.[22] That Griffith endorsed Deakin's view is unsurprising considering his diligent circuit attendances as Chief Justice of Queensland, an experience which impressed upon him the importance of bringing law to the frontier.[23] Subsequently, Griffith, as Chief Justice of Australia, would lead the charge on making the vision of Commonwealth circuits a reality.[24] After the 1902 second reading speech, itinerancy continued to be emphasised in the 1903 Judiciary Bill debates,[25] alongside those of the High Court Procedure Bill 1903 (Cth).[26] Deakin noted the necessity of using state court facilities until a proper seat of government in a federal capital could be established,[27] and the absolute requirement of a five-person bench to be able to attend to circuit and principal registry matters.[28] Regardless, strong dissent was raised in the House on the basis of delays from judges indisposed on circuit,[29] and the burden of travelling — 'thousands of miles, to Coolgardie' in Sir John Quick's words[30] — all of which would financially impact litigants.

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18 *Debates and Proceedings of the Australasian Federation Conference*, Melbourne, 10 February 1890, 25–6 (Alfred Deakin).

19 See, eg, *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 976–7 (George Reid).

20 Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) 253.

21 See *Australian Constitution* s 71. See below Part III(C).

22 See Roger B Joyce, *Samuel Walker Griffith* (University of Queensland Press, 1984) 257, citing Letters from Alfred Deakin to Samuel Griffith, 18, 29 January, 8, 21 February, 12 March, 3, 17, 24 April 1901, archived at Dixson Library, Correspondence of Samuel Griffith, MSQ 190, 203–10, 229–36, 257–64, 281–8.

23 See Joyce (n 22) 240–5.

24 See below Part II(B).

25 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1903, 607–8 (Alfred Deakin, Attorney-General).

26 Commonwealth, *Parliamentary Debates*, House of Representatives, 1 July 1903, 1624 (Alfred Deakin, Attorney-General).

27 See Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1903, 608 (Alfred Deakin, Attorney-General).

28 See ibid 607.

29 Ibid 625 (Patrick Glynn).

30 Ibid 648 (Sir John Quick).

The Bill emerged from the House in amended form; the number of judges was cut from five to three.[31] This amendment would lead to future critique about delays and workload, as initially voiced in the House. However, having 'scraped so many rocks' and 'skirted so many quicksands', the Bill received royal assent in August 1903.[32]

B *The Arch Raised: Itinerancy from Federation, 1903–28*

The provisions of the *Judiciary Act* enabled sittings in multiple locations from the outset. As ss 12 and 13 of the original Act provided:

> **Place of sitting.**
>
> **12.** Sittings of the High Court shall be held from time to time as may be required at the principal seat of the Court and at each place at which there is a District Registry.
>
> **Matter heard at one place may be further dealt with at another place.**
>
> **13.** When any cause or matter has been heard at a sitting of the High Court held at any place the Justice or Justices before whom the matter was heard may pronounce judgment or give further hearing or consideration to the cause or matter at a sitting of the High Court held at another place.[33]

This latent facility was translated into a positive policy of circuits following a conference between Prime Minister Alfred Deakin, Attorney-General James Drake, and the prospective justices.[34] To this effect, the Governor-General declared Melbourne the principal seat of the Court, pending the establishment of the seat of government.[35] As contemplated in parliamentary debates, the principal registry made use of existing facilities in the Victorian Supreme Court.[36] On 6 October 1903, Chief Justice Griffith and Justices Barton and O'Connor assembled in the Banco Court of the Supreme Court House, in a commemorative event which reportedly

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31 See *Judiciary Act 1903* (Cth) ss 21(2), 22.

32 See Alfred Deakin, 'The High Court Established', *Morning Post* (London, 25 August 1903), reproduced in JA La Nauze (ed), *Federated Australia: Selections from Letters to the Morning Post 1900–1910* (Melbourne University Press, 1968) 118, 119.

33 *Judiciary Act 1903* (Cth) ss 12–13, as enacted.

34 Letter from SW Griffith, Edmund Barton and RE O'Connor, Justices of the High Court to the Attorney-General of the Commonwealth, 14 February 1905, reproduced in Parliament of the Commonwealth of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 10, 10–11.

35 Attorney-General (Cth), 'Appointment of the Principal Seat and the Principal Registry of the High Court' in Commonwealth, *Commonwealth of Australia Gazette*, No 52, 2 October 1903, 626.

36 Ibid.

'taxed to its utmost extent' the accommodation available in the premises.[37] Chief Justice Griffith, on the occasion, made the prescient observation that '[w]e cannot but be conscious of the fact that the extent to which we obtain the confidence we are anxious to command will depend on what the future of the court will be'.[38]

On 16 October 1903, the Governor-General designated the respective Supreme Court Houses in the capitals of New South Wales, Queensland, South Australia, Tasmania, and Western Australia as district registries.[39] By this time the Rules of Court included wording which provided:

> APPEAL RULES
>
> SECTION I
>
> **1A.** Unless otherwise directed by the Court or a Justice such appeals and applications shall be heard at the seat of government of the State. The Court or a Justice may direct that any such appeal or application shall be heard at the seat of government of some other State.[40]

This facilitated burgeoning circuit travel, where appeals or related applications could be heard in one place and later transferred to a Full Court elsewhere. This was in addition to general rules which allowed any party to apply for a transfer from one district registry to another at the discretion of the Court or Justice presiding.[41] This was to be an essential incident of the Court's ability to deal with first instance and appeal matters in a multi-registry system where the Rules provided for sittings at any of those registries.[42]

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37 See 'The High Court: Judges Sworn In', *The Argus* (Melbourne, 6 October 1903) 5.

38 'The High Court: Opening Ceremony', *The Argus* (Melbourne, 7 October 1903) 9.

39 Attorney-General (Cth), 'Appointment of District Registry of the High Court in the State of New South Wales' in Commonwealth, *Commonwealth of Australia Gazette*, No 56, 17 October 1903, 669; Attorney-General (Cth), 'Appointment of District Registry of the High Court in the State of Queensland' in Commonwealth, *Commonwealth of Australia Gazette*, No 56, 17 October 1903, 669; Attorney-General (Cth), 'Appointment of District Registry of the High Court in the State of South Australia' in Commonwealth, *Commonwealth of Australia Gazette*, No 56, 17 October 1903, 670; Attorney-General (Cth), 'Appointment of District Registry of the High Court in the State of Tasmania' in Commonwealth, *Commonwealth of Australia Gazette*, No 56, 17 October 1903, 670; Attorney-General (Cth), 'Appointment of District Registry of the High Court in the State of Western Australia' in Commonwealth, *Commonwealth of Australia Gazette*, No 56, 17 October 1903, 670.

40 High Court of Australia, 'Rules of Court' in Commonwealth, *Commonwealth of Australia Gazette*, No 56, 17 October 1903, 671 r 2(4).

41 See *High Court Procedure Act 1903* (Cth) s 7(1), as enacted. This operated on the assumption that first instance matters would be heard at the relevant district registry from which the cause originated: see ords ix and xxx(1).

42 Until the advent of the Federal Court: see below Part III(C).

The result was a manic tempo from the outset. *The Sydney Morning Herald* observed, '[i]n all probability the first sitting of the High Court will be held in Sydney on Thursday week'.[43] This was confirmed when the Court issued a Rule of Court ordering sittings in Sydney on 15 October and 6 November 1903 at the Court House in Darlinghurst.[44] It was to then return to Melbourne on 18 November.[45] However, before 15 October, the Court fixed a date for Brisbane on 26 October.[46] Following the Brisbane sittings, the Court appointed further dates of 24 November (Adelaide) and 2 December (Perth).[47] Upon arriving in Adelaide, it again fixed dates for the new year of 23 February 1904 (Hobart), 1 March (Melbourne) and 15 March (Sydney).[48]

Overall, the Court's first, partial year of operation alone involved travel from: Melbourne to Sydney; Sydney to Brisbane; Brisbane to Sydney; Sydney to Melbourne; Melbourne to Adelaide; Adelaide to Perth; and then back to the principal registry of Melbourne from Perth in mid-December in preparation for the new year's hearings.[49] Some legs were only separated by a few days, and for a country the size of Australia the distances covered (by train and steamer no less) could only be described as extraordinary. This was especially so for judges primarily resident in Brisbane and Sydney.[50] Some legs were less than salubrious; the High Court toiled in a 'subterranean' room in the Perth Supreme Court House populated with vermin and malodorous furnishings.[51] This was the Griffith Court's practice for years, a testament to the commitment the early federal judges had to the Commonwealth judicial project.

It is also unsurprising that there was an early challenge to this practice and the freewheeling judges behind it. There is a significant amount of literature on the

43 'Sitting in Sydney', *The Sydney Morning Herald* (Sydney, 7 October 1903) 10.

44 High Court of Australia, 'Rule of Court' in Commonwealth, *Commonwealth of Australia Gazette*, No 55, 10 October 1903, 662.

45 Ibid. The first Full Court hearing occurred on the latter Sydney date, 6 November 1903: see: Bennett (n 4) 25; *Dalgarno v Hannah* (1903) 1 CLR 1.

46 High Court of Australia, 'Rule of Court' in Commonwealth, *Commonwealth of Australia Gazette*, No 56, 17 October 1903, 672.

47 High Court of Australia, 'Rule of Court' in Commonwealth, *Commonwealth of Australia Gazette*, No 61, 31 October 1903, 757.

48 High Court of Australia, 'Rule of Court' in Commonwealth, *Commonwealth of Australia Gazette*, No 68, 28 November 1903, 876.

49 See 'High Court's Sitting', *The Sydney Morning Herald* (Sydney, 28 November 1903) 11.

50 See Susan Priest, 'The Griffith Court, the Fourth Commonwealth Attorney-General and the "Strike of 1905"' (Speech, Sir Harry Gibbs Oration Lecture, 2012).

51 See Justice Michael Kirby, '85 Journeys to Perth' (High Court Dinner, Law Society of Western Australia, 24 October 2001). This would continue well into the second half of the century, until the intervention of Sir Ronald Wilson.

judicial 'strike' of 1905, so the events will only be covered briefly.[52] The *Judiciary Act* at the time of the Griffith Court did not provide for the payment of travelling expenses, and responsibility for such disbursements fell to the Attorney-General's Department.[53] In 1904, for instance, Attorney-General Henry Higgins had pressed the Court on whether a daily cap on travel expenses of £3 10s might be acceptable,[54] to which the justices jointly replied: 'the present arrangement is not only in accordance with law, but is calculated rather to diminish than to increase the actual expenditure in travelling expenses'.[55]

However, with the appointment of Josiah Symon as Attorney-General in August 1904, such quibbling culminated in overt conflict between the judicial and executive arms. When Griffith wrote to Symon on 13 December 1904 requesting the arrangement of a Hobart courtroom, Symon responded with a reiteration of his criticisms ventilated during the Convention Debates, pointing out '[a]n ambulatory Court of Appeal … is, so far as I am aware, without precedent'.[56] He believed appeals should be heard in the principal seat of the Court, with any exceptional travelling expenses to be calculated from there.[57] This sparked a series of escalating correspondences

52 See, eg: Justice Stephen Gageler, 'When the High Court Went on Strike' (2017) 40(3) *Melbourne University Law Review* 1098; Susan Priest, 'Australia's Early High Court, the Fourth Commonwealth Attorney-General and the "Strike of 1905"' in Paul Brand and Joshua Getzler (eds), *Judges and Judging in the History of the Common Law and Civil Law: From Antiquity to Modern Times* (Cambridge University Press, 2012) 292; WG McMinn, 'The High Court Imbroglio and the Fall of the Reid-McLean Government' (1978) 64(1) *Journal of the Royal Australian Historical Society* 14; Joyce (n 22) 262–6.

53 Gageler (n 52) 1105, citing Minute Paper for the Executive Council, 12 October 1903, archived at National Library of Australia, Papers of Sir Josiah Symon, MS 1736, 11/313.

54 Letter from HY B Higgins, Attorney-General to Justices of the High Court, 29 July 1904, reproduced in Parliament of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 1, 1.

55 Letter from SW Griffith, Edmund Barton and RE O'Connor, Justices of the High Court to the Attorney-General of the Commonwealth, 19 August 1904, reproduced in Parliament of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 2, 2.

56 Letter from JH Symon, Attorney-General to Sir SW Griffith, Chief Justice, 23 December 1904, reproduced in Parliament of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 3, 3. The courtroom, however, was begrudgingly arranged: at 4.

57 Letter from JH Symon, Attorney-General to Sir SW Griffith, Chief Justice, 23 December 1904, reproduced in Parliament of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 3, 4.

between the Court and the Attorney-General, all the while the former defiantly continued to go on circuit.[58]

The Argus newspaper canvassed the arguments for and against: 'until the number of cases to be heard in South Australia, Western Australia, Tasmania, and perhaps Queensland increase they hold that no injustice would be done to these states if the High Court only sat in Melbourne and Sydney';[59] versus '[e]ven if a thousand pounds was saved in travelling expenses, it is claimed that this would not compensate for the hardship inflicted upon persons living in Western Australia and Tasmania'.[60] In April 1905, the Attorney-General's Department refused to reimburse travel expenses entirely; in response, the Court adjourned an eight day civil jury hearing in Melbourne.[61] Following concessions at a Cabinet consultation with Prime Minister George Reid, the Court resumed sitting on 9 May.[62] However, Symon's ongoing refusal to cover expenses generated further friction, including a public statement disseminated by the Court in protest.[63] The impasse would only be broken when the Reid Government gave way to the Deakin Government, and Josiah Symon to Isaac Isaacs.[64] Isaacs was quick to assure the Court that 'the intention of Parliament in enacting the *Judiciary Act* was that the High Court … should sit in each State capital "as may be required"';[65] although this would not stop Symon reventilating the issue in the Senate.[66]

Having warded off this attack, the Court continued to sit around Australia. Their attitude was further vindicated with *The Commonwealth Law Review*'s publication of a unanimous series of opinions from the profession about the merits of circuits.[67] The consensus was that itinerancy 'saved expense, and drew upon the services

58 See Gageler (n 52) 1106–14.

59 'The High Court: Where Shall It Sit? An Interesting Situation', *The Argus* (Melbourne, 13 March 1905) 5.

60 'The High Court: Where Shall It Sit? Opinions of the Judges', *The Argus* (Melbourne, 14 March 1905) 5.

61 Gageler (n 52) 1116–17.

62 See ibid 1118.

63 Letter from EPT Griffith, Associate to the Chief Justice to the Secretary, Attorney-General's Department, 22 June 1905, attaching a statement, reproduced in Parliament of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 35.

64 Gageler (n 52) 1128.

65 Letter from Isaac A Isaacs, Attorney-General to Sir Samuel W Griffith, Chief Justice, 22 August 1905, reproduced in Parliament of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 41, 41.

66 Commonwealth, *Parliamentary Debates*, Senate, 28 November 1905, 5837–9 (Sir Josiah Symon). See Judiciary Act 1903 Amendment Bill 1905 (Cth).

67 Everard Digby, 'The Home of the High Court and a High Court Bar' (1905) 3(2) *Commonwealth Law Review* 49, 49–58.

of lawyers best equipped to argue cases affecting the laws of their own States'.[68] Two important legislative amendments to the *Judiciary Act* arose thereafter. The *Judiciary Act 1906* (Cth) expanded the bench from three to five,[69] as originally planned. It was driven by concerns about the Court's workload, not least due to the risk of business falling into arrears due to travel.[70] After all, the Court's docket had expanded beyond the measure of anyone's predictions:[71]

> the High Court had, from its creation in October 1903 until the end of that year, heard two appeals and eight motions and applications; in 1904 there were thirty-nine appeals and forty motions and applications; … while in the first half of 1906 there had been forty-two appeals 'and a very large number of motions'.[72]

The issue was also partly attributable to the 'dual hats' worn by O'Connor J (and later Higgins J) as both President of the Court of Conciliation and Arbitration ('Arbitration Court') and puisne High Court justice, with considerable delays and much complaint arising from the preferencing of appellate over industrial work.[73]

Judicial workload was revisited in the *Judiciary Act 1912* (Cth), which expanded the Court to its current-day maximum strength of seven.[74] Attorney-General William Hughes gave a frank assessment of the Court's untenable circuit workload:

> In order to give some idea of the work of the Court, it may be pointed out that the judicial year is one of 200 days, and that last year the full Court sat 161 days, in addition to the time spent by the members of the Court in travelling. …
>
> It must be remembered that the Justices of the High Court travel all over Australia. No other Justices do that. The Supreme Court of America does not do it. It sits in Washington only, although some of its Justices go on circuit. But here the High Court travels, not over a State, but over a continent.[75]

However, even with an enlarged bench, a growing case docket and the commensurately growing needs of the Arbitration Court were a thorn in the side of the Knox Court,

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68 See Bennett (n 4) 102.

69 *Judiciary Act 1906* (Cth) s 2.

70 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 July 1906, 1432–3 (Isaac Isaacs, Attorney-General).

71 See, eg, ibid 1435 (William Henry Wilks).

72 Bennett (n 4) 30.

73 See: Commonwealth, *Parliamentary Debates*, House of Representatives, 18 July 1906, 1432–3 (Isaac Isaacs); Commonwealth, *Parliamentary Debates*, House of Representatives, 20 July 1906, 1625 (Joseph Cook); Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1912, 6983–5 (William Hughes, Attorney-General).

74 *Judiciary Act 1912* (Cth) s 2.

75 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1912, 6984–5 (William Hughes, Attorney-General).

putting strain on the availability of state courtrooms where both required separate facilities.[76] For the principal registry in Melbourne, such pressures eased when the Court moved into a standalone building situated on 450 Little Bourke Street on 20 February 1928, reportedly '[w]ith a complete absence of ceremonial'.[77] The Court finding the space insufficient, a second storey was added in 1935.[78] Similarly, a free-standing Sydney courtroom, situated north-west of the Darlinghurst complex,[79] was (unofficially) opened on 17 August 1923 and cost the state government the princely sum of £22,000.[80] In 1926, Attorney-General JG Latham proposed an amendment to the *Judiciary Act*, providing for the continued sitting of the Court in other locations even after the seat of government at Canberra had been established.[81] This minor administrative change was to have lasting ramifications until 1980.

C *The Arch Tested: Depression, Wartime and Centralisation, 1929–50*

The Court had survived the first major test to its circuit sittings, and '[t]hereafter the regular visitation of the court to the capital cities came to be taken for granted by governments and the community'.[82] The Court's routine outside the Sydney–Melbourne circuit became 'Hobart in February, Brisbane in June, Perth in September, and Adelaide in October', or near enough to those dates.[83] However, the Court did not emerge unscathed from the Great Depression in 1929, which was shortly followed by the outbreak of war, both posing major interruptions to the Court's established routine.

The Depression was immediately felt by the Court with the passage of the *Financial Emergency Act 1931* (Cth) ('*Financial Emergency Act*') as part of a raft of federal austerity measures. Part VII of that Act provided that, notwithstanding the *Judiciary Act 1903* or the *High Court Procedure Act 1903*, sittings of the Full Court could only be held at places specified by the Governor-General.[84] Single justices were free to continue their sittings as they wished, perhaps as a sop to litigants and the

76 Bennett (n 4) 43.

77 'High Court: New Building Opened', *The Argus* (Melbourne, 21 February 1928) 21; Department of the Environment and Heritage, 'High Court of Australia (Former)' (Australian Heritage Database Assessment, Place ID 105896, 16 June 2006) 1. It was observed '[t]he newly erected High Court of Australia building … contrasts poorly with the lofty splendour of the Victorian Law Courts buildings': 'New High Court Building', *The Argus* (Melbourne, 22 February 1928) 19.

78 See Department of the Environment and Heritage (n 77) 4.

79 'Buildings and Works: New High Court at Darlinghurst', *The Sydney Morning Herald* (Sydney, 24 January 1923) 8. 'Built in the Grecian style', reportedly 'its elevation harmonise[d] well with the existing buildings'.

80 'High Court's Home', *The Evening News* (Sydney, 17 August 1923) 8.

81 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 May 1926, 2238–9 (JG Latham, Attorney-General). See also *Judiciary Act 1926* (Cth) s 2.

82 Bennett (n 4) 102.

83 Ibid 102–3.

84 *Financial Emergency Act 1931* (Cth) s 51 ('*Financial Emergency Act*').

Court in light of the arguments raised in 1905. As Treasurer Ted Theodore pointed out, 'fairly considerable savings will be effected in regard to travelling expenses, and this can be done without inconvenience to litigants who have matters to bring before the court in its appellate jurisdiction'.[85] Presumably this was an allusion to the Court's ability to transfer matters heard in one location to another under (the then) s 13 of the *Judiciary Act 1903*, even if the Full Court remained static.[86]

In August 1931, such an order was duly made by the Governor-General, prohibiting sittings of the Full Court in Brisbane, Adelaide, Perth and Hobart.[87] It remains to date the only instance of a legislatively implemented injunction on Court sittings, and, all the more surprisingly, it happened to be done with the consent of the Justices.[88] The controversy was significant.[89] The Premier of South Australia wrote to the Prime Minister in protest, suggesting that any costs saved to the Commonwealth would be offset by increased costs to litigants.[90] The State Attorney-General also conceded costs would increase.[91] The Adelaide Chamber of Commerce coordinated a united protest with the Chambers in Perth, Hobart and Brisbane about costs to litigants.[92] The Queensland legal profession urged restoration of state sittings.[93] Interestingly, the Tasmanian perspective seems to have been mixed in comparison to the enthusiasm of the other states. *The Mercury* newspaper applauded the change, noting that low volumes of work and mundane first instance applications did not justify Full Court attendances[94] — upon one such visit, it had observed 'a very large and very expensive steam hammer has been used to crush a very small nut'.[95] Perhaps contributing to judicial acceptance of curtailed sittings was the diminished size of the bench. In January 1931, Isaacs CJ had resigned from the bench to take up the post of Governor-General,[96] leaving Frank Gavan Duffy as Chief Justice.[97]

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85 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 July 1931, 3407–8 (Ted Theodore).

86 Cf *Judiciary Act 1903* (Cth) s 12, as enacted.

87 Governor-General, 'Notice' in Commonwealth, *Commonwealth of Australia Gazette*, No 65, 6 August 1931, 1312.

88 See Bennett (n 4) 103.

89 See ibid.

90 See ibid 103, citing Letter from LL Hill to the Prime Minister, 4 November 1931, archived at National Archives of Australia, item 31/1654.

91 'Full High Court Sittings: Adelaide Omitted', *The Advertiser and Register* (Adelaide, 17 August 1931) 7.

92 See 'Sittings of the High Court: Protest against Limitation', *The Advertiser* (Adelaide, 15 December 1931) 4.

93 See 'The High Court', *The Courier-Mail* (Brisbane, 11 September 1933) 12.

94 See 'High Court Progresses', *The Mercury* (Hobart, 7 July 1931) 6.

95 'An Expensive Judiciary', *The Mercury* (Hobart, 11 February 1931) 6.

96 'Sir Isaac Isaacs', *The Sydney Morning Herald* (Sydney, 21 January 1931) 12.

97 'Chief Justice: Sir Frank Gavan Duffy', *The Sydney Morning Herald* (Sydney, 24 January 1931) 13.

No further appointment would be made until the end of the Second World War. In the intervening period, Parliament amended the *Judiciary Act* to reflect the reduced size of six,[98] with Attorney-General Latham commenting, '[s]ix justices are able to do the work'.[99]

However, this prognostication proved ill-fated as the decision was made in 1933 to restore inter-state sittings. With the worst of the Depression behind Australia (no doubt assisted by considerable savings from the judicature with the *Financial Emergency Act* measures[100] which apparently included the cutting of railway passes[101]), and growing concern over state resentment,[102] the Governor-General revoked the order prohibiting state Full Court sittings on 27 September 1933.[103] The press at the time welcomed the move as a timely removal of inconvenience posed to the states.[104]

Unfortunately, only a few years after the Court's tentative return to its pre-Depression practice, Australia would be plunged into the Second World War. Although no Order in Council was made, circuits were nonetheless constrained. Travels to Perth, for example, ceased entirely between 1938 and 1945.[105] While the Court sought to hold its regular sittings in the states, the notices became qualified in that '[n]o sittings will be held unless there is a substantial amount of business' — if a sitting in a location was omitted, then the subsequently located sitting would start from that date instead.[106]

Compounding the difficulty was the involvement of several Justices in full time war service:[107]

98 See *Judiciary Act* 1933 (Cth) s 2.

99 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 1933, 5004 (JG Latham, Attorney-General).

100 See Bennett (n 4) 103, citing Memorandum of JG Latham, Attorney-General, 17 July 1933, archived at National Archives of Australia, item 31/1038.

101 See Clem Lloyd, 'Not Peace but a Sword!: The High Court under JG Latham' (1987) 11(2) *Adelaide Law Review* 175, 180.

102 See Bennett (n 4) 103, citing Memorandum of JG Latham, Attorney-General, 17 July 1933, archived at National Archives of Australia, item 31/1038.

103 Governor-General, 'Notice' in Commonwealth, *Commonwealth of Australia Gazette*, No 54, 28 September 1933, 1353.

104 See: 'High Court for Brisbane', *The Courier-Mail* (Brisbane, 20 September 1933) 14; 'High Court Sittings: To Be Held in All States', *The Mercury* (Hobart, 13 September 1933) 6; 'High Court Sittings: Resumption in All States', *The Age* (Melbourne, 29 September 1933) 9.

105 See Kirby, '85 Journeys to Perth' (n 51).

106 See, eg, High Court of Australia, 'Rule of Court' in Commonwealth, *Commonwealth of Australia Gazette*, No 128, 9 November 1939, 2350.

107 Justice Michael Kirby, 'Sir Edward McTiernan: A Centenary Reflection' (1991) 20(2) *Federal Law Review* 165, 177–8 (citations added).

> justices of the High Court took on extra-judicial responsibility. Latham as Minister to Japan;[108] Dixon as Minister to Washington[109] and later Kashmir.[110] McTiernan was also asked by Evatt (who by this time had resigned his seat on the court and was federal Attorney-General) to conduct an inquiry into the alleged falsification of records in connection with aircraft production.[111]

Justice Dixon was often taken away from hearings to attend to duties on the Central Wool Committee during the early war.[112] Even after the war and restoration of the bench to seven,[113] the Court continued to be affected with Webb J occupied as President of the International Military Tribunal for the Far East[114] when appointed to the Court on 16 May 1946.[115] During this time Starke J repeatedly refused to travel to 'the outstations', complaining about being treated as a 'carpet bagger roaming the country'.[116] This caused much consternation to Latham CJ in assembling a court on circuit.[117] Justice Williams also reportedly declined to travel to Adelaide or Perth on occasions.[118]

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108 See *Judiciary Act 1940* (Cth) (17 August 1940 to 8 December 1941).

109 See *Judiciary (Diplomatic Representation) Act 1942* (Cth) (3 June 1942 to 1 October 1944).

110 From May to September 1950: see Owen Dixon, *Report of Sir Owen Dixon, United Nations Representative for India and Pakistan, to the Security Council*, UN Doc S/1791 (15 September 1950).

111 See generally Fiona Wheeler, 'Parachuting In: War and Extra-Judicial Activity by High Court Judges' (2010) 38(3) *Federal Law Review* 485, 486 n 7, 494 (1 March to 10 July 1943).

112 See Philip Ayres, *Owen Dixon* (Miegunyah Press, 2007) 118. He would subsequently chair the Shipping Control, Commonwealth Marine War Risks Insurance and Salvage Boards, as well as the Allied Consultative Shipping Council: see generally Grant Anderson and Daryl Dawson, 'Dixon, Sir Owen (1886–1972)' in John Ritchie (ed), *Australian Dictionary of Biography* (Melbourne University Press, 1996) vol 14.

113 See *Judiciary Act 1946* (Cth) s 2. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 29 March 1946, 807–9 (HV Evatt, Attorney-General).

114 See Wheeler (n 111) 495–6 (term ending 12 November 1948).

115 Governor-General, 'Commonwealth of Australia' in Commonwealth, *Commonwealth of Australia Gazette*, No 108, 13 June 1946, 1609.

116 Letter from Justice Starke to Chief Justice Latham, 217 October 1938, archived at National Library of Australia, Papers of Sir John Latham, ref 1009/62, quoted in Lloyd (n 101) 179. See also JD Merralls, 'That's Sir Hayden Starke' [2013] (153) *Victorian Bar News* 42, 45.

117 See Lloyd (n 101) 179–80.

118 Mason, 'The High Court of Australia' (n 9) 868.

Nevertheless, despite the vicissitudes of Depression and wartime, the Court returned to its habitual sittings going into the 1950s.[119] By this time, the approach had become somewhat more qualified than the days of the Griffith Court. As Sir Owen Dixon (the then Chief Justice) explained to the Perth Bar in 1952:

> There have been occasions when a year has been missed, they have been few, other than those I have mentioned. They have been due to the practice, which became more or less established, that the Court would not visit any capital city if there were less than three cases in its list. It may seem an arbitrary rule of practice but, in view of what is involved in the movement of a court, some rule has to be established upon these matters. It has been rare for Perth to have fewer than three cases, and I hope that it will be rarer in future.
>
> The fact that the Court must visit every capital in rotation makes it impossible to come here more than once a year, such are the demands upon its time of the very large lists in Sydney and Melbourne. No doubt if the interval between sittings were less than a year a greater number of appeals would be brought to the Court.[120]

Even so, when sufficient business presented itself, there emerged continuity with the tradition of old: 'Hobart in February to be out of the heat and watch the regatta, Perth in spring for the wildflowers, Adelaide in transit to Perth, and a winter visit to Brisbane at the time of the Doomben Ten Thousand'.[121]

D *The Arch Expanded: Affixation in the Capital and the Creation of the Federal Court, 1951–80*

In many respects, the Court's permanent affixation in Canberra had been presaged for some time. The early *Judiciary Act* debates had treated the bringing about of the principal registry in the national capital as assumed.[122] Walter Burley Griffin's 1912 capital plans had provided for a 'Courts of Justice' building.[123] In 1927, the *Judiciary Act* was amended to allow the exercise of supreme court jurisdiction by the High Court in the Australian Capital Territory, and there a district registry was

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119 See High Court of Australia, 'Rule of Court' in Commonwealth, *Commonwealth of Australia Gazette*, No 80, 3 November 1949, 3128.

120 Sir Owen Dixon, 'Address upon the Occasion of First Presiding as Chief Justice at Perth on 2nd September, 1952' in Judge Severin Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (Law Book, 1965) 252, 252 ('Address upon the Occasion of First Presiding').

121 David Marr, *Barwick* (George Allen & Unwin, 1980) 215.

122 See Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1903, 608 (Alfred Deakin, Attorney-General). See also *Judiciary Act 1903* (Cth) s 10, as enacted.

123 Senate Select Committee on the Development of Canberra, Parliament of Australia, *Report from the Select Committee Appointed To Inquire into and Report upon the Development of Canberra* (Report, September 1955) Appendix B 93–4.

duly opened.[124] After some cavilling[125] and political pressure,[126] the Court attended its first Canberra sitting on 31 January 1933, exercising the Territory's original jurisdiction.[127] While restrictions on sittings further west may have prompted visits to the capital,[128] the absence of facilities necessary for the principal registry's transfer to Canberra was a contemporaneously noted problem.[129] A survey of the post-war notices indicates that Canberra sittings were rare, despite the district registry and permitting mechanisms under the *Judiciary Act*.

This situation would change with the large-scale centralisation of government in Canberra. The National Capital Development Commission,[130] at the instigation of Prime Minister Robert Menzies, would contribute considerably to the development of Canberra and ensure the transfer of the physical organs of government to the capital.[131] From 1959, the Court appeared as a marked building in Sir William Holford's plans for the capital.[132] By the end of the 1960s, the concept had gone from a relatively modest building to a considerably enlarged edifice.[133] The decision was then made to site the High Court Building 'in the north-eastern sector of the parliamentary triangle',[134] with 'a two-stage architectural competition' commencing in July 1972.[135] The resulting design was 'an outstanding example of late modern Brutalist architecture'.[136] In a symbolic flourish, the wood used for the judicial chambers reflected 'different varieties derived from the different subnational parts

124 See: *Judiciary Act 1927* (Cth) ss 3–4; Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 1927, 960 (JG Latham, Attorney-General).

125 See also Bennett (n 4) 104, quoting Letter from Chief Justice Gavan Duffy to the Attorney-General, 16 May 1931, archived at National Archives of Australia, items 31/787, 29/3516.

126 See 'High Court: Canberra Sittings: Urged by Mr FM Baker', *The Canberra Times* (Canberra, 27 October 1932) 2.

127 See High Court of Australia, 'Rule of Court' in Commonwealth, *Commonwealth of Australia Gazette*, No 6, 2 February 1933, 140.

128 See Bennett (n 4) 104.

129 See 'High Court: Canberra Sitting: Under Consideration', *The Canberra Times* (Canberra, 6 July 1932) 2.

130 See generally *National Capital Development Commission Act 1957* (Cth).

131 See Sir Frederick White, 'Robert Gordon Menzies: 20 December 1894–15 May 1978' (1979) 25(1) *Biographical Memoirs of Fellows of the Royal Society* 445, 468, 470.

132 See Paul Reid, *Canberra Following Griffin: A Design History of Australia's National Capital* (National Archives of Australia, 2002) 264–5, 284.

133 Bennett (n 4) 107; Michael Pearson et al, *High Court of Australia Conservation Management Plan* (Management Plan, 15 March 2011) vol 1, 20.

134 Commonwealth, *Parliamentary Debates*, Senate, 13 May 1970, 1395 (Bob Cotton).

135 See Commonwealth, *Parliamentary Debates*, House of Representatives, 15 April 1980, 1761 (Bob Ellicott). See also Pearson et al (n 133) 22–3.

136 See 'The Building', *High Court of Australia* (Web Page) <https://www.hcourt.gov.au/about/the-building>.

of the Commonwealth'.[137] Not only were the working facilities on offer finally of an 'exceptional' standard,[138] the spatial largesse was considerable — it has been observed that the No 1 and No 2 courtroom benches and the level nine floor layout could very well accommodate two additional justices.[139]

Such architectural plans coincided with an announcement in 1968 by the Gorton Government to transfer the Court's principal seat to Canberra from Melbourne,[140] with the caveat that 'single justice sittings will continue to be held in the various capital cities'.[141] This did not prevent what appears to have been a further move of the principal registry from Melbourne to Sydney in September 1973.[142] After the proclamation in April 1980 of the *High Court of Australia Act 1979* (Cth) ('*HCA Act*'),[143] the Court and principal registry settled into its present-day premises at Lake Burley Griffin on 26 May 1980.[144] Up until this point, the Court had performed its circuits in the outlying states in mostly unchanged form; in fact, since 1963, the frequency of such sittings had increased, and enlarged Full Court panels of five had 'become more common' in Brisbane and Adelaide.[145] This was as the overall work on the Melbourne list tended to decline while the Brisbane and Adelaide lists increased during the 1960s.[146]

What cannot be ignored against this backdrop is the emergence of the Federal Court of Australia. The mooting of a superior federal court of record not only facilitated

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137 Michael Kirby, 'Remembrance of Times Past: Times Missed and Times Not Missed' (2018) 24(1) *James Cook University Law Review* 25, 29 ('Remembrance of Times Past').

138 See ibid 28.

139 Justice Michael Kirby, 'Law at Century's End: A Millennial View from the High Court of Australia' (2001) 1(1) *Macquarie Law Journal* 1, 7 ('Law at Century's End'). Certainly, there are no constitutional barriers to the enlargement of the bench in the future: at 7; especially if the volume of work (special leave or otherwise) increases precipitously as a result of new hearing practices: see below Part IV.

140 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 1968, 420–1 (Nigel Bowen, Attorney-General).

141 Ibid 421.

142 See: Governor-General, 'Australia' in Commonwealth, *Australian Government Gazette*, No 102, 16 August 1973, 53; High Court of Australia, 'Rule of Court' in Commonwealth, *Australian Government Gazette*, No 129, 20 September 1973, 2.

143 Governor-General, 'Proclamation' in Commonwealth, *Commonwealth of Australia Gazette: Special*, No S 82, 18 April 1980. See also *High Court of Australia Act 1979* (Cth) ss 14, 30 ('*HCA Act*').

144 See, eg: 'Tribute to Judiciary: Queen Opens High Court Building', *The Canberra Times* (Canberra, 27 May 1980) 1; High Court of Australia, *Annual Report 2003–04* (Report, 2004) 11.

145 See Eddy Neumann, *The High Court of Australia: A Collective Portrait 1903–1972* (Department of Government and Public Administration, University of Sydney, 2nd ed, 1973) 9, citing Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 38.

146 See Sawer (n 145) 39.

the Court's transfer to permanent premises in Canberra but was also a key justification of Barwick CJ's attempts to curtail the Court's circuits. When Maurice Byers and Paul Toose initially catalysed the conversation on a putative Federal Court in 1963,[147] the contemporaneous Dixon Court would not have been a receptive audience; as Dixon himself wrote in 1935, 'neither from the point of view of juristic principle nor from that of the practical and efficient administration of justice can the division of the Courts into state and federal be regarded as sound'.[148] The ascendancy of Barwick as Chief Justice in 1964, however, set the stage for change.

Barwick's own views (expressed at the time he was Attorney-General) in support of the proposal are illuminating:

> Basically, then, my own reason for supporting the creation of a new federal superior court is not to relieve State courts of their federal jurisdiction, but to relieve the *federal* supreme court, the High Court of Australia, of some of its present work. …
>
> [H]ow long the High Court can, and should, continue to hold at least one sitting each year in each of the State capitals is a matter which, though perhaps not immediately pressing, cannot indefinitely escape consideration. As in the United States, the centralisation of the High Court's work in one place is probably an inevitable development … The new court should, I think, supplement, and eventually probably replace, the High Court in supplying a Commonwealth 'presence' in the less populous State capitals.[149]

On the bench, Barwick CJ set about implementing a static Court with tributary Federal Courts (themselves itinerant) supplanting the former's circuits.[150] The passage of the *Federal Court of Australia Act 1976* (Cth) eased the High Court's appellate workload and removed the burden of first instance work which had plagued the Court since its inception.[151] This, along with *Judiciary Act* reforms in 1976 and 1984, which abolished appeals as of right (and direct from single state Supreme

147 See generally MH Byers and PB Toose, 'The Necessity for a New Federal Court: A Survey of the Federal Court System in Australia' (1963) 36(10) *Australian Law Journal* 308. See also Justice Susan Kenny, 'Federal Courts and Australian National Identity' (2015) 38(3) *Melbourne University Law Review* 996, 1010.

148 Owen Dixon, 'The Law and the Constitution' (1935) 51(4) *Law Quarterly Review* 590, 606.

149 Sir Garfield Barwick, 'The Australian Judicial System: The Proposed New Federal Superior Court' (1964) 1(1) *Federal Law Review* 1, 3, 20 (emphasis in original) ('The Australian Judicial System'). See also at 7–8, 19–21.

150 See ibid 3, 20. See also: *Federal Court of Australia Act 1976* (Cth) s 12; Commonwealth, *Parliamentary Debates*, House of Representatives, 21 October 1976, 2113 (Bob Ellicott, Attorney-General).

151 See: Sir Garfield Barwick, 'The State of the Australian Judicature' (1977) 51(7) *Australian Law Journal* 480, 488; Commonwealth, *Parliamentary Debates*, Senate, 22 August 1906, 3190 (John Keating). See also below Part III(C).

Court justices),[152] reduced the Court's docket considerably — including, not unexpectedly, the kind of work which had frequently occupied the circuit lists in the past.

From around 1968, Barwick CJ would also agitate for the Court's permanent installation in a Canberra edifice.[153] A salient worry for Barwick was that they were 'weekly tenants' at the mercy of the state government or occupiers dependent on Commonwealth financing.[154] These pressures culminated in the above-mentioned construction of the High Court Building, leading some to dub it 'Gar's Mahal'.[155] In anticipation of the monolith's opening, Barwick proposed in 1979 that all the outlying registries be closed and circuits abolished, with justices being obliged to live in Canberra.[156] This was not supported by Bar Associations or the federal Attorney-General.[157] It was also resisted by the puisne justices, led by Stephen J,[158] who jointly protested about the proposals to Prime Minister Malcolm Fraser with Attorney-General Peter Durack as interlocutor.[159] Following this, the Government put the proposals on ice and issued assuaging statements that the Court's practice should remain unchanged.[160] Like Symon, Barwick CJ lost the fight to abolish circuits, and further failed to exercise control over judicial residences;[161] although Stephen J, for one, acceded to Barwick CJ's demands and purchased a Canberra residence.[162] The *HCA Act* put the final nail in the coffin by providing expressly for hearings in the outlying states.[163] Chief Justice Barwick, however, would continue

152 See: *Judiciary Amendment Act* 1976 (Cth) s 6; *Judiciary Amendment Act (No 2) 1984* (Cth) s 3. See generally *Parkin v James* (1905) 2 CLR 315, 332–3 (Griffith CJ for the Court).

153 See Marr (n 121) 240, quoting Sir Garfield Barwick, 'Garfield Barwick Address at the National Press Club on 10 June 1976' (Speech, National Press Club, 10 June 1976) 2.

154 See Marr (n 121) 240, quoting Sir Garfield Barwick, 'Garfield Barwick Address at the National Press Club on 10 June 1976' (Speech, National Press Club, 10 June 1976) 2.

155 See: Mason, 'The High Court of Australia' (n 9) 868; Commonwealth, *Parliamentary Debates*, Senate, 31 May 1979, 2425 (Gareth Evans).

156 See: Antonio Buti, *Sir Ronald Wilson: A Matter of Conscience* (University of Western Australia Press, 2007) 199; Marr (n 121) 298.

157 Current Topics, 'Arrangements for the High Court after Its Principal Seat Is at Canberra' (1980) 54(2) *Australian Law Journal* 55, 55.

158 Buti (n 156) 199. See generally Mason, 'The High Court of Australia' (n 9) 868.

159 See also Brian Galligan, 'The Barwick Court' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 201, 219 ('The Barwick Court').

160 See also Commonwealth, *Parliamentary Debates*, Senate, 14 May 1980, 2178–9 (Peter Durack, Attorney-General).

161 See also Galligan, 'The Barwick Court' (n 161) 219.

162 See Philip Ayres, *Fortunate Voyager: The Worlds of Ninian Stephen* (Miegunyah Press, 2013) 90.

163 See *HCA Act* (n 143) ss 15, 30(3), 31(1).

throughout his tenure to emphasise the disjunction, in his view, between the Court's new premises and its ongoing itinerancy.[164]

Despite these setbacks, the nucleus of Barwick CJ's grand design for the Court had ultimately been achieved. The principal registry had been moved to Canberra as originally envisioned at Federation; the Court had secured for itself a freestanding edifice befitting its status as the apex judicial organ in the Commonwealth; and the Court had finally detached its anchors from the former de facto capitals of Sydney and Melbourne. These changes laid the foundations which would mould the Court's procedure into the form recognised up until the present-day pandemic.

E *Repainting the Arch: Entrenchment and Incremental Change, 1981–2020*

Following this last great challenge, the High Court has continued to practise circuits into the 21st century, albeit with some incremental change. Most significant has been the practical abolition of Full Court business held in Sydney or Melbourne, formerly the great political–commercial centres which had dominated the work of the Court prior to its settlement in Canberra. The last Full Court appeal hearing in Melbourne occurred on 1 April 1980;[165] the last Sydney hearing occurred on 11 March 1980.[166] The Barwick Court thus oversaw the removal of Sydney and Melbourne as fixed destinations on the circuit calendar, supplanted by Canberra as a central hub amalgamating the Full Court work of both registries.

The result of these measures seems to have been a precipitous uptick in legal travelling costs for litigants.[167] In 1981, Gibbs CJ said it would be 'obviously impossible for the Court to attempt to contain' these by returning to the old practice.[168] However, he opined that circuits had 'real advantages' for litigants and the profession, and resolved to have the Court travel to the states for a week every year, the volume of work in the states permitting.[169] In 1984, during parliamentary debates on the Judiciary Amendment Bill (No 2) 1984 (Cth), similar concerns were raised about the onerous burden on litigants from counsel having to travel from Sydney or Melbourne to Canberra merely for special leave hearings.[170] In response, Attorney-General Gareth Evans confirmed an 'agreement in principle' between the Government and the Court to hold regular special leave hearings in Sydney

164 See Sir Garfield Barwick, 'The State of the Australian Judicature' (1980) 6(1) *Commonwealth Law Bulletin* 280, 294–5.

165 *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1981) 146 CLR 249.

166 *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 145 CLR 625.

167 See Sir Harry Gibbs, 'The State of the Australian Judicature' (1981) 55(9) *Australian Law Journal* 677, 681.

168 Ibid.

169 See ibid.

170 See Commonwealth, *Parliamentary Debates*, Senate, 2 April 1984, 1063 (Peter Durack).

and Melbourne.[171] The Court then implemented the practice which has persisted to the present-day,[172] thereby banishing once and for all the spectre of a sedentary court no sooner than Barwick CJ's departure. Notably, in a break with this new normal, the Full Court returned to Sydney on 14 June 2017.[173] However, this did not signal a lasting shift in the Court's behaviour, with it continuing to adhere to the special leave sitting format.

Another development has been the gradual shift in accommodation from state to federal facilities. In Melbourne, the Court moved to level 17 of the Commonwealth Law Courts Building immediately after its construction, in February 1999, vacating its leased chambers at 200 Queen Street in doing so.[174] The Court had occupied these 'cramped and generally unsatisfactory' premises since the Canberra relocation, having been displaced by the Federal Court's occupation of Little Bourke Street.[175] A similar process occurred in Brisbane, Perth and Adelaide, the Court relocating from their respective Supreme Court Houses to newly completed Commonwealth Law Courts Buildings.[176] The Adelaide move on 9 August 2005 was the most recent of these, finally severing 102 years of history.[177] In Sydney, the Court remained at Darlinghurst until the unveiling of the combined state-federal Law Courts Building at Queens Square on 1 February 1977,[178] where it now sits on level 23. Hobart is therefore the last holdout; the High Court, on the rare occasions it ventures south for Full Court matters, continues to share facilities with the Supreme Court of Tasmania.[179]

171 See ibid 1063 (Gareth Evans, Attorney-General).

172 See High Court of Australia, *Annual Report 1983–84* (Report, 1984) 5.

173 See Matt Grey, 'WEDNESDAY, 14 JUNE 2017: AT 10:15 AM', *High Court of Australia* (Court List, 14 June 2017) <https://www.hcourt.gov.au/assets/registry/court-lists/2017/14-06-17web.pdf>.

174 See High Court of Australia, *Annual Report 1998–99* (Report, 1999) 28.

175 See Parliamentary Standing Committee on Public Works, Parliament of Australia, *Report Relating to the Commonwealth Law Courts Building, Melbourne* (Report No 25, 1995) 4.

176 See High Court of Australia, *Annual Report 2019–20* (Report, 2020) 74. The drive for separate federal architecture was very much driven by Federal Court Chief Justice Michael Black: see generally Chief Justice Michael Black, 'Transcript of Ceremonial Sitting of the Full Court on the Occasion of the Opening of the New Ceremonial Court and Farewell to the Honourable Michael Black AC Chief Justice, Federal Court of Australia' [2010] (1) *Federal Judicial Scholarship* 7.

177 High Court of Australia, *Annual Report 2005–06* (Report, 2006) 13.

178 See '"Humane" Courtrooms Opened by Premier', *The Sydney Morning Herald* (Sydney, 2 February 1977) 2.

179 See, eg: Transcript of Proceedings, *Coverdale v West Coast Council* [2016] HCATrans 43; Transcript of Proceedings, *Ceremonial: Crennan J: Welcome Hobart* [2006] HCATrans 151; Transcript of Proceedings, *Ceremonial: Special Sitting at Hobart: Centenary of High Court of Australia* [2003] HCATrans 446.

As for the circuits themselves, there has been remarkably little change in formal terms. The framework in which the Court is able to dictate its own travels was reinforced with the commencement of the *High Court Rules 2004* (Cth).[180] In 2001, Kirby J observed that the Court had yet to travel to Darwin.[181] This was rectified on 4 September 2018, when the Full Court heard appeals in the premises of the Supreme Court of the Northern Territory.[182] As described above, Sydney and Melbourne continue to do a robust trade in special leave applications, with attendances of justices nearly every month. The outlying staples of Adelaide, Brisbane, Perth and Hobart have all continued to receive visits for Full Court business through the 2010s,[183] and most likely will through the 2020s barring a decisive shift in the attitude of the Court towards circuits.

If there has been an identifiable pattern of change, it has been with the frequency of sittings (and, presumably, business) in Adelaide, Perth and Hobart, which has reduced considerably over the 21st century. A glance at the 2010s business lists shows multiple-year gaps between Full Court sittings[184] — at the time of writing (mid-way through the 2023 court year), Hobart has not had a Full Court for seven years since 2016;[185] Adelaide, six years since 2017;[186] and Perth, five years since 2018.[187] Only Brisbane has maintained frequency of business resembling pre-Canberra practice, but not quite enough to avoid omissions; for example, between 2017 and 2019. It has also become more difficult to determine where and when the Court will sit outside

180 See *High Court Rules 2004* (Cth) r 6.04. See especially at r 6.04.2 which gives power to the Chief Justice to unilaterally appoint sitting places.

181 Kirby, 'Law at Century's End' (n 139) 8. The delay may partly have been because of the death of the first (and only) South Australian Supreme Court circuit judge to Palmerston on the return journey in 1875: see 'Wreck of the Steamship Gothenburg', *The South Australian Register* (Adelaide, 27 March 1875) 1.

182 See: Transcript of Proceedings, *Ceremonial: On the Occasion of the First Sitting of the High Court of Australia at Darwin* [2018] HCATrans 173; Philippa Lynch, 'List of Business for Sittings at Darwin', *High Court of Australia* (Business List, 4 September 2018) <https://cdn.hcourt.gov.au/assets/registry/business-lists/2018/BusinessList_Darwin_Sep2018.pdf>.

183 See, eg: *Chiro v The Queen* (2017) 260 CLR 425; *Thorne v Kennedy* (2017) 263 CLR 85; *Commissioner of State Revenue (WA) v Place Dome Inc* (2018) 265 CLR 585; *Coverdale v West Coast Council* (2016) 259 CLR 164.

184 See 'List of Business for Sittings', *High Court of Australia* (Web Page) <https://www.hcourt.gov.au/registry/list-of-business-for-sittings>.

185 See 'List of Business for Sittings at Hobart', *High Court of Australia* (Business List, 1 March 2016) <https://www.hcourt.gov.au/assets/registry/business-lists/2016/01-03-16HobBL.pdf>.

186 See 'List of Business for Sittings at Adelaide', *High Court of Australia* (Business List, 19 June 2017) <https://www.hcourt.gov.au/assets/registry/business-lists/2017/BusinessList_ADEL_June2017.pdf>.

187 See 'List of Business for Sittings at Perth', *High Court of Australia* (Business List, 18 June 2018) <https://www.hcourt.gov.au/assets/registry/business-lists/2018/BusinessList_PerthJune2018.pdf>.

of Canberra. From 2010, the annual *Rules of Court* which had formerly specified sitting dates and destinations,[188] ceased identifying locations other than Canberra, instead providing for 'other places as required'.[189] This ambiguous language has continued up to and including the latest iteration of the *Rules*.[190] Such a lack of transparency has not been without criticism.[191]

In summary, the result has been an attenuated form of circuits — a middle ground between the Symon or Barwick view of a static court, and the restlessly peripatetic court of Griffith and Deakin. It seems mundane market forces — cheaper airfares, professional harmonisation and diversion of business to Canberra — have managed to do what executive fiat could not, and Depression and wartime could only manage temporarily. Of course, something must be said about the profound changes brought about by the onset of the COVID-19 pandemic in early 2020. The immediate consequence was the suspension of all circuit travel, including an anticipated circuit to Adelaide.[192] It also had an outsize impact on the proliferation of video-link hearings, which will be further considered in Part IV below.

In June 2021, the pandemic (after the outbreak of the Delta variant, no less) forced the Justices of the Court to remain in their home states, and conference by video-link for all matters.[193] As contemporaneously observed by *The Australian Financial Review*:

> The judges are split across three cities: Chief Justice Susan Kiefel, Justice Patrick Keane and Justice James Edelman are based in Brisbane; Justice Stephen Gageler and Justice Jacqueline Gleeson in Sydney; and Justice Michelle Gordon and Justice Simon Steward in Melbourne.[194]

188 See, eg, *High Court of Australia Rule of Court (25/08/2009)* (Cth) r 1.

189 See *High Court of Australia Rule of Court (24/08/2010)* (Cth) r 1.

190 See, eg: *High Court (2016 Sittings) Rules 2015* (Cth) r 4(1); *High Court (2017 Sittings) Rules 2016* (Cth) r 4(1); *High Court (2018 Sittings) Rules 2017* (Cth) r 4(1); *High Court (2019 Sittings) Rules 2018* (Cth) r 4(1); *High Court (2020 Sittings) Rules 2019* (Cth) r 4(1); *High Court (2021 Sittings) Rules 2020* (Cth) r 4(1); *High Court (2022 Sittings) Rules 2021* (Cth) r 4(1); *High Court (2023 Sittings) Rules 2022* (Cth) r 4(1).

191 See Jeremy Gans, 'News: High Court Hears Appeal in…. Sydney??', *Opinions on High* (Blog Post, 14 June 2017) <https://blogs.unimelb.edu.au/opinionsonhigh/2017/06/14/news-high-court-hears-appeal-in-sydney/>.

192 See High Court of Australia, *Annual Report 2019–20* (n 176) 12.

193 See generally 'Recent AV Recordings', *High Court of Australia* (Web Page) <https://www.hcourt.gov.au/cases/recent-av-recordings>. This is despite the ostensible designation of 'Canberra' sitting dates on the Business Lists: see above n 184.

194 Michael Pelly, 'Meet the High Court's Busiest Barrister', *The Australian Financial Review* (online, 13 January 2022) <https://www.afr.com/companies/professional-services/meet-the-high-court-s-busiest-barrister-20211215-p59ht7>.

Although the Court resumed its in-person Canberra sittings from March 2022,[195] for a brief interval, it returned to a time prior to its Canberra-centricity. Foregrounded was the relevance of retaining home chambers in the states. The separation of the Court's members and recourse to remote working practices failed to sound the death-knell for such residual presences in the states, as might have been expected had a Canberra 'bubble' been adopted. As a conscious alternative to permanent installation in Canberra, a balance was later struck between the usual state presences for special leave matters and Canberra-located Full Court conferences. This was a relatively smooth transition which could not have come about without the transformative effect of technology in tandem with the residual influence of yesterday's circuits.

III Competing Attitudes to the Court on Circuit

All challenges to the High Court's circuits involved the intersection of financial concerns, judicial independence, the federal compact, and institutional proximity. The Court has always wielded these aspects as a shield in defence of its circuits: (1) that costs should be borne by the Commonwealth instead of litigants; (2) that judicial independence trumps accountability to the executive; (3) that the federal compact necessitates presences in the states as an antidote to a central 'ivory tower'; and (4) that in symbolic and practical terms proximity is preferable to prestige. This Part will consider how this reasoning, as seen in the Court's institutional history from time to time, circumvented opposing arguments enabling circuits to survive, albeit in changed form.

A *Financial Concerns*

The scarlet thread connecting almost every dispute has been the debate on costs, waxing and waning with the decades. Implicit is the question of on whom the financial burden of administration of justice ought to fall — the litigant, or the state. Maintenance of circuits was associated with defraying litigant costs, while abolition was supported by those wishing to generate savings for government. Each successive period of challenge — from Symon in 1905,[196] the executive arm in 1931,[197] and likely Barwick CJ in 1979[198] — adopted financial rationalisation to some degree as a justification. However, as the Commonwealth's financial capabilities expanded and demand for judicial services grew, parsimony alone could no longer make a convincing case for the shuttering of the roving Court. Ultimately,

195 See 'List of Business for Sittings at Canberra', *High Court of Australia* (Business List, 8 March 2022) <https://cdn.hcourt.gov.au/assets/registry/business-lists/2022/Business_list_March_2022.pdf>.

196 See Commonwealth, *Parliamentary Debates*, Senate, 28 November 1905, 5837–9 (Sir Josiah Symon).

197 See Commonwealth, *Parliamentary Debates*, House of Representatives, 3 July 1931, 3407–8 (Ted Theodore).

198 See: Buti (n 156) 199; Marr (n 121) 298.

pressure to cut the cost of judicial administration lessened over time, while the pressure to ensure affordability of justice did not.

A preoccupation with costs is very noticeable in the Federation transcripts. No sooner had the Convention Debates turned to cl 71 did the attendees raise the issue of financing the mooted court. Debates on judicial salaries were followed by discussion of appeals to the Privy Council in light of the new court.[199] Carruthers took this opportunity to skewer the justification that the abolition of Privy Council appeals would 'mak[e] it easier for the poor man to prosecute an appeal', which he thought trite.[200] Prophetically, he observed that

> if the High Court is constituted in the capital city of the Commonwealth the possibilities — nay, the probabilities — are that [it] … will be some inland town selected far away from where the courts are constituted at the present time; and … litigants will have to pay very high fees to get men to leave their practice at Melbourne, Sydney or Adelaide … men cannot expect to be served by the bar before the High Court of Australia for lower fees than those for which they would be served by the bar appearing before the Privy Council at Westminster. Therefore, I think, on the score of economy, there is very little to induce litigants to favour the establishment of a High Court of Australia.[201]

Such pointed criticisms could not have been far from Deakin's mind when drafting the Judiciary Bills. When the first Bill was presented to Parliament, there was vigorous emphasis on the necessity of circuits.[202] It was an immediate response to objections that the poor litigant might be disadvantaged should Supreme Court matters be removed to the distant High Court.[203] In Deakin's view, it was a given that the Commonwealth ought to bear the financial costs of bringing justice 'door-to-door', in light of these contemporaneous concerns about the impecunious litigant.

The counter reaction, of course, was swift and sustained. Symon's acrimonious stance towards the costs of the peripatetic Griffith Court has already been discussed in detail.[204] Vituperative conduct aside, the costs were indeed considerable; as revealed during debates for the Appropriation Bill 1905 (Cth) in 1905, the Chief Justice's travelling expenses from October 1903 to June 1904 amounted to £591 2s 7d, with the puisne Justices drawing £616.[205] This was when the lower range

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199 See *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 302, 304–5.

200 See ibid 324–5 (Joseph Carruthers).

201 Ibid 325.

202 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10984, 10987 (Alfred Deakin, Attorney-General).

203 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1903, 624–5 (Patrick Glynn), 625 (Alfred Deakin).

204 See above Part II(B).

205 Commonwealth, *Parliamentary Debates*, Senate, 28 November 1905, 5837 (Sir Josiah Symon). A total of approximately £1,207.

of the total expected appropriation for the Court was approximately £2,665.[206] These expenses would have been exacerbated by the judicial entourage, customarily including a spouse, tipstaff, associate and secretary.[207] With an even larger travelling bench into the 1930s,[208] it is unsurprising that early austerity measures curtailed the Court's sittings. As JM Bennett notes, travelling expenses dropped from £6,173 in 1930 to £2,843 in 1932.[209] Thus, the case put forward by the fiscal hawks was not without merit.

However, at each interval there was strong support for the Court's presence in the states.[210] The uproar generated by the Governor-General's restriction on sittings during the 1930s, and prior to that, the broad public support commanded by the Court in protest at their treatment in 1905,[211] show that the view outside of federal government was decidedly in favour of cost savings to litigants.[212] This sentiment continued to be strong in 1979.[213] The balance likely shifted even further from the Commonwealth as time went on, with the passing of the penury of Federation Australia and the economic hangovers of Depression and wartime.[214] The persuasiveness per se of an austere approach to judicial expenditure thus diminished. It is also notable that plans to move the Court to Canberra were carried to fruition around the time that appeals to the Privy Council were being restricted,[215] when the Court's circuits had previously been a great cost differentiator for litigants.[216] As noted previously, so much was acknowledged by Gibbs CJ at the beginning of his tenure in support of continuing circuits.[217] In summary, the Court's itinerant mould

206 See ibid 5835 (Sir Josiah Symon).

207 See Marr (n 121) 215.

208 See: *Judiciary Act 1906* (Cth) s 2; *Judiciary Act 1912* (Cth) s 2.

209 Bennett (n 4) 103, citing Memorandum of JG Latham, Attorney-General, 17 July 1933, archived at National Archives of Australia, item 31/1038.

210 See, eg: Commonwealth, *Parliamentary Debates*, Senate, 28 November 1905, 5848 (Thomas Givens); Commonwealth, *Parliamentary Debates*, House of Representatives, 15 September 1944, 884 (Archie Cameron); Commonwealth, *Parliamentary Debates*, Senate, 8 March 1945, 464–5 (Richard Nash); Commonwealth, *Parliamentary Debates*, Senate, 14 May 1980, 2178–9 (John Button). See also Commonwealth, *Parliamentary Debates*, Senate, 28 March 1968, 457 (Reginald Wright).

211 See above n 63 and accompanying text.

212 See above nn 89–93 and accompanying text. Cf above nn 94–95 and accompanying text.

213 See Current Topics (n 157).

214 See generally Commonwealth Treasury of Australia, 'Australia's Century since Federation at a Glance' [2001] (Centenary) *Economic Roundup* 53.

215 See: *Privy Council (Limitation of Appeals) Act 1968* (Cth); *Privy Council (Appeals from the High Court) Act 1975* (Cth).

216 Sir Garfield Barwick, 'Foreword' in JM Bennett, *Keystone of the Federal Arch: A Historical Memoir of the High Court of Australia to 1980* (Australian Government Publishing Service, 1980) v, vi ('Foreword').

217 See Gibbs (n 167) 681–2.

combined with the persistent need for an affordable forum for litigants in the states won out over ephemeral budgetary concerns.

B *Judicial Independence*

Closely tied to the financial friction between the executive and judicature, was the broader issue of judicial accountability versus independence from the other arms of government. Both the challenges of 1905 and 1931 to the Court's sitting practices emerged from the executive branch. In 1979, it occurred at Barwick CJ's instigation, which required executive intercession. Only in the 1930s did circuits actually halt, albeit temporarily and with the Court's consent. The Court's freedom to determine the site and manner of its sittings throughout these conflicts was framed as a fundamental aspect of judicial independence, which was guarded jealously — even if by the 1970s the ironclad assurance of extramural sittings in all states had become honoured more in the breach.

Symon's 1905 challenge to circuits classically illustrates the nature of the judicial independence debate which would continue to frame the discourse up to the late 20th century. Symon believed that judicial independence did not extend beyond reasoning and tenure; 'independence' was not 'a shield behind which Judges may seek shelter in respect of their non-judicial acts or excessive expenditure'.[218] By contrast, while the bench was willing 'to give due weight to the views and wishes of the Government, even in matters intrusted to [the Court's] uncontrolled discretion', attempts 'to instruct and censure the Justices of the High Court with respect to the exercise of statutory powers conferred upon them in their judicial capacity' could only be a fetter on independence.[219] As Susan Priest concludes, the actions of Griffith CJ set a foundation for judicial independence, which would be built upon going forward.[220]

The consequence of the animus generated by this initial skirmish was that the next time the executive sought to encroach upon circuits, it came clothed not as fiat but as a cautious request. As emphasised before, these injunctions occurred by consent; the judges agreed for restrictions to be made by the Governor-General in 1931, and from the outbreak of war in 1939, voluntarily tapered their own travel in the national

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218 Letter from JH Symon, Attorney-General to Sir SW Griffith, Chief Justice, 22 February 1905, reproduced in Parliament of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 13, 13.

219 See letter from SW Griffith, Edmund Barton and RE O'Connor, Justices of the High Court to the Attorney-General, 15 February 1905, reproduced in Parliament of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 12, 12.

220 Susan Priest, 'Archives, the Australian High Court, and the "Strike of 1905"' (2013) 32(2) *University of Queensland Law Journal* 253, 262.

interest.[221] In this sense, there was no attack upon judicial independence, but rather members of the Court offered a margin of appreciation to the Commonwealth considering the exigencies of the time.[222] In wartime particularly, the normal rules of engagement between the judiciary and the executive became suspended — a reality illustrated by the multiplicity of extra-judicial public service work undertaken by sitting Court judges, despite prior (and continuing) judicial reticence.[223] Although some concessions had been made, the Court emerged from wartime, as far as administrative freedom went, no worse for wear.

Although the salient role of Barwick CJ in the 1979 challenge to circuits is detailed above, it was to the Fraser Government that he looked to intercede to cement the administrative powers of the Court in the Chief Justice and in so doing permanently install the judges in Canberra.[224] This prompted dissent from the puisne justices which influenced the executive to to push back against the Chief Justice's proposals, maintaining the current system.[225] The executive ended up acknowledging the Court's administrative independence from both the government and Chief Justice. Accordingly, the *HCA Act* provided that the powers of the Court 'may be exercised by the Justices or by a majority of them',[226] while ensuring executive non-interference with staffing or application of monies.[227] These measures were intended to ensure a judiciary 'free from any practical constraints or pressures imposed by other branches so that it can fulfil its functions without fear of reprisal'.[228] There was no mention of any mandatory residence in Canberra.[229] Thus, the 1979 challenge

221 There being no Order-in-Council in force since 1933. See above Part II(C).

222 Noting also that Justices Rich, Dixon and McTiernan, while refusing to accept a diminution in emoluments in view of s 72(iii) of the *Australian Constitution*, voluntarily repaid part of their salaries until the end of the Great Depression in circumstances where remuneration had remained fixed at £3,000 since 1903 (until 1947, when it would rise to £4,000): see George Winterton, *Judicial Remuneration in Australia* (Australian Institute of Judicial Administration, 1995) 22 n 188, 37.

223 See: JD Holmes, 'Royal Commissions' (1955) 29(4) *Australian Law Journal* 253, 272 (Sir Owen Dixon); Graham Fricke, 'The Knox Court: Exposition Unnecessary' (1999) 27(1) *Federal Law Review* 121, 127–8. See also: Chief Justice Murray Gleeson, 'The Right to an Independent Judiciary' (2006) 16(4) *Commonwealth Judicial Journal* 6, 14; *Wainohu v New South Wales* (2011) 243 CLR 181, 199 [24] (French CJ and Kiefel J).

224 See also Galligan, 'The Barwick Court' (n 161) 219.

225 Buti (n 156) 199. See also Martin Clark, 'The Chief Justice of Australia? The Role of the Chief Justice of the High Court' (2009) 11(4) *Constitutional Law and Policy Review* 161, 162–3.

226 *HCA Act* (n 143) s 46(1).

227 Ibid pts III, V.

228 See Commonwealth, *Parliamentary Debates*, House of Representatives, 13 November 1979, 2917–8 (Philip Ruddock).

229 Cf *Supreme Court Act*, RSC 1985, c S-26, s 8, a measure historically unpopular with Canadian judges: see Edward G Hudon, 'Growing Pains and Other Things: The Supreme Court of Canada and the Supreme Court of the United States' (1986) 17(4) *Revue Générale de Droit* 753, 765–6.

served, ironically, to crystallise and entrench a broader view of judicial independence setting it administratively and operationally apart from the executive and legislative arms.[230]

In one sense, this was in accordance with the Griffith Court's (and its successors') juristic independence.[231] But, crucially, this conception of judicial independence was secured in the absence of any express constitutional protections on the operational independence of courts.[232] Insistence by the Justices on the right to commute from their states and conduct circuits was therefore a significant incident of the Court's judicial independence from the other branches of government. The Justices believed that administrative freedom should be coterminous with the deference given to adjudicatory functions; and this attitude was embodied in the maintenance of circuits, which exercised both forms of independence against executive encroachment. As Gageler J observed (as the Chief Justice was then), the Court's view has been subsequently borne out in the consensus that adjudicatory independence must pair with administrative freedom, with the latter as 'a functional extension' of the former.[233] It has also been suggested that 'allow[ing] Justices to maintain a principal place of residence away from Canberra' (itself a facilitator to circuits) has helped the Court avoid being 'influenced by the prevailing pro-government sentiments in Canberra'.[234]

C *Federal Compact*

The Court's role as 'keystone of the federal arch'[235] imported with it a three-pronged relationship with the colonies-turned-states. The first was, at least prior to the *Engineers' Case*,[236] the Court's role as an independent arbiter of Commonwealth–state disputes in the federalist mould. The second was the Court's political role in bringing together a unified Commonwealth (to the extent possible within a federal

230 See generally: Justice RE McGarvie, 'Judicial Responsibility for the Operation of the Court System' (1989) 63(2) *Australian Law Journal* 79, 94; TF Bathurst, 'Separation of Powers: Reality or Desirable Fiction?' (Conference Paper, JCA Colloquium, 11 October 2013) 6 [16].

231 See especially: *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 685 (Toohey J); *Harris v Caladine* (1991) 172 CLR 84, 159 (McHugh J). See generally: *New South Wales v Commonwealth* (1915) 20 CLR 54; *The Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Kable v DPP (NSW)* (1996) 189 CLR 51.

232 See Rebecca Ananian-Welsh and George Williams, 'Judicial Independence from the Executive: A First-Principles Review of the Australian Cases' (2014) 40(3) *Monash University Law Review* 593, 612.

233 Gageler (n 52) 1130–1.

234 See Mason, 'The High Court of Australia' (n 9) 868.

235 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10967 (Alfred Deakin, Attorney-General).

236 *The Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers' Case*').

compact) through discharge of its judicial functions in the states. The third was the maintenance of a unified legal system,[237] operating on state and federal law in an appellate (and primary) capacity. These factors were crucial justifications towards the continuance of the Court's footprint in the outlying states.

The initial challenge for the Court was securing state acceptance. That it might be accused of being an agent of centralism was a serious concern at the Convention Debates,[238] and contributed to the maintenance of Privy Council appeals.[239] During the Judiciary Bill 1903 debates it was feared that the Court's discretion to decide applications to remit matters back to the capital would lead to the 'centralization of justice'; the circuit system was expressly included to overcome this concern.[240] The Court's early practice reflected this aversion to centralism. Until 1920, the tenor of the Court's decisions was predominantly federalist, preserving the ambit of state regulation,[241] even if Symon believed the circuits themselves were tantamount to 'an instrument of Federal propaganda'.[242] In any event, members of the legal profession in all states continued to regard circuits as an extension of such federalist sympathies towards the states, where '[t]hose who feared for the future of State powers were appeased' by them.[243] By the time of Griffith CJ's death in 1920, the Court was held in high esteem[244] and regarded as generally receptive to state concerns.[245] However, the ascendancy of constitutional textualism following the

237 See generally Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10965 (Alfred Deakin, Attorney-General).

238 See *Official Report of the National Australasian Convention Debates*, Adelaide, 30 March 1897, 307 (Andrew Inglis Clark).

239 See *Official Report of the National Australasian Convention Debates*, Adelaide, 26 March 1897, 201 (Henry Dobson). Cf *Australian Constitution* s 74.

240 See Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1903, 624–5 (Patrick Glynn).

241 See Angus J O'Brien, 'Wither Federalism: The Consequences and Sustainability of the High Court's Interpretation of Commonwealth Powers' (2008) 23(2) *Australasian Parliamentary Review* 166, 169–70.

242 Letter from JH Symon, Attorney-General to Sir SW Griffith, Chief Justice, 22 February 1905, reproduced in Parliament of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 13, 15.

243 Bennett (n 4) 102.

244 See: Commonwealth, *Parliamentary Debates*, House of Representatives, 11 August 1920, 3423 (Henry Gregory); Commonwealth, *Parliamentary Debates*, House of Representatives, 12 October 1920, 5510 (Sir Robert Best).

245 See 'More Centralisation', *The Mercury* (Hobart, 30 August 1915) 4. See generally: 'High Court Judges', *The Examiner* (Launceston, 27 December 1912) 4; 'Legislative Powers of the Commonwealth & States by the Hon Sir John Quick', *The Geelong Advertiser* (Geelong, 6 December 1919) 9.

Engineers' Case meant the rejection of a federalist approach to the resolution of Commonwealth–state disputes.[246]

Even after the *Engineers' Case*, however, the Court's constitutional role as a unifying organ of the Commonwealth continued undiminished. It was a mechanism directed towards a practical concern with state secessionism. As Edmund Barton commented:

> One of the strongest guarantees for the continuance and indestructibility of the Federation is that there should be some body of this kind constituted which, instead of allowing the States to fly to secession because they cannot get justice in any other way, will enable them to settle their differences in a calm judicial atmosphere.[247]

As late as 1933, John Latham would opine: 'I think it is unfortunate, particularly at the present time when separatist movements are developing, that four of the capitals of Australia should have no sittings of the High Court'.[248] The federal 'footprint' remained a critical aspect of the itinerant Court's raison d'être until the devolution of that function to the Federal Court.

The Court in its appellate capacity also provided a travelling, corrective influence on the states. In contrast to the US Supreme Court, it had untrammelled jurisdiction to hear appeals on both federal and state matters.[249] As the state jurisdictional cross-vesting scheme shows,[250] the Court was intended to slot into the system of state adjudication.[251] Following *Parkin v James*,[252] the Court held that appeals lay as of right to the High Court from a decision of even a single Supreme Court justice.[253] The Court's jurisdiction thus encompassed state Courts of Appeal, which was reflected in its circuits. *Tait v The Queen* illustrates the Court's overt usage of mobility to intervene in state law.[254] In 1961, Mr Tait was sentenced to hang

246 See generally Greg Craven, 'Cracks in the Façade of Literalism: Is There an Engineer in the House?' (1992) 18(3) *Melbourne University Law Review* 540.

247 *Official Report of the National Australasian Convention Debates*, Adelaide, 23 March 1897, 25 (Edmund Barton).

248 Bennett (n 4) 103, quoting Memorandum of JG Latham, Attorney-General, 17 July 1933, archived at National Archives of Australia, item 31/1038.

249 See *Judiciary Act 1903* (Cth) s 35. See generally Eugene Gressman, 'The Jurisdiction of the Court: The United States Supreme Court' (1980) 3(1) *Canada–United States Law Journal* 29.

250 See *Judiciary Act 1903* (Cth) ss 38–9.

251 See: Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1903, 608–9 (Alfred Deakin, Attorney-General); Kenny (n 147) 1001.

252 *Parkin v James* (n 152).

253 Ibid 329–30 (Griffith CJ for the Court). This would change with reforms to the *Judiciary Act* from the 1970s: see above n 152 and accompanying text.

254 (1962) 108 CLR 620.

for murder, which was unsuccessfully challenged in the Victorian Supreme Court. An appeal lay to the High Court, prompting three justices to fly down to Melbourne to assemble an ad hoc full bench, less than 24 hours before Tait's hanging. The Court stayed the execution and adjourned the case. The special leave hearing was then listed for Sydney, on a day which (likely deliberately) happened to be Melbourne Cup Day. Tait's sentence was commuted on the eve of the hearing.[255]

Importantly, since the enactment of the *Judiciary Act 1903*, the Court had jurisdiction to hear first instance federal matters. A majority came to include taxation and intellectual property.[256] As Griffith CJ explained, the Court was 'not merely an Appellate Court, but a Court of original jurisdiction, and the Justices are called upon to discharge duties in every respect analogous to those of the State Judges'.[257] This meant a '"dual" system' where 'a litigant could start proceedings either in the High Court or a State court'.[258] Consequently, first instance trials became interspersed amongst manifold Full Court, interlocutory and special leave commitments. This required the Court to travel through necessity, due to the need to take evidence,[259] and on the rare occasion, conduct jury trials.[260] Such work directly led to smaller Full Court benches for outlying states, as some justices were usually left behind in Sydney and Melbourne to provide original jurisdiction coverage.[261] Thus, the Federal Court, as Barwick prophesied,[262] singlehandedly liberated the High Court of a vast trough of matters which had come to exert a gravitational pull of their own away from constitutional and apex appeals, not only in terms of workload but also geographical availability. The abolition of appeals as of right,[263] and relegation

255 See Keith Mason, *Old Law, New Law: A Second Australian Legal Miscellany* (Federation Press, 2014) 139–41.

256 See, eg: *Hayes v Federal Commissioner of Taxation* (1956) 96 CLR 47 (taxation, before Fullagar J); *Federal Commissioner of Taxation v McPhail* (1968) 117 CLR 111 (taxation, before Owen J); *F Hoffman-La Roche & Co AG v Commissioner of Patents* (1971) 123 CLR 529 (intellectual property, before Gibbs J); *Meyers Taylor Pty Ltd v Vicarr Industries Ltd* (1977) 137 CLR 228 (intellectual property, before Aickin J). See also *Suehle v Commonwealth* (1967) 116 CLR 353 (tort, before Windeyer J).

257 Letter from SW Griffith, Chief Justice to the Attorney-General, 22 June 1905, reproduced in Parliament of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 34, 34.

258 Sir Nigel Bowen, 'Federal and State Court Relationships' (1979) 53(12) *Australian Law Journal* 806, 806.

259 See Law Reform Commission, *Reform of Evidence Law 1980* (Discussion Paper No 16, 19 July 1980) 2–3.

260 See Mark Lunney, 'The Limits of Political Libel: Conscription and the *Ryan v The Argus* Libel Trial' (2017) 41(2) *Melbourne University Law Review* 758, 773. See also *Cunningham v Ryan* (1919) 27 CLR 294, 295.

261 See Sawer (n 145) 39.

262 See Barwick, 'The Australian Judicial System' (n 149) 19.

263 See *Judiciary Amendment Act 1976* (Cth) ss 5–6.

of first instance matters to the Federal Court,[264] must also be considered as salient reasons for the decline in circuits, and not just the Canberra shift.

D *Institutional Proximity*

What the foregoing adverts to is the philosophy that the Court ought to be made available to litigants in all locations. The financial clashes between the executive and judicature revolved around whether the Commonwealth or litigants should bear the burden of travel. Judicial independence was at stake in whether the Court ought to dispense justice 'door-to-door' on its own dictates, or at the seat of government. As an apex court for both federal and state law, the Court aimed to supply comprehensive authority in its jurisprudence for all matters. However, the Court's ability to maintain state presences had an additional symbolic effect of considerable power in enhancing the Court's perceived proximity to and efficacy on provincial matters. Conversely, installation in Canberra may have lent institutional prestige to the Court at the expense of this symbolism.

The conventional value of circuits is that '[t]hey provide an essential link between the serving Justices and the legal profession and litigants in the outlying States'.[265] Chief Justice Griffith stressed that justices 'should not be a mere abstract body, a figment of the brain, but real live human beings, not only willing to be looked at, but desirous of making ourselves acquainted with the different parts of Australia'.[266] These opinions were best encapsulated by the remarks of Sir Victor Windeyer while in Canada:

> It certainly produces some inconveniences and perhaps some loss of speed and efficiency in adjudication. But it has done much to make the court recognised and accepted as a part of the legal system of Australia and to promote among members of the legal profession and the judges and the public in the several States a sense of the unity of the nation through the basic unity of its law. And my own view, based upon my own experience, is that it has been useful too for us members of the High Court. We were able to meet regularly and associate with the Judges of the Supreme Courts and to know the leading practitioners in each State, and to understand affairs in far flung places.[267]

Thus, the benefits of a travelling court accrued not only to litigants, but also the state legal professions. Kirby, reflecting on his time on the Court, recalled the regularity and institutional benefits of traditional events coinciding with court sittings, including

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264 *Federal Court of Australia Act 1976* (Cth) s 19; *Judiciary Act 1903* (Cth) s 39B.

265 Kirby, 'Law at Century's End' (n 139) 8.

266 'The Commonwealth High Court', *The Adelaide Observer* (Adelaide, 28 November 1903) 21.

267 Sir Victor Windeyer, 'Some Aspects of Australian Constitutional Law' (JA Weir Memorial Lecture, University of Alberta, 13–14 March 1972) 65–6, quoted in Bennett (n 4) 104.

dinners with local judges, Bar and Law Society events, and university functions.[268] It was said that Wilson J's chancellorship of Murdoch University during his tenure was to impress upon those agitating for the removal of the justices to Canberra 'that there were important reasons' for members to continue residing in their home states.[269] Certainly, Gibbs considered it possible that qualified persons for appointment to the Court might be deterred if forced to sever ties from their home states.[270]

Undoubtedly, proximity was a critical feature of the value conferred by circuits. Deakin said, '[l]aw is only the reflection of the community from which it springs … The laws which we pass possess an Australian atmosphere, and require to be interpreted with a knowledge of the circumstances under which they are passed and applied'.[271] In response, however, Sir Joseph Abbott raised a countervailing issue: 'I ask those who contend that local knowledge is a great advantage, what benefit would local knowledge be if they had to retain counsel in Sydney to advocate their interests in an appeal to the High Court … [or if] Western Australians had to, come to Victoria to appeal to the High Court?'[272] Circuits reconciled these two viewpoints. For litigants, itinerancy was essential as they 'should have the advantage of the services of their own counsel, and the advantage of seeing for themselves how their cases fare'.[273] For the bench, circuits enabled a better understanding of local conditions, especially in state law issues where matters of property, contract, tort or crime might 'have a more significant local element'.[274]

Of course, opinion was never uniform on the institutional benefit of circuits. Justice Starke was a prominent dissenter. He considered '[t]he movements of the court mean nothing to the public anywhere'.[275] Instead, the advantages were outweighed by inconvenience, disruption and inefficiency.[276] The judges often highlighted

268 See Kirby, 'Remembrance of Times Past' (n 137) 32.

269 See Robert Nicholson, 'Sir Ronald Wilson: An Appreciation' (2007) 31(2) *Melbourne University Law Review* 499, 513.

270 See Gibbs (n 167) 682.

271 Commonwealth, *Parliamentary Debate*s, House of Representatives, 9 June 1903, 594 (Alfred Deakin, Attorney-General).

272 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 11 March 1898, 2290 (Sir Joseph Abbott).

273 Dixon, 'Address upon the Occasion of First Presiding' (n 120) 252. See also above Part III(A).

274 See Bowen (n 258) 813.

275 Memorandum of Justice Starke, 'Sittings of the High Court in the Capitals of the States', October 1933, archived at High Court Registry, Melbourne, quoted in Bennett (n 4) 103.

276 Memorandum of Justice Starke, 'Sittings of the High Court in the Capitals of the States', October 1933, archived at High Court Registry, Melbourne, discussed in Bennett (n 4) 103.

the arduous hardships of incessant travel[277] — as Clem Lloyd observed, '[e]ven the congenial McTiernan raised an occasional objection to Latham's scheduling', thinking the pace '"too revolutionary"'.[278] There is also the question of whether there truly was a federal 'ivory tower' which circuits needed to keep in abeyance. As remarked upon the eve of the Court's removal to Canberra:

> many public servants resident in Canberra were amused or bemused, whichever be the correct word, by the underlying idea that residence in Canberra necessarily isolates one from the problems of State capital cities. The majority of the top echelons of the Canberra bureaucracy do constantly visit all State capitals, and have, in most instances, a closer acquaintance of the general practical problems affecting all of these as a whole than a person who is merely resident in one State capital.[279]

Further, the Court's travels troubled both Barwick CJ and Starke J from a reputational standpoint. Justice Starke claimed a lack of independent accommodation depreciated the Court's prestige,[280] while Barwick CJ thought it was beneath the Court's dignity to travel.[281]

The bulk of opinion post-relocation to the Court's Canberra premises suggests an appreciation in prestige. Contemporaries suggested that the move 'enhanced the public status of the Court and its ability to devote its attention to the most significant matters',[282] and that 'public interest in and awareness of the Court and its activities are likely to be changed. It is likely hereafter to bulk larger in public consciousness'.[283] The High Court building has spawned an outpouring of architectural analysis foregrounding the importance of its construction and design as a means of advancing the symbolic importance, institutional independence and unity

277 See, eg: Letter from SW Griffith, Edmund Barton and RE O'Connor, Justices of the High Court to the Attorney-General, 14 February 1905, reproduced in Parliament of Australia, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court* (Parliamentary Paper No 26, 24 August 1905) 10, 11; Memorandum of Justice Starke, October 1933, archived at High Court Registry, Melbourne, discussed in Bennett (n 4) 103; Letter from Justice Rich to Chief Justice Latham, 15 January 1937, archived at National Library of Australia, Papers of Sir John Latham, ref 1009/62. See generally Justice JB Thomas, 'Epistle from a Judge on Circuit' (1987) 10(1) *University of New South Wales Law Journal* 173.

278 Lloyd (n 101) 180.

279 Current Topics (n 157) 56.

280 Memorandum of Justice Starke, October 1933, archived at High Court Registry, Melbourne.

281 See Barwick, 'The State of the Australian Judicature (1980)' (n 164) 295.

282 Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987) 261.

283 Barwick, 'Foreword' (n 216) v. Cf Ingrid Nielsen and Russell Smyth, 'What the Australian Public Knows about the High Court' (2019) 47(1) *Federal Law Review* 31.

of purpose reflective of the Court's status.[284] While this article's focus remains on the historical perspective, the architectural dimension to judicial institutions should not be ignored, and is a subject which has merited substantial scholarly attention.[285]

In a retrospective, Kirby J notes that '[t]he creation of the Court's permanent building in Canberra undoubtedly had an effect which went beyond the more efficient operations that it permits', impressing upon those who work in it the significance of the institution.[286] Chiefly, this was because

> [w]hilst the High Court, and the mostly elderly gentlemen who made it up, moved around Australia in regular contact with the judiciary and the Bar in the scattered communities of the Commonwealth, their self-image was, I think, very

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284 See generally: 'Part 3: The Artistry', *Oral History Podcast of the 40th Anniversary of the High Court Building* (History at Work, Sound Environment, LookEar and Line of Sight Heritage, 19 May 2021) <https://www.hcourt.gov.au/about/podcast-3>; 'Part 4: The Vibe', *Oral History Podcast of the 40th Anniversary of the High Court Building* (History at Work, Sound Environment, LookEar and Line of Sight Heritage, 19 May 2021) <https://www.hcourt.gov.au/about/podcast-4>; Philip Goad, 'Architecture of Court Building: An Analysis' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 29; Georgie Juszczyk, 'Power on a Pedestal: How Architecture Creates, Reinforces, and Reflects Power Structures in the Legal System' (2021) 11(1) *ANU Undergraduate Research Journal* 39; Gaia Ewing, 'Law, Art, and Time in the Architecture of the High Court: A Chronotopic Analysis' (2021) 11(1) *ANU Undergraduate Research Journal* 58. For a sustained exploration of the historical design process, see Simon Kringas, 'Design of the High Court of Australia' (PhD Thesis, University of Sydney, 2017).

285 See generally: Rosemary Annable, *A Setting for Justice: Building for the Supreme Court of New South Wales* (UNSW Press, 2007); Graham Brawn, 'The Changing Face of Justice: The Architecture of the Australian Courthouse' (2009) 98(5) *Architecture Australia* 39; Julian R Murphy, 'Architecting Aboriginal Access to Justice: The Courts as Doors to the Law' (2016) 18(2) *Flinders Law Journal* 269; Peter D Rush, 'The Forensic Precinct: Notes on the Public Address of Law' (2016) 20(1) *Law Text Culture* 216; Justice Melissa Perry, 'Introductory Remarks' (Speech, Sherman Centre for Culture and Ideas Architecture Hub, 14 October 2019). As to international perspectives, see generally: Julienne Hanson, 'The Architecture of Justice: Iconography and Space Configuration in the English Law Court Building' (1996) 1(4) *arq: Architectural Research Quarterly* 50; Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Routledge, 2011); Wessel le Roux, 'The Right to a Fair Trial and the Architectural Design of Court Buildings' (2005) 122(2) *South African Law Journal* 308; Judith Resnik, Dennis Curtis and Allison Tait, 'Constructing Courts: Architecture, the Ideology of Judging, and the Public Sphere' in Anne Wagner and Richard K Sherwin (eds), *Law, Culture and Visual Studies* (Springer, 2013) 515; Jonathan Simon, Nicholas Temple and Renée Tobe (eds), *Architecture and Justice: Judicial Meanings in the Public Realm* (Routledge, 2016); Keith J Bybee, 'Judging in Place: Architecture, Design, and the Operation of Courts' (2012) 37(4) *Law & Social Inquiry* 1014. The above is not intended to be exhaustive, and is only intended to give a snapshot of the wide analysis this topic has attracted.

286 Kirby, 'Law at Century's End' (n 139) 8–9.

> largely that of circuit judges after the traditions of the working courts whom they supervised. But when the Court moved to its permanent home in Canberra and was placed squarely in the constitutional triangle, with its clear physical relationship to the Parliament and to the offices of the Executive Government, a new and powerful symbolism was established.[287]

This comparison sheds light on how there was, for a time, a conscious trade-off made by the Court in its circuits by favouring accessibility over prestige — hewing to the principle that 'a Court is a Court even if it be held under a gum-tree'.[288]

IV Waning Relevance of Circuit Sittings?

As the High Court nears its 120th anniversary, the question arises whether there is continuing utility to circuits. It is uncontroversial to say that conditions have changed since 1903. The efficiency of transportation and telecommunications has improved; judicial exploitation of which has been enabled by a mature Commonwealth with considerable resources at its disposal. This has benefited the accessibility of justice, which might be said to offset any detriment flowing from a decline in circuits. However, to focus on the practicalities alone would have shut down the circuits from the very outset.[289] This Part acknowledges the altered conditions of the Court's present-day, but posits there remains a residual benefit from circuits.

The most notable change has been the conquest of the tyranny of distance. 'Australia is a large place', Deakin commented, 'and travelling is very expensive'.[290] The most daring circuit leg, Sydney to Perth, is over 3,000 kilometres by air. From Griffith CJ to Gavan Duffy CJ, the Court travelled by steamer and train, with all the attendant difficulties.[291] Considering the Convention and *Judiciary Act* debates, the Court in fact probably travelled because of such distances; to make justice less remote when the only alternative was over 16,000 kilometres away on Downing Street. Travelling also reduced the early Court's reliance on mail for the transfer of documents between registries. As Alex Castles observed, '[t]yranny of distance tells you something fundamental about law in Australia … The tyranny in distance was a fundamental thing that changed the various structures of our law'.[292] However, by the time of the Latham Court, interstate air travel had become a frequent occurrence.[293] In the

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287 Justice Michael Kirby, 'Sir Anthony Mason Lecture 1996: A F Mason — From *Trigwell* to *Teoh*' (1996) 20(4) *Melbourne University Law Review* 1087, 1093.

288 *Comyn v Willshire* (1875) 9 SALR 161, 168 (Stow J).

289 See above Part II(A).

290 Commonwealth, *Parliamentary Debate*s, House of Representatives, 16 December 1912, 7152 (Alfred Deakin).

291 See Lloyd (n 101) 179.

292 Annesley Athaide, 'Alex Castles on the Recognition of Australian Legal History 1955–1963' (2003) 7(1) *Australian Journal of Legal History* 107, 147. See generally Geoffrey Blainey, *The Tyranny of Distance* (Pan Macmillan, 2001).

293 Ayres, *Owen Dixon* (n 112) 97.

1960–70s, air travel was a ubiquitous experience of the circuits, leading to increased frequency of state appeals.[294] Barwick noted that for all practical purposes, Perth had become closer to Melbourne than parts of Victoria not served by intrastate airlines.[295] Related was the 'paradox' that cheap international air travel had dramatically increased recourse by Australian litigants to the Privy Council when the facility for doing so was being dismembered.[296] These developments illustrate the practical necessity of an itinerant Court prior to air travel, and its subsequent decline in movement.

Courtroom technology has been a prominent development following the Court's relocation to Canberra. While the contemporaneous effect of the COVID-19 pandemic on hearings has merited much attention, technological integration has in fact been underway for some time. As early as 1986, the usage of video-link for special leave hearings was proposed, consistent with foreign practice.[297] This was formally adopted by Mason CJ in 1987, subject to ongoing 'acceptance by the legal profession'.[298] Such acceptance was very much forthcoming.[299] Through the 1990s, the Court was hearing special leave applications for Brisbane, Adelaide, Perth and Hobart by video-link prior to in-person appeals.[300] By the 2000s, the hearing of video-link applications from the capital was cemented practice.[301] This early adoption left the present-day Court well-placed to persist with state special leave applications throughout the pandemic lockdowns.[302] After suspending circuits and Canberra sittings from April to June 2020,[303] the Court held its first ever remote Full Court hearing on 15 April 2020.[304] There is now a videoconferencing protocol for practitioners,[305] while Full Court hearings over video-link occurred with

294 See Barwick, 'Foreword' (n 216) vi.

295 Barwick, 'The Australian Judicial System' (n 149) 20.

296 Bennett (n 4) 96. See also Marr (n 121) 124.

297 See GC Shannon, 'Report on Visit to Supreme Courts of Canada and the United States by the Clerk of the High Court' (Report, High Court of Australia, September–October 1986).

298 See Daryl R Williams, 'Use of Video Recordings and Video Links by Courts and Tribunals' (1987) 17(2) *University of Western Australia Law Review* 257, 262.

299 See Michael Kirby, 'The Future of Courts — Do They Have One?' (1999) 41(3–4) *Journal of the Indian Law Institute* 383, 385.

300 See Sir Anthony Mason, 'The Regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal' (1996) 15(1) *University of Tasmania Law Review* 1, 5.

301 See, eg, High Court of Australia, *Annual Report 2006–07* (Report, 2007) 4, 17–18.

302 High Court of Australia, 'HCA Response to COVID-19' (Notice, March 2020): This source is no longer publicly accessible on the High Court's website.

303 Ibid.

304 Transcript of Proceedings, *Cumberland v The Queen* [2020] HCATrans 49.

305 High Court of Australia, 'HCA Video Connection Hearings: Protocol', *High Court of Australia* (Protocol, August 2021).

regularity throughout 2021,[306] particularly where, as discussed before, the Justices were confined at home from June 2021 to March 2022 due to successive COVID-19 variant outbreaks.[307] The sum result has been nearly two years in which the Court has had no occasion to resume its circuits — and seemingly little reason even after resumption of in-person hearings. While advocates might bemoan the shortcomings of online advocacy,[308] there may be little practical inducement for the Court to resume circuits which have had less robust business in recent years.

However, the continuance of circuits presents more diffuse benefits. While many issues intended for circuits to solve have been mitigated with the passage of time, Gleeson CJ directly addressed this tension between tradition and modernity in 2005:

> Throughout the 20th century, and even after the establishment in 1980 of the Court's own building and permanent headquarters in Canberra, the practice of circuit sittings continued and it continues up to the present. Some people ask the question, 'Why does the High Court sit on circuit in State capitals?' They might also ask the question, 'Why does the High Court sit at all?' For years technology has existed that would permit us all to work from home, but it is part of the function of a court to sit to conduct its business in public and to expose itself and its reasoning to the public gaze and that is why the High Court sits on circuit.[309]

Such an assessment is prescient where recent empirical research suggests hearings by video-link may make it more difficult for a judge to maintain the authority of the court, or to engage with the community at large.[310]

Comments on the 'public gaze' represent a remarkable continuity of opinion from the sentiments of Griffith in 1903.[311] The words of Kiefel CJ in 2018 reflect the current view of the Court in much the same, if slightly qualified, terms:

> The Justices of the Court appreciate the importance of circuits not only to the profession but to the public more generally. It is sometimes suggested that we should undertake them more often, but it needs to be understood that the considerable cost associated with circuits must be weighed against the matters

306 See, eg: *Chetcuti v Commonwealth* (2021) 272 CLR 609; *Palmer v Western Australia* (2021) 274 CLR 286; *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219. See 'Court Lists', *High Court of Australia* (Web Page) <https://www.hcourt.gov.au/registry/court-lists>.

307 See above nn 192–5 and accompanying text.

308 See Michael Legg and Anthony Song, 'The Courts, the Remote Hearing and the Pandemic: From Action to Reflection' (2021) 44(1) *University of New South Wales Law Journal* 126, 152–3.

309 Transcript of Proceedings, *Ceremonial: Final Sitting of the High Court in Supreme Court of South Australia* [2005] HCATrans 571.

310 See Emma Rowden and Anne Wallace, 'Remote Judging: The Impact of Video Links on the Image and the Role of the Judge' (2018) 14(4) *International Journal of Law in Context* 504, 515–20.

311 See above n 266 and accompanying text.

> available to be heard at a given time. That said, any opportunity to undertake a circuit is given careful consideration.[312]

Ultimately, this may just be the ineluctable force of history. As Kirby has observed, the Court's circuits are very much in character with the Australian legal system's English inheritance, concluding, '[t]he value of sending judges around the country was recognised in England from the reign of Henry II. … As Queen Elizabeth II has said of her own office: "One has to be seen to be believed".'[313]

While COVID-19 might have obviated once and for all the issue of travelling costs, the other historical justifications of federal unity, judicial independence and, above all, the administration of tangible justice in the public eye, have maintained their resonance. The travelling Court services these aims in a way that remote conferencing could not. So long as this remains the case, circuits will likely continue.

Revisiting the introductory comparisons to the US and Canada, debate around circuits remains live even in jurisdictions which have not retained itinerancy. In the US, calls have been made for the reintroduction of circuit riding to the Supreme Court,[314] including a recent submission to the Biden Presidential Commission on Supreme Court reform pointing to the need to ensure 'justices are in regular contact with a broad set of Americans and their legal concerns'.[315] In Canada, the Supreme Court in 2019 sat outside of Ottawa for the first time in Winnipeg,[316] 90 years after a Manitoban advocate had suggested sitting in provincial capitals.[317] The Privy Council has recently begun travelling to jurisdictions including the Caribbean, in response to concerns of proximity and accessibility.[318] The possibility had been

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312 Transcript of Proceedings (n 182). See also High Court of Australia, *Annual Report 2018–19* (Report, 2019) 6. Perhaps it was no coincidence that these remarks were issued on the occasion of the Court's unprecedented sitting in Darwin: Transcript of Proceedings (n 182).

313 Kirby, 'Remembrance of Times Past' (n 137) 32.

314 See, eg, Steven G Calabresi and David C Presser, 'Reintroducing Circuit Riding: A Timely Proposal' (2006) 90(5) *Minnesota Law Review* 1386.

315 Center for American Progress, Written Testimony to the Presidential Commission on the Supreme Court of the United States (2021) 5.

316 Supreme Court of Canada, 'News Release' (News Release, 13 May 2019).

317 Topics of the Month, 'Supreme Court Appeals' (1930) 8(9) *Canadian Bar Review* 675, 676. This move was not without controversy: see Paul Warchuk and Bruno Gélinas-Faucher, 'Travelling Court' (16 September 2019) *Canadian Bar Association National Magazine* <https://www.nationalmagazine.ca/en-ca/articles/law/judiciary/2019/travelling-court>.

318 See Stephen Vasciannie, 'The Appellate Jurisdiction of the Caribbean Court of Justice' in Richard Albert, Derek O'Brien and Se-shauna Wheatle (eds), *The Oxford Handbook of Caribbean Constitutions* (Oxford University Press, 2020) 503, 50–12 [18.2.2]. Note that the Caribbean Court of Justice, created as a response to the Privy Council, is fully itinerant: see *Agreement Establishing the Caribbean Court of Justice*, opened for signature 14 February 2001, 2255 UNTS 319 (entered into force 23 July 2002) art III(3).

mooted as early as 1943,[319] and it is telling that it has been resurrected as many members of the Commonwealth have abolished Privy Council appeals.[320] Quite unexpectedly, considering the London-centricity of the antecedent House of Lords, even the Supreme Court of the United Kingdom has begun sitting in places such as Edinburgh, Cardiff and Belfast such that '[t]ravelling to other parts of the UK has now become an established part of the court's calendar'.[321] The revival of this custom elsewhere bears major significance for Australia's own adherence to circuits.

V Conclusion

This article concludes that itinerancy was an integral aspect of the High Court's role as 'keystone of the federal arch'.[322] Far from merely being a curious artefact of early Federation, the practice's survival throughout the last century despite numerous challenges suggests an enduring value proposition. As Bennett concludes, '[t]he presence of the court in State capitals did advance Australian unity, limit the expense of litigation in the court and serve the public interest well'.[323] Litigants were spared the cost of commuting across the country or briefing coastal counsel; procedural flexibility afforded a shield to judicial independence; centrifugal tendencies in the states were mollified while propagating the federal footprint; and the Court's reputation was markedly enhanced by its proximity to the people.

Of course, it must be acknowledged that modernity, while making circuit riding less inconvenient, has also seemingly reduced the marginal benefits. In particular, a significant development in the Canberra phase of the Court's history has been the advent of remote hearing technology. This raises the question of why the Court needs to maintain regular interstate sittings where, post-COVID-19, the same facility could be obtained through now-ubiquitous audio/video-link facilities in all of its registries. But it must be said that since 1980 it has never been mere incapacity to work remotely prompting the undertaking of circuits. As many of the Court's members have commented, a court is not just a workspace — it is a forum in which justice is shown to be administered. It seems the general view, at least among the judiciary, is that physical proximity is best-positioned to achieve this aim. Thus, the value in maintaining the tradition far exceeds any practical gain from wholesale abolition. In this respect, the position remains principally the same as in 1905, 1931

319 Rohit De, '"A Peripatetic World Court" Cosmopolitan Courts, Nationalist Judges and the Indian Appeal to the Privy Council' (2014) 32(4) *Law and History Review* 821, 821.

320 See also Daniel Clarry, 'Institutional Judicial Independence and the Judicial Committee of the Privy Council' (2012–13) 4(1) *UK Supreme Court Yearbook* 44, 55–7.

321 Lord Reed, 'The Supreme Court Ten Years On' (Bentham Association Lecture, University College London, 6 March 2019) 16.

322 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10967 (Alfred Deakin, Attorney-General).

323 Bennett (n 4) 105.

or 1979. While the commitment to circuits may be honoured more in the breach, the fact that they are undertaken at all in a time of technological reliance and fiscal rationalisation is significant in and of itself. Of course, it is readily conceded that there may be a time when circuits pass from the tangibly practical into the purely ceremonial. Nevertheless, much like that brutalist edifice sitting on the banks of Lake Burley Griffin, their significance for the functioning of the High Court, and by extension the administration of justice in the Commonwealth, cannot be minimised. As described before, itinerancy has already touched the recent practice of other apex courts. It would not be surprising if such courts turned to the Australian experience of circuit sittings for guidance. Should they do so, they will no doubt find much that is instructive in the Court's century-long history of itinerancy.

*Sirko Harder**

VALUING THE INCONVENIENCE RESULTING FROM THE TEMPORARY UNAVAILABILITY OF ONE'S PROPERTY

Abstract

A tort or breach of contract may temporarily deprive the owner of certain property of the use of the property, without the wrongdoer making use of the property themselves. Where the unavailability of the property to its owner has not generated tangible financial loss — which could be the subject of special damages — general damages for the loss of use, or the inconvenience of not having access to the property, may be awarded. The courts have used various methods to calculate such general damages, but they have often not explained why one particular method rather than a different one was used. This article examines the five methods that have been considered by the courts: (1) wasted expenditure; (2) depreciation; (3) interest on capital value; (4) letting value; and (5) the hypothetical cost of renting a substitute property. For each method, its acceptance or rejection by the Australian courts will be reviewed and its propriety as a matter of principle will be discussed.

I Introduction

A tort or breach of contract may temporarily deprive the owner of certain property (a chattel or real property)[1] of the use of the property,[2] without the wrongdoer making use of the property themselves.[3] For example, property

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1 In this article, the term 'property' encompasses both a chattel and real property.

2 This article assumes that the owner of the property would have been in possession of it in the absence of the defendant's wrong. A third party who has damaged a leased chattel is liable to compensate the hirer for any rent paid while the chattel was being repaired: *West Midlands Travel Ltd v Aviva Insurance UK Ltd* [2014] RTR 10, 135 [33] (Moore-Bick LJ) ('*West Midlands Travel*'); *Lee v Strelnicks* (2020) 92 MVR 366, 384 [72] (White JA) ('*Lee*').

3 This article is not concerned with a tortfeasor who has made unauthorised use of the plaintiff's property. In those circumstances, the court may award 'user damages', often calculated by reference to a reasonable hiring fee. For a discussion of the nature of such damages, see *Lewis v Australian Capital Territory* (2020) 271 CLR 192, 242–6 [144]–[148] (Edelman J) ('*Lewis*').

may be negligently damaged,[4] or a chattel sold may show defects, in each case requiring repair of the property and depriving the owner of its use while it is being repaired. Or a contractor may fail to complete building work on certain property by the contractually agreed date, thus depriving the owner of the property of its use during the period of delay. The property's temporary unavailability may cause its owner tangible pecuniary loss, which is in principle compensable. Thus, the owner can in principle claim damages for the loss of rental income,[5] the loss of other profit,[6] or the reasonable rent paid for a substitute property.[7]

Where the temporary unavailability of certain property has not generated tangible pecuniary loss for its owner,[8] general damages for the loss of use per se have been awarded,[9] as opposed to special damages for the tangible pecuniary consequences of the property's temporary unavailability.[10] This was first recognised by the House of Lords in *The Greta Holme*[11] and subsequent cases[12] in which a non-profit-earning ship was negligently damaged and could not be used during the time of repair. Australian and English courts have recognised the availability of general damages

4 Cases of nuisance will not be discussed in this article.

5 *Illawarra Hotel Co Pty Ltd v Walton Construction Pty Ltd* (2013) 84 NSWLR 410, 432 [127] (Barrett JA, Meagher JA agreeing at 411 [1], Ward JA agreeing at 435 [149]) ('*Illawarra Hotel*').

6 *Lonie v Perugini* (1977) 18 SASR 201, 205 (Bray CJ), 217 (King J).

7 *Arsalan v Rixon* (2021) 395 ALR 390, 398–9 [32]–[33] ('*Arsalan*').

8 General damages for the loss of use cannot be awarded in addition to special damages for the rent of a substitute property: *Calabar Properties Ltd v Stitcher* [1984] 1 WLR 287, 291 (Stephenson LJ, May LJ agreeing at 299) ('*Calabar*'); *Lee* (n 2) 370 [8] (Meagher JA).

9 Unless the loss of use had no impact on the plaintiff: *Alexander v Rolls Royce Motor Cars Ltd* [1996] RTR 95, 102 (Beldam LJ); or the plaintiff would have made a loss from using the property: *The Hebridean Coast* [1961] AC 545, 564 (Devlin LJ) ('*The Hebridean Coast*'); *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG* [2008] QSC 141, [938] ('*BHP Coal*').

10 This article uses the terms 'general damages' and 'special damages' with those meanings. The terms are used with very different meanings in other contexts: see Harold Luntz and Sirko Harder, *Assessment of Damages for Personal Injury and Death* (LexisNexis, 5th ed, 2021) 159–66 [1.8].

11 [1897] AC 596, 602 (Lord Halsbury LC) ('*The Greta Holme*').

12 *The Mediana* [1900] AC 113, 116 (Earl of Halsbury LC) ('*The Mediana*'); *The Marpessa* [1907] AC 241, 244 (Lord Loreburn LC) ('*The Marpessa*'); *The Chekiang* [1926] AC 637, 642 (Viscount Dunedin); *The Susquehanna* [1926] AC 655, 662 (Viscount Dunedin) ('*The Susquehanna*'); *The Hebridean Coast* (n 9) 551 (Lord Merriman P).

for loss of use in cases involving other types of chattel,[13] or real property.[14] General damages for the loss of use have also been awarded where a commercially used chattel became unavailable but no loss of profit was proved.[15] In Australia, they have been considered available not only in negligence actions but also in actions for breach of contract,[16] under the former *Trade Practices Act 1974* (Cth),[17] and under the *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*').[18]

In *Arsalan v Rixon* ('*Arsalan*'), discussed in Part II, the High Court of Australia rejected the term 'loss of use' and instead identified the (physical) inconvenience of not having access to the property and — in the case of an individual — loss of amenity in the sense of the loss of pleasure or enjoyment as the losses resulting from the temporary unavailability of certain property to its owner.[19] This article will use the term 'loss of use' when describing decisions in which that term was used, and will refer to the inconvenience of not having access to the property when discussing the law in the abstract.

While the availability of general damages for the inconvenience of not having access to certain property is now established in principle for chattels as well as for real property and — at least in Australia — for actions in contract as well as in tort, the measure of those damages is far from settled. Various methods have been entertained in the cases, but the choice of a particular method on particular facts has rarely been explained. An exception is *Leeda Projects Pty Ltd v Zeng* ('*Leeda Projects*'), where the Victorian Court of Appeal sought to justify a distinction between chattels and real property and between essential and non-essential property

13 See: *Millar v Candy* (1981) 38 ALR 299, 307–8 (Franki J), 312 (McGregor J) (car); *West Midlands Travel* (n 2) 127 [5] (public service bus); *Beechwood Birmingham Ltd v Hoyer Group UK Ltd* [2011] QB 357, 373 [49] (Potter P, Dyson and Maurice Kay LJJ agreeing at 375 [57]–[58]) ('*Beechwood Birmingham*') (car owned by motor dealer).

14 *Westwood v Cordwell* [1983] 1 Qd R 276, 279; *Bayoumi v Protim Services Ltd* (1998) 30 HLR 785, 791 (Swinton Thomas LJ, Mummery and Leggatt LJJ agreeing at 792); *Sweeney v R & D Coffey Pty Ltd* [1999] NSWCA 38, [26] (Mason P, Powell JA agreeing at [53], Fitzgerald AJA agreeing at [54]) ('*Sweeney*'); *Bella Casa Ltd v Vinestone Ltd* [2005] 108 Con LR 148, 157 [34] ('*Bella Casa*'); *Leeda Projects Pty Ltd v Zeng* (2020) 61 VR 384, 402–3 [58] (Kaye JA), 428–9 [174] (McLeish JA) ('*Leeda Projects*').

15 See: *Beechwood Birmingham* (n 13) and the cases cited in n 79.

16 *Yates v Mobile Marine Repairs Pty Ltd* [2007] NSWSC 1463, [85] ('*Yates*'); *Rider v Pix* (2019) 2 QR 205, 217 [34] (Flanagan J, Sofronoff P and Morrison JA agreeing at 208 [1]–[2]) ('*Rider*').

17 *Wyzenbeek v Australasian Marine Imports Pty Ltd (in liq)* (2019) 272 FCR 373, 407 [138] ('*Wyzenbeek*') (misleading or deceptive conduct).

18 *Vautin v By Winddown, Inc [No 4]* (2018) 362 ALR 702, 774 [316] (breach of consumer guarantees).

19 *Arsalan* (n 7) 394 [17]–[18].

in relation to the valuation of the loss of use.[20] For some of the methods that have been applied, it is not settled whether they are mutually exclusive or whether they can be applied cumulatively. Nor have the valuation methods found much attention in the literature.

This article will investigate the five different methods of valuing the loss of use that have been considered by the courts in various circumstances: wasted expenditure (Part III); depreciation (Part IV); interest on capital value (Part V); letting value (Part VI);[21] and the hypothetical cost of renting a substitute property (Part VII).[22] For each method, its acceptance or rejection by Australian courts will be reviewed and its propriety as a matter of principle will be discussed. It will also be examined whether all of the methods are mutually exclusive or whether some of them can be combined.

The individual arguments advanced in this article in relation to the various valuation methods make, taken together, three overall claims. First, it will be argued that there is no justification for choosing different valuation methods depending upon whether the cause of action is breach of contract or tort. While the aim of compensatory damages differs between contract and tort (placing the plaintiff in the position as if the contract had been performed as opposed to placing the plaintiff in the position as if the tort had not occurred),[23] this difference has no relevance to the valuation of the inconvenience of not having access to one's property. The task is to place a value on having possession of particular property during a particular period of time. It cannot make a difference to that value whether the defendant had breached a promise to provide the plaintiff with such possession or whether the defendant had forced the plaintiff out of an existing possession. A difference between contract and tort in the measure of general damages for the inconvenience of not having access to one's property should be present only where this is required on the facts

20 *Leeda Projects* (n 14) 402 [57] (Kaye JA), 429 [178], 430 [184], 431–2 [187]–[192] (McLeish JA).

21 This article uses the term 'letting value', rather than the more common term 'rental value', to denote the amount of rent that the plaintiff could have obtained from letting the subject property, in order to emphasise the difference between this amount and the amount of rent that the plaintiff would have had to pay for a substitute property.

22 Where one chattel of a fleet becomes unavailable and the plaintiff uses a standby kept for such an emergency, damages may be calculated by reference to the proportionate cost of maintaining the standby: *The Mediana* (n 12) 121–2 (Lord Shand), 123 (Lord Brampton); *The Susquehanna* (n 12) 662; *Beechwood Birmingham* (n 13) 372 [45]. This particular valuation method, which cannot be combined with any other method, will not be discussed.

23 See, eg: *McIntyre v Quality Roofing Services Pty Ltd* [2019] SASCFC 29, [61] (Tilmouth AJ, Parker J agreeing at [1], Lovell J agreeing at [2]), citing *Robinson v Harman* (1848) 1 Ex 850; 154 ER 363, 365 (Parke B) ('*Robinson*') (for contract); *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 (Lord Blackburn) (for tort).

of the individual case by the difference between contract and tort in the rules on the remoteness of loss and the recoverability of non-pecuniary loss.[24]

Secondly, it will be argued that there is no justification for choosing different valuation methods for chattels and real property except where this is required by the difference in the nature of the property. Thus, the depreciation method is generally unsuitable for real property, which experiences little or no depreciation.

Thirdly, and most importantly, it will be argued that four of the five valuation methods (wasted expenditure, depreciation, interest on capital value, and letting value) are apt to express the value that the plaintiff placed on having access to the property during the period in which it was unavailable. The letting value method reflects the plaintiff's theoretical ability to let the property during that period, and the other three methods reflect the plaintiff's theoretical ability to sell the property at the beginning of the period and to reacquire it at the end of the period. It cannot be overemphasised that the ability to enter into those hypothetical transactions is purely theoretical. It is not assumed that a letting, or a sale and re-purchase, of the property could in practice have occurred. The transaction costs are usually prohibitive. There is no actual loss of opportunity to enter into those transactions.

II The Impact of *Arsalan v Rixon*

A *Tort*

In *Arsalan*,[25] privately owned luxury cars were negligently damaged and required repair. Since their owners needed to use a car during the time of repair, they each hired for that period a substitute car equivalent to the damaged car. The contentious issue was whether the owners were entitled to recover the entire hire charges or only the cost of hiring a substitute car that fulfilled the same functions as the damaged car but lacked the same luxury features. The High Court held that the owner of a negligently damaged vehicle is usually entitled to recover the reasonable cost of hiring, for the period of repair, a substitute vehicle that is broadly equivalent to the damaged vehicle.[26] The hire of a substitute vehicle aims to mitigate the loss resulting from the damage to the car and it is for the defendant to show that the costs incurred in mitigation were unreasonable.[27] The concept of need, which had been introduced in a previous case,[28] was rejected as being too uncertain.[29]

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24 For those differences, see Katy Barnett and Sirko Harder, *Remedies in Australian Private Law* (Cambridge University Press, 2nd ed, 2018) 28 [2.10] (non-pecuniary loss), 162 [5.92] (remoteness).

25 *Arsalan* (n 7). A joint judgment was given by Kiefel CJ, Gageler, Keane, Edelman and Steward JJ.

26 Ibid 391 [2].

27 Ibid 391 [3].

28 *Anthanasopoulos v Moseley* (2001) 52 NSWLR 262, 276 [80] (Ipp AJA).

29 *Arsalan* (n 7) 394 [17].

What is important for present purposes is the High Court's description of the loss suffered by the owner of a negligently damaged chattel. Previously, it had been common to describe that loss as the loss of use of the chattel.[30] The High Court rejected that term as 'inadequate because it does not identify the manner or extent of any loss to a plaintiff'.[31] The High Court identified two heads of loss suffered by the plaintiffs. One head of loss was the inconvenience of not having access to their cars during the period of repair, which the Court described as 'physical inconvenience' to distinguish it from 'mere inconvenience' such as annoyance, disappointment or vexation.[32] The other head of loss was 'loss of amenity, in the sense of loss of pleasure or enjoyment, in the use of a chattel',[33] here the loss of 'enjoyment of the safety features, pleasurable functions, and other specifications of those cars'.[34] It was common ground that physical inconvenience was a recoverable head of loss in actions for negligent damage to a chattel. The High Court held that loss of amenity should also constitute a recoverable head of loss in such actions,[35] because it has been recognised for negligent damage to land,[36] and because the boundary between physical inconvenience and loss of amenity 'is neither clear nor precise because "all inconvenience has to include some mental element"'.[37]

The statement that all inconvenience includes some mental element would strictly mean that a corporation, which has no mind, cannot suffer inconvenience as a result of temporarily losing access to its property. Since a corporation cannot suffer loss of amenity as defined by the High Court (because it cannot experience pleasure or enjoyment), a corporation could not recover damages for negligent damage to a chattel in the absence of tangible financial loss. However, this was not the High Court's view. The High Court cited, without disapproval, a number of English cases in which the corporate owner of a negligently damaged chattel obtained damages in the absence of tangible financial loss.[38] In particular, the High Court mentioned *The Mediana*,[39] where the Mersey Docks and Harbour Board obtained damages for the 'loss of the use' of one of its lightships during a period of repair in which the Board deployed a spare lightship. The High Court described the loss in that case as

30 See, eg: *Rider* (n 16) 217 [34]; *Wyzenbeek* (n 17) 407–8 [136]–[139].

31 *Arsalan* (n 7) 394 [18].

32 Ibid 396 [23].

33 Ibid 394 [17].

34 Ibid 400–1 [40].

35 Ibid 397 [27]. Cf Harry Sanderson and Kanaga Dharmananda, 'Needs and Wants: Recovering Loss of Enjoyment Damages in Australia' (2022) 138 (July) *Law Quarterly Review* 353, 356–7.

36 *Arsalan* (n 7) 397 [26].

37 Ibid 396 [23], quoting *Athens-Macdonald Travel Service Pty Ltd v Kazis* [1970] SASR 264, 274.

38 *Arsalan* (n 7) 395 [19]–[20].

39 *The Mediana* (n 12).

'the inconvenience of no longer having a spare lightship available during the period of repair'.[40]

It follows that the mental element of inconvenience is present whenever the owner of certain property temporarily loses access to the property, and the difference between 'loss of use of the property' and 'inconvenience of not having access to the property' is purely semantic. In any event, while the High Court rejected the term 'loss of use' to denote the non-tangible loss suffered as a result of temporarily losing access to one's property, the Court did not reject the methods judges had used to place a value on such loss. The Court mentioned, without disapproval, various methods employed in previous cases to place a value on the loss of use of a chattel.[41] The Court mentioned that interest on the capital value of the damaged property had been awarded in 'older cases involving the loss of use of a ship',[42] and that wasted expenses and an allowance for depreciation had been added in 'some modern cases'.[43] It can be inferred that the Court envisaged the continued application of these methods to value what the Court described as the inconvenience of not having access to one's property.

This does not conflict with the Court's statement that 'it is often convenient to quantify physical inconvenience and the loss of amenity of use of property together as part of a single award of general damages'.[44] The established valuation methods are apt to do this in most cases because features of the property from which an individual derives particular pleasure and enjoyment will often increase the cost of the acquisition or maintenance of the property and will then be captured by the valuation methods, as explained later in this article.[45] In some cases, an individual may be awarded an amount of damages (for loss of amenity) in addition to the amount generated by the methods discussed in this article. The amount of that extra award needs to be determined at common law in the same way as the amount of damages for non-pecuniary loss in other contexts, which will not be discussed in this article.

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40 *Arsalan* (n 7) 395 [19], where the Court added that the loss should be valued at the expense of having the spare ready, citing: *The Mediana* (n 12) 122 (Lord Shand); *The Susquehanna* (n 12) 662, 665–6, 668–9; *Beechwood Birmingham* (n 13) 369–72 [33]–[45]; *West Midlands Travel* (n 2) 132–3 [23].

41 *Arsalan* (n 7) 395 [20]. These methods had already been mentioned, without disapproval, by Edelman J in *Lewis* (n 3) 254–5 [166].

42 *Arsalan* (n 7) 395 [20], citing: *The Marpessa* (n 12); *The Susquehanna* (n 12) 664 (Lord Sumner); *The Hebridean Coast* (n 9) 578 (Lord Morton).

43 *Arsalan* (n 7) 395 [20], citing: *Consort Express Lines Ltd v J-Mac Pty Ltd [No 2]* (2006) 232 ALR 341, 356 [87] ('*Consort Express Lines*'); *West Midlands Travel* (n 2) 132–3 [23]; *Vautin* (n 18) 773 [314].

44 *Arsalan* (n 7) 397 [27].

45 In *Yehia v Williams* (2022) 99 MVR 393 ('*Yehia*'), the interest on capital value method was used to place a value on the plaintiff's 'inability to enjoy and appreciate his vehicle', stating that the High Court in *Arsalan* (n 7) had endorsed such an approach: at 418 [164].

B *Contract*

In *Arsalan*, the High Court did not address claims for breach of contract. However, the High Court's conceptualisation of the loss resulting from the unavailability of certain property to its owner must apply in contract too.[46] If the unavailability of property leads to physical inconvenience — and in the case of an individual, loss of amenity — where the unavailability results from damage to the property caused by the breach of a tortious duty of care, it must lead to the same losses where the unavailability results from damage to the property caused by the breach of a contractual duty of care or results from some other breach of contract such as delay in the repair of the property. The cause of the property's unavailability to its owner cannot make a difference to the types of loss resulting from the unavailability. Nor can it make a difference to the quantification of those types of loss.

What needs to be examined is how the High Court's conceptualisation of the loss resulting from the unavailability of certain property to its owner sits with the general proscription of contractual damages for non-pecuniary loss.[47] Prior to *Arsalan*, Australian courts sometimes awarded contractual damages for the loss of use of property to individuals, without mentioning the general rule.[48] The general rule was mentioned in two cases.

One of these cases is *Cappello v Hammond & Simonds NSW Pty Ltd*,[49] where substantial renovation work on the plaintiffs' home was completed about seven months late. The plaintiffs' claim for general damages for delay was rejected by the trial judge who, while noting that contractual damages for physical inconvenience can be awarded, was unable to find significant physical inconvenience on the facts and also took into account that the plaintiffs had been responsible for a substantial part of the delay.[50] The New South Wales Court of Appeal detected no error of law in the trial judge's reasoning and refused to disturb his Honour's findings because his conclusions were likely affected by the evidence at trial.[51] The decision may imply that general damages for the delay could be awarded only if the case fell within

46 The following discussion is concerned with compensation for consequential loss, as opposed to what Edelman J has described as 'compensation directly based on the performance interest', which is 'the difference between the value of what was promised and the value of what was received' and 'is not concerned with loss in any real or factual sense': *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326, 348–9 [64]. A discussion of this latter type of damages is beyond the scope of this article.

47 See, eg, *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 365 (Mason CJ).

48 See, eg: *Rider* (n 16) 217 [34] (catamaran); *Leeda Projects* (n 14) 401 [52] (Kaye JA) (apartment).

49 [2021] NSWCA 57 ('*Cappello Appeal*').

50 *Cappello v Hammond & Simonds NSW Pty Ltd* [2020] NSWSC 1021, [40].

51 *Cappello Appeal* (n 49) [86]–[93] (Leeming JA, Macfarlan JA agreeing at [1], McCallum JA agreeing at [97]). Leeming JA (at [92]) quoted a passage from *Lee v Lee* (2019) 266 CLR 129, 148–9 [55] (Bell, Gageler, Nettle and Edelman JJ) for the rules on appellate restraint.

an exception to the general proscription of contractual damages for non-pecuniary loss, but the plaintiffs do not seem to have challenged that position.

The second case in which the general rule was mentioned is *Vautin v By Winddown, Inc [No 4]* ('*Vautin*'),[52] where a vessel bought for pleasure had a latent defect since its construction and could not be used for three years. Justice Derrington in the Federal Court distinguished two heads of loss. The first was 'the loss of enjoyment of the vessel', which was captured by the general rule and thus was recoverable only if the object of the contract was the provision of enjoyment, pleasure or the like, which was not the case on the facts.[53] The second head of loss was 'the loss of use of a non-profit making chattel', which had been regarded as compensable as part of general damages.[54]

Justice Derrington's comments assist in characterising the types of loss recognised by the High Court in *Arsalan*. Loss of amenity, defined by the High Court as loss of pleasure or enjoyment, must be characterised as non-pecuniary loss and thus subject to the general proscription of contractual damages for such loss. Different considerations apply to the (physical) inconvenience of not having access to the property, as this loss can be suffered by a corporation as well as an individual. It should not be subject to the general proscription of contractual damages for non-pecuniary loss.

The remainder of this article analyses the various methods courts have used to place a value on the loss of use of property, which Australian courts may continue to use to place a value on what the High Court in *Arsalan* described as the (physical) inconvenience of not having access to the property and which often also capture the loss of amenity suffered by an individual.

III Wasted Expenditure

The wasted expenditure method identifies the expenses which the plaintiff incurred in keeping and maintaining the property during the period of unavailability, and which were wasted as the plaintiff was not able to use the property during that period. In the case of a chattel, this could be, for example, insurance premiums, registration fees or tax. In the case of real property, this could be, for example, council rates, utility charges or owners' corporation fees.[55] The cost of purchasing the property is not included, as this is captured by the depreciation and the interest on capital value methods to be discussed in Parts IV and V below.

52 *Vautin* (n 18).

53 Ibid 771–2 [308]–[309].

54 Ibid 772 [310], citing *Yates* (n 16).

55 See *Leeda Projects* (n 14) 401–2 [55] (Kaye JA).

In England, the wasted expenditure method has been approved in relation to chattels[56] and real property.[57] In Australia, it was applied to real property in *Leeda Projects*.[58] The completion of building work on an apartment intended to be used as a private art gallery and occasional residence was delayed by 130 weeks. The plaintiff claimed damages in the amount of $283,802.17, which was the sum of owners' corporation fees, council rates, electricity charges and water charges paid by her as the owner of the apartment for the period of delay.[59] The trial judge rejected the claim on the ground that the defendant's delay had not caused the plaintiff to incur those expenses.[60] The Victorian Court of Appeal awarded damages in the amount of the wasted expenditure. Justice of Appeal Kaye said:

> the respondent acquired the Eureka apartment for the purpose of her intended use and enjoyment of it as a private art gallery and occasional residence … The costs of ownership of the apartment — the rates, service charges and the like — were incurred to enable the respondent to have and use the Eureka apartment for that specific purpose. Thus, the proportion of those costs, that the respondent incurred during the delay period, are an appropriate measure of the loss and damage occasioned to her by reason of her inability to use the apartment for its intended purpose during the 130 week delay period …[61]

His Honour was saying that the plaintiff was not claiming damages directly for the expenses. To use the distinction between general damages and special damages, the plaintiff was claiming, not special damages for owners' corporation fees etc, but general damages for the inconvenience of not having access to the apartment for 130 weeks. This inconvenience had been caused by the defendant's breach of contract, and the wasted expenses were taken to place a value on it. They were not themselves losses to be compensated.

Justice of Appeal McLeish, with whom Tate JA agreed, said:

> Damages for 'wasted expenditure' are not true alternative heads of damage, but manifestations of the central principle in *Robinson v Harman*. It is therefore not to the point that there is a class of case where expenditure made in reliance on the contract being performed may be recovered, and that this case falls outside that class. The label 'wasted expenditure' does not work to circumscribe the

56 *The Marpessa* (n 12) 244–5; *The Susquehanna* (n 12) 664. Wasted expenditure was regarded as an item additional (rather than alternative) to interest on capital value and depreciation. This cumulation is discussed in Parts IV and V(A) below.

57 *Bella Casa* (n 14) 157 [32]–[34].

58 *Leeda Projects* (n 14) 402 [57] (Kaye JA), 431–2 [187]–[192] (McLeish JA).

59 Ibid 401 [55] (Kaye JA). This claim was the alternative to a claim for the letting value of the apartment, which was rejected. This aspect of the case is discussed in Part VI below.

60 Ibid 389 [11].

61 Ibid 402 [57].

> operation of the general principles for recovery of contract damages to particular kinds of case.[62]

His Honour was referring to the function of reliance loss in calculating damages for breach of contract. Such damages aim to place the innocent party in the position as if the contract had been performed properly.[63] It is the innocent party's expectation loss that is compensated. But the innocent party, who bears the onus of proof, needs to prove the amount of loss that would have been avoided, or the amount of profit that would have been made, had the contract been performed properly.[64]

Sometimes, the very fact that a performance promised by the defendant has not been provided makes it impossible to determine the amount of expectation loss. In those circumstances, if the innocent party has incurred a loss (that is, has incurred an expenditure or forgone income) in reliance on the other party's promise to perform, this reliance loss can be taken as the measure of the damages.[65] The reason is not that the breach of contract has caused the innocent party to incur the reliance loss; it would have been incurred in any event. The reason is that the innocent party incurred the loss in the expectation that the revenue to be obtained as a result of the other party's performance would exceed, or at least equal, the reliance loss. People do not generally spend money in expectation of receiving a contractual performance unless the expected benefit exceeds or at least equals the expenditure. The point is that the reliance loss is not independently compensable. It constitutes, through a presumption of profitability, the minimum amount of expectation loss, which could not otherwise be quantified.[66]

The reliance loss principle addresses uncertainty as to what would have happened without the defendant's wrong. It is not directly applicable to the valuation of the inconvenience of not having access to one's property because such uncertainty is not present. Nevertheless, as alluded to by McLeish JA in the passage quoted, the reliance loss principle can be seen as flowing from the wider principle that a person who has incurred expenditure, or foregone income, in order to obtain a particular benefit has a higher interest in obtaining that benefit than keeping the money or drawing the income. Thus, the value the person places on the benefit exceeds the amount of expenditure incurred or income foregone. This wider principle can be employed in the present context, whether the action is in contract or tort. A plaintiff who has incurred expenditure, or forgone income, in order to have the use of

62 Ibid 431 [189] (McLeish JA, Tate JA agreeing at 386 [2]).

63 *Robinson* (n 23) 365. Approved in, for example, *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 80 (Mason CJ and Dawson J), 98 (Brennan J), 116 (Deane J), 134 (Toohey J), 148 (Gaudron J), 161 (McHugh J) ('*Amann Aviation*').

64 *Amann Aviation* (n 63) 14–15 (Mason CJ and Dawson J), 27 (Brennan J).

65 See generally *Amann Aviation* (n 63).

66 Ibid 126 (Deane J); *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] 1 CLC 662, 709 [190]. See David McLauchlan, 'The Limitations on "Reliance" Damages for Breach of Contract' in Roger Halson and David Campbell (eds), *Research Handbook on Remedies in Private Law* (Edward Elgar, 2019) 86, 86.

particular property must value the benefit from using the property higher than the amount of expenditure incurred or income foregone.

The wider principle justifies the wasted expenditure method for both chattels and real property, although care must be taken in its application. In general, the value the plaintiff placed on having access to the property during the period of unavailability must exceed or at least equal the expenses the plaintiff incurred for the maintenance of the property during this period. However, it may be different where the amount of outgoings is not the same in every period of time but fluctuates. There may be an amount that is paid once a year for the whole year, for example the owners' corporation fee of a unit or the registration fee of a vessel. If the property is unavailable for a week and such an annual payment happens to fall within that week, it cannot be said that it represents the value of the property to the plaintiff in that week. The value of the property to the plaintiff will usually be the same every day of the year. Annual payments have to be averaged over the year. Similar considerations may apply where utility bills fluctuate with the seasons. It may be appropriate to take 1/52 of the annual outgoings for every week in which the plaintiff was not able to use the property.

IV Depreciation

The depreciation method identifies the decrease in value (if any) of the property during the period of unavailability. The value of the property at the end of the period is compared to its value at the beginning of the period, not to its value at the time the plaintiff acquired it.[67]

The courts do not seem to have entertained the depreciation method in relation to real property, which is unsurprising considering the small rate of depreciation of buildings.[68] In relation to chattels, English courts have applied[69] or approved[70] the depreciation method, and there has been support for the method in the following two Australian cases.

In *Vautin*,[71] a vessel bought for pleasure had a latent defect since its construction and could not be used for three years. It was held that the buyer was entitled to reject the vessel and obtain a refund of the purchase price and damages for wasted expenses. Justice Derrington in the Federal Court, added that if the buyer had not been entitled to a refund of the purchase price, damages for the loss of use of the

67 *The Marpessa* (n 12) 245.

68 Where, due to external factors, the value of the real property decreased significantly during the period of its unavailability, damages for this fall in value can be awarded only if the plaintiff would in fact have sold the property at the beginning of the period: *Cappello Appeal* (n 49) [76]–[85].

69 *Beechwood Birmingham* (n 13) 374 [52]; *West Midlands Travel* (n 2) 135 [33].

70 *The Marpessa* (n 12) 244–5; *The Susquehanna* (n 12) 663–4.

71 *Vautin* (n 18).

vessel would have been awarded in the amount of 10% of the purchase price over three years. This was based on evidence that the vessel decreased in value by about 50% over five to six years.[72]

In *Wyzenbeek v Australasian Marine Imports Pty Ltd (in liq)*,[73] the plaintiffs were induced to buy a motor yacht by the false representation that the yacht was an ocean-going vessel. Repair work was required, and the yacht was laid up for 629 days. The Full Court of the Federal Court held that the seller was liable for misleading and deceptive conduct and that the plaintiffs were entitled to be compensated on a 'no transaction basis', placing them in the position as if they had not bought the yacht. The Court added that if the plaintiffs had not been entitled to be compensated on a 'no transaction basis', they could have claimed damages for the loss of use of the yacht while it was in repair, in the amount of the depreciation in value of the yacht (at a rate of 6%) during the 629 days of repair.[74]

The depreciation method might be criticised with the argument that the property would have depreciated even without the defendant's wrong. As in relation to the wasted expenditure method discussed in Part III above, such an argument would overlook that the depreciation is not itself the loss to be compensated but is used as a measure of the inconvenience of not having access to the property, which was caused by the defendant's wrong.

The wasted expenditure method was justified on the ground that the value a person places on a particular benefit must exceed or at least equal the amount of expenditure incurred in obtaining the benefit. The same idea justifies the depreciation method. In order to be able to use depreciable property on a particular day, its owner has spent money not only on any ongoing expenses but also on being the owner of the property on that day. At some point in the past, the owner either purchased the property or, if it was a gift, decided not to sell it. If the property does not depreciate, the owner can always regain the whole amount spent, or income foregone, by selling the property: nothing is lost. But if the property depreciates, the amount the owner can gain by selling it decreases day by day. Money is lost every day. Thus, the benefit of having the use of the property on a particular day can be attributed to a proportion of the money spent, or income foregone, on being the owner on that day. The value the owner places on that benefit must exceed or at least equal that proportion of the cost of acquiring ownership.

It is therefore appropriate to use the depreciation method in measuring the inconvenience of not having access to depreciable property. Care must be taken in the application of the method. The relevant amount is not necessarily the decrease in the value of the property during the period of unavailability. Depreciation is not always linear. Some chattels (such as ordinary cars) lose more value in the first year of their existence than in a later year. But the owner will not necessarily place a higher value

72 Ibid 774 [316]–[317].

73 *Wyzenbeek* (n 17).

74 Ibid 407 [138].

on the availability of the property in its first year than in a later year. Depending on the circumstances, it may be appropriate to average the rate of depreciation over the entire period of the plaintiff's ownership of the property.

The depreciation method can be applied cumulatively with the wasted expenditure method; the two methods are not mutually exclusive.[75] The value the owner of depreciable property places on its availability on a particular day must exceed or at least equal the total of the relevant proportion of the total expenditure, both for acquiring ownership and for things such as maintenance, registration and tax.

V Interest on Capital Value

This method identifies an amount of interest on a particular amount of money over a particular period of time. The relevant period of time is the period of the property's unavailability to its owner. The amount of money is the value of the property at the beginning of that period, not the time the plaintiff acquired it. The rate of interest could be the market rate for a savings account; alternatively, the court's rate for pre-judgment interest could be chosen for convenience.[76] This method represents the plaintiff's cost of holding the property during the period of its unavailability, in the sense that money was tied up in the property and could not be invested elsewhere. It is not assumed that the plaintiff took out a loan for the acquisition of the property and was still repaying that loan during the period of the property's unavailability.

The authorities on whether this method can be used require a separate discussion of chattels and real property.

A *Chattels*

The interest on capital value method is established with regard to chattels in actions for negligence[77] or breach of contract.[78] It has been applied in a number of cases where a chattel was used in a business and the fact that the chattel could not be used

75 *The Marpessa* (n 12) 244–5. The depreciation method and the interest on capital value method can also be applied cumulatively: *Consort Express Lines* (n 43) 356 [87]; *Beechwood Birmingham* (n 13) 374 [52]; see below Part V(A).

76 It was chosen in *Pix v Suncoast Marine Pty Ltd* [2019] QSC 45, [27] ('*Suncoast Marine*'), affd *Rider* (n 16).

77 See, eg: *The Greta Holme* (n 11) 605 (Lord Hershell); *The Hebridean Coast* (n 9) 560 (Willmer LJ), 564 (Devlin LJ); *Beechwood Birmingham* (n 13) 372 [45]; *Yehia* (n 45) 418 [164].

78 See, eg, *Yates* (n 16) [77].

for some time affected the profit of the business but the plaintiff could not prove the amount of lost profit.[79]

The availability of the interest on capital value method for a privately used chattel was confirmed in *Rider v Pix* ('*Rider*').[80] A catamaran was bought for private use and then showed defects, requiring repair work for 230 days. The seller was liable for breach of contract. The trial judge awarded damages for the loss of use of the catamaran for 230 days in the amount of 10% per annum (the Practice Direction rate) of the value of the catamaran at the time the repairs began for 230 days.[81] On appeal, the seller argued that the depreciation method (which yielded a lower figure) should have been employed as the interest on capital value method can be used only for chattels that are profit-earning or fulfil a public function but not for a pleasure vessel. The Queensland Court of Appeal rejected that argument:

> This submission fails to appreciate the significance of additional loss in this area of law. The existence of additional loss justifies an additional award of damages; it does not justify the interest on capital value method. Rather, the true justification for the interest on capital value method is that the money invested in the chattel is tied up while the chattel remains out of use. That applies equally to personal chattels like the [catamaran].[82]

The interest on capital value method can be justified for any chattel on the same basis as the depreciation method. In theory, the plaintiff could have sold the chattel when the period of unavailability began and repurchased it when the period ended. During the period, the plaintiff would have had the proceeds of the sale and could have placed it in an interest-bearing bank account. That potential interest constitutes income foregone by the plaintiff in order to have the use of the chattel during that period, and the value the plaintiff placed on that use must exceed or at least equal the income foregone. It is not to the point that the plaintiff would not in fact have sold and repurchased the chattel, or that this would not have been feasible for some reason, or that the transaction costs would have been prohibitive. It is a purely hypothetical scenario employed to ascertain the holding cost of the chattel.

The argument of the seller in *Rider* –– that the depreciation method instead of the interest on capital value method ought to have been used –– was based on the premise that the two methods are mutually exclusive. The Queensland Court of Appeal did not reject that premise. However, the Court was only concerned with whether the interest on capital value method can be applied at all to a privately used chattel. The Court was not concerned with whether that method could be combined

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79 *Woodman v Rasmussen* [1953] St R Qd 202, 217 (Philp J) (planing machine in a sawmill); *Commissioner for Railways v Luya, Julius Ltd* [1977] Qd R 395, 398 (locomotive and other vehicles); *BHP Coal* (n 9) [919]–[949] (bucket wheel excavator in an open mine).

80 *Rider* (n 16).

81 *Suncoast Marine* (n 76).

82 *Rider* (n 16) 220 [45] (Flanagan J speaking for the Court).

with the depreciation method (the buyer not having argued for such cumulation), and the Court's decision should not be understood as regarding the two methods as alternatives. In other cases, it has been said that damages could be assessed in the total amount of lost interest, depreciation and wasted expenditure.[83]

Such a cumulative approach is correct on principle. A person who has spent a particular amount of money on acquiring depreciable property must value its availability during a particular period of time more than a person who has spent the same amount of money on acquiring non-depreciable property, everything else being equal. Similarly, a person who has spent money (apart from the purchase price) in order to have the use of particular property during a particular period must place a higher value on such use than a person who has spent no money, everything else being equal. Therefore, if the owner of a depreciable chattel incurred expenditure in order to have its use during a particular period, the owner has not only foregone interest on the value of the chattel but has also spent money on the chattel and has foregone the theoretical opportunity to sell the property at the beginning of the period and repurchase it for a lower price at the end of the period. There will be no double counting if damages are assessed at the total of the amounts generated by the three methods.

B *Real Property*

The interest on capital value method has rarely been applied in a case involving real property.[84] In *Leeda Projects*,[85] where the trial judge did not entertain this method as the plaintiff had invoked it too late in the proceedings,[86] Kaye JA in the Victorian Court of Appeal observed that this method could be applied to real property as well as chattels.[87] Justice of Appeal McLeish, with whom Tate JA agreed on this point,[88] preferred not to embrace this method 'as the appropriate measure of damages in cases where real property intended purely for personal use is rendered unavailable

83 *The Susquehanna* (n 12) 663–4; *West Midlands Travel* (n 2) 135 [33]. In *Wyzenbeek* (n 17) the Full Court of the Federal Court described depreciation as 'another measure of damages during the period of unavailability for use instead of an amount based on interest on the purchase price': at 403 [112]. However, the Court (at 402–3 [110]) also cited without disapproval Lord Sumner's statement in *The Susquehanna* that lost interest and depreciation could be added together.

84 It was applied by Derrington J in *Bamford v Albert Shire Council* (1996) 93 LGERA 335, where a dwelling could not be used because of a potential landslip that the defendant had negligently failed to detect. The issue was not considered on appeal: *Bamford v Albert Shire Council* [1998] 2 Qd R 125. The method was rejected for real property in *Bella Casa* (n 14) where a flat in London could not be used for some time as a result of defective refurbishment: at 165–7 [59]–[63].

85 *Leeda Projects* (n 14).

86 Ibid 406 [82].

87 Ibid 401 [52]–[53].

88 Ibid 386 [2].

by a breach of contract'.[89] His Honour acknowledged that the method is established in relation to chattels but said that 'the particular approaches taken to assessing damages in the chattel cases are not necessarily applied to cases involving land'.[90] Justice of Appeal McLeish gave three reasons. None of them are convincing.

First, McLeish JA observed that '[t]he authorities concerned with chattels reflect the position that loss is caused when an asset depreciates while it is wrongfully kept from the person entitled to it', and that land does not ordinarily depreciate.[91] It is not obvious why his Honour thought that the chattel cases reflect the position that the asset depreciates. The cases reflect the position that the plaintiff could not use the chattel for some time. References to depreciation are not often found in the chattel cases, and awards of damages calculated by reference to depreciation are rarer still. Furthermore, when real property is the subject matter of a claim for the inconvenience of not having access to one's property, it usually involves a building rather than naked land, and McLeish JA conceded that fixtures on land generally depreciate.[92] The fact that buildings last for a long time may well render the depreciation method irrelevant in cases involving real property because depreciation is negligible on the facts. But the interest on capital value method is not based upon depreciation. It reflects the fact that the plaintiff could in theory have elsewhere invested the money that is tied up in an asset. This applies to chattels and real property alike.

Secondly, McLeish JA said that '[r]eal property also stands in a special position because, when it is used for the purpose of a residence, it is used neither for profit nor for pleasure alone, but to meet a necessity'.[93] This argument is confined to real property used as a residence and cannot explain a special status of all real property. Where the property is the plaintiff's sole residence, the plaintiff will usually have to rent a substitute property and will claim damages for the rent paid. Where no substitute property is rented (because, for example, the plaintiff stays with family members or friends for free), the interest on capital value method can be used to value the plaintiff's inconvenience of not having access to the plaintiff's residence because the method is based on the purely theoretical ability to sell and repurchase the property and does not assume that this would have been feasible in practice.

Thirdly, McLeish JA said that '[t]he multiple purposes for which land may be owned make it hard to say that the measure of the loss of its use is ordinarily calculated by any one measure'.[94] His Honour then mentioned various purposes for which real

89 Ibid 429 [177].

90 Ibid 430 [180]. His Honour distinguished between chattels and real property in order to reject both the interest on capital value method and the letting value method for real property. Further arguments by McLeish JA specifically against the letting value method are considered below in Part VI.

91 Ibid 429 [178]. A similar argument was made in *Bella Casa* (n 14) 165–7 [59]–[63].

92 *Leeda Projects* (n 14) 429 [178].

93 Ibid 429 [179].

94 Ibid.

property may be used including letting and using it as a residence.[95] This does not explain a difference between chattels and real property. Chattels too can be used for various purposes including letting and using them as essential personal items.

On principle, there is no justification for rejecting the interest on capital value method for real property whilst applying it to chattels.

VI Letting Value

A plaintiff who would have let the property during the period of unavailability can claim special damages for the loss of rental income,[96] reduced by expenditure saved,[97] unless this loss is too remote on the facts.[98] The question here is whether the same amount can be taken as the measure of general damages for the inconvenience of not having access to the property where there is a market for the property, even though the plaintiff would not in fact have let the property. While the letting value method does not require that the plaintiff *would* have let the property during the relevant period, it does require that the plaintiff *could* have let it. If nobody would be willing to rent the property from the plaintiff, the property cannot be said to have any letting value. It will usually be possible to find a lessee for a building, but it may be different for some chattels.

The House of Lords has rejected the letting value method even for property that could easily have been let during the period of unavailability. In *The Susquehanna*,[99] an oil tanker belonging to the Admiralty was damaged and disabled for 32 days, during which time another of the Admiralty's oil tankers took the place of the damaged one. The Admiralty occasionally let its oil tankers on a mercantile charter, but this would not have been the case for the damaged tanker during the time of repair. The Registrar assessed general damages for the loss of use of the damaged tanker by reference to the amount that the Admiralty could have obtained by letting the tanker on hire. On appeal, the assessment of damages was referred back to the Registrar. The House of Lords upheld the latter decision. The only reason their Lordships gave for rejecting the letting value method is that the tanker would not, in fact, have been let.[100] But this merely explains why special damages for the loss of hire could not

95 Ibid.

96 See, eg, *Illawarra Hotel* (n 5) 432 [127]. A plaintiff who was forced to use another property which the plaintiff would otherwise have let can claim the loss of rent from that other property: *Sweeney* (n 14) [27]–[29].

97 See *Lahoud v Lahoud* [2009] NSWSC 623, [175] ('*Lahoud*').

98 See, eg, where a contractor was unaware of the letting purpose: *Bui v DB Homes Australia Pty Ltd* [2017] NSWCATAP 218, [24], [28] (Principal Member Seiden and Senior Member Currie). See also: *Illawarra Hotel* (n 5) 431 [123]; *Lahoud* (n 97) [163].

99 *The Susquehanna* (n 12).

100 Ibid 662 (Viscount Dunedin), 663 (Lord Sumner), 664–5 (Lord Phillimore).

be awarded. It does not explain why the letting value cannot constitute the value the Admiralty placed on the use of the tanker.

The Susquehanna involved negligent damage to a chattel. The English Court of Appeal has rejected the letting value method in a case where a flat could not be used by the tenant because of dampness for which the landlord was contractually liable.[101]

In Australia, there is some authority for the applicability of the letting value method where a building has been tortiously damaged. In *Westwood v Cordwell* ('*Westwood*'), where a dwelling occupied by its owner was negligently destroyed and rebuilding would have taken 20 weeks, McPherson J in the Supreme Court of Queensland awarded damages for the loss of use of the dwelling for 20 weeks and measured them by reference to the letting value of the dwelling.[102] In *Sweeney v R & D Coffey Pty Ltd*, where a contractor was liable in contract and tort for carelessly damaging a dwelling occupied by its owner, the New South Wales Court of Appeal observed that general damages for the loss of use of the dwelling, measured by reference to its letting value, could have been awarded if such damages had been claimed earlier in the proceedings.[103]

In *Ray Laurence Constructions Pty Ltd v Nolks*, Southwood J in the Supreme Court of the Northern Territory said, relying on *Westwood*, that '[t]here is some force in the argument' that the letting value method should be applied where the completion of building work was delayed, but his Honour left the question open.[104] An application of the letting value method in those circumstances was rejected in *Leeda Projects*.[105] Delay in the completion of building work caused the temporary loss of use of an apartment that would not have been let during the delay period. The Victorian Court of Appeal refused to assess damages for the loss of use of the apartment by reference to its letting value during the delay period, arguing that such an award would not place the plaintiff in the same position as if the defendant's breach of contract had not occurred, and was excluded by the remoteness doctrine because a potential letting of the apartment had not been in the reasonable contemplation of the parties at the time of the contract.[106] Neither argument is convincing.

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101 *Calabar* (n 8) 293 (Stephenson LJ, Griffiths LJ agreeing at 297, May LJ agreeing at 299).

102 *Westwood* (n 14) 278–9. For the measure of damages, McPherson J relied on United States cases: *Beetschen v Shell Pipe Line Corporation*, 248 SW 2d 66 (Mo Ct App, 1952); *Kentucky Mountain Coal Co v Hacker*, 412 SW 2d 581 (Ky Ct App, 1967). But the letting value method is not universally accepted in the United States. It was rejected, for example, in *Gee v Payne*, 939 SW 2d 383 (Mo Ct App, 1997).

103 *Sweeney* (n 14) [26], citing *The Mediana* (n 12) 116 (Earl of Halsbury LC) and *Westwood* (n 14) 278–9.

104 [2010] NTSC 37, [65].

105 *Leeda Projects* (n 14) 419 [140].

106 Ibid 400 [50] (Kaye JA), 430 [184] (McLeish JA).

The Court's first argument is that because the plaintiff would not have let the apartment during the period of delay, an award of damages in the amount of the letting value would overcompensate the plaintiff. But the plaintiff did suffer a loss. She suffered the inconvenience of not having access to the apartment during the delay period as well as loss of amenity. Since not awarding any damages in respect of that loss would undercompensate such a plaintiff, the court is required to place a money figure on the loss. How this is to be done is not a matter on which the compensatory principle can assist. An award of damages for the inconvenience and –– where present –– loss of amenity, however calculated, does place the plaintiff in the same position as if the delay had not occurred.

The Court's reference to the remoteness doctrine is equally misplaced. That doctrine is not concerned with the method of placing a monetary figure on a compensable head of loss. It is concerned with whether a particular head of loss is compensable at all, which in contractual actions depends upon the foreseeability of the loss as a serious possibility at the time of the contract.[107] It is the kind of loss that needs to be foreseeable, not its extent.[108] Still less does the valuation method applied by the court need to be foreseeable.[109] If the plaintiff had intended to let the apartment and had claimed special damages for lost rent, it would have been necessary to determine whether a letting of the apartment was reasonably foreseeable at the time of the contract. But the plaintiff was claiming general damages for the inconvenience of not having access to the apartment as well as loss of amenity. The only question in terms of remoteness was whether it was reasonably foreseeable at the time of the contract that the apartment would be unavailable for the plaintiff during a period of delay on the defendant's part. This was clearly foreseeable. How any consequential loss is to be quantified is not a matter with which the remoteness test is concerned.[110]

Justice of Appeal McLeish in *Leeda Projects* said that the letting value method 'rests on a fictitious assumption divorced from the value of the apartment to Mrs Zeng'.[111]

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107 See, eg, *Amann Aviation* (n 63) 91–2 (Mason CJ and Dawson J), 98–9 (Brennan J), 116 (Deane J), 135–6 (Toohey J), 174 (McHugh J). Loss of profit resulting from the loss of use of property may be too remote, as demonstrated by the very case that established the contractual remoteness test: *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 145. The loss of profit resulting from the standstill of the plaintiff's mill was too remote as the defendant carrier did not know that the loss of use of the new crankshaft would have that consequence.

108 See, eg, *Stuart Pty Ltd v Condor Commercial Insulation Pty Ltd* (2006) Aust Contract Reports 90–245, 477 [46] (Beazley JA, Tobias JA agreeing at 488 [124]).

109 This was overlooked by Kaye JA in *Leeda Projects* (n 14) who said that an *award* in the amount of the letting value had not been in the contemplation of the parties: at 400 [50].

110 See *J d'Almeida Araujo Lda v Sir Frederick Becker & Co Ltd* [1953] 2 QB 329 (different legal systems may govern the issue of remoteness and the quantification of damages); *Jackson v Royal Bank of Scotland plc* [2005] 1 WLR 377, 386–7 [33]–[36].

111 *Leeda Projects* (n 14) 430–1 [184], citing *Calabar* (n 8) 293 (Stephenson LJ, May LJ agreeing at 299).

The apartment in that case was one of several apartments in Melbourne owned by the plaintiff and was not her main residence.[112] She could easily have let it had she wanted to. It would not have been artificial to use the apartment's letting value as the value the plaintiff placed on having access to the apartment.

Paradoxically, McLeish JA regarded the letting value method as 'potentially applicable for loss of use of property intended to be used for profit or otherwise essential to its owner'.[113] Property that is essential to its owner (such as the owner's sole residence) could not have been let during the period of unavailability, and the hypothetical scenario of letting the property is more artificial than in the case of Mrs Zeng. If there is to be a distinction between essential and non-essential property, the letting value method ought to apply to the latter rather than the former.

A distinction between essential and non-essential property should not be made, however. Even though the hypothetical scenario of letting is unrealistic in the case of essential property, it is not less realistic than the hypothetical scenario of a sale and repurchase of the property, which underpins the depreciation and the interest on capital value methods, both of which are established in relation to chattels. In the case of real property, the hypothetical scenario of letting is actually less unrealistic than that of sale and repurchase where the transaction cost will always be prohibitive. If the interest on capital value method is applied to real property, as it is argued in this article that it should, there is even more reason to apply the letting value method to real property.

On principle, the letting value method ought to be available whenever there is a market for the property in question, regardless of the type of property and the cause of action. This method could not be applied cumulatively with any of the methods discussed before. The hypothetical letting of the property during the period of unavailability is not consistent with a hypothetical sale and repurchase of the property, and the hypothetical rent covers any expenses incurred in relation to the property.

VII Hypothetical Cost of Renting a Substitute Property

The final valuation method to be discussed is the hypothetical cost of renting a substitute property while the plaintiff's property is not available. It presupposes that a substitute property is available on the market. A plaintiff who has reasonably rented an equivalent property may recover the rent as the cost of a reasonable measure of mitigating the loss resulting from the subject property's temporary unavailability.[114] The question here is whether the rent to be paid for a substitute property may be taken as the measure of the inconvenience of not having access to

112 *Leeda Projects* (n 14) 408 [87].

113 Ibid 430 [184]. For a similar view, see James Edelman, Simon Colton and Jason Varuhas (eds), *McGregor on Damages* (Sweet & Maxwell, 21st ed, 2021) 987 [31-009].

114 *Arsalan* (n 7) 398–9 [32]–[33].

the subject property in circumstances in which it would have been reasonable to rent a substitute property but no substitute property has in fact been rented.

It is important to distinguish this method from the letting value method considered before. The letting value method identifies the amount of rent that the plaintiff could in theory have obtained from letting the subject property to someone. The method considered now identifies the rent that the plaintiff would have had to pay for renting a substitute property. Even if the subject property and the substitute are of the same value, the amount of rent that the plaintiff would have to pay to a commercial lessor for a substitute property is not necessarily the same as the amount of rent that the plaintiff as a lessor would be able to charge for the subject property, in particular where the plaintiff is not running a business.

The hypothetical cost of renting a substitute property has never been taken as the measure of the inconvenience of not having access to one's property. In relation to chattels, this method has been rejected by the House of Lords,[115] the English Court of Appeal,[116] and the High Court of Australia.[117] In relation to real property, the method was rejected by McLeish JA in *Leeda Projects*.[118]

The rejection of the method is convincing. It is difficult to see how the value that an owner of property places on its availability can be reflected by the hypothetical cost of renting a different property. Even if the two properties are very similar (for example, identical apartments in the same block of apartments or cars of the same make, model, age and specification), there is a difference in that the owner had purchased the subject property for use over a longer period than the period for which the substitute property would be rented. It cannot be assumed that the owner would have been willing to rent the subject property longer term instead of buying it. The opposite is suggested by the owner's decision to buy it, whatever the reasons for it.

Where the subject property fulfils an essential need of the owner (such as the need for a residence or the need for a mode of transport), the owner will generally need to rent a substitute property whenever the subject property is temporarily unavailable. While this may justify (depending upon reasonableness) the compensation of expenses incurred in renting a substitute property, it does not mean that the rent to be paid for a substitute reflects the value that the owner of the subject property places upon its availability during that period. The value of the subject property's availability does not suddenly change only because it becomes unavailable. Even if the cost of renting a substitute on occasion is seen as being included in the value of

115 *The Marpessa* (n 12) 244–5; *The Susquehanna* (n 12); *The Ikala* [1929] AC 196 (Lord Hailsham LC in dissent at 196, Lord Carson in dissent at 205); *The Hebridean Coast* (n 9).

116 *Bee v Jenson* [2007] 4 All ER 791, 798–9 [21]; *Beechwood Birmingham* (n 13) 372 [46].

117 *Arsalan* (n 7) 397–8 [20]. See also *Lewis* (n 3) 255 [167] (Edelman J).

118 *Leeda Projects* (n 14) 430–1 [184].

essential property, this cost will have to be averaged over the entire period in which the owner uses the property. The weekly amount will be negligible.

VIII Conclusion

Where the temporary unavailability of certain property as a result of a tort or breach of contract has not generated tangible pecuniary loss for its owner (who would have been in possession of the property in the absence of the defendant's wrong), damages may be awarded for the consequences of the property's unavailability to its owner. The High Court of Australia in *Arsalan* described these consequences as the (physical) inconvenience of not having access to the property and –– in the case of an individual –– loss of amenity in the sense of loss of pleasure or enjoyment.

In measuring the damages for such inconvenience, the court is required to determine, as best as it can, the value that the plaintiff placed on having access to the property during the period of unavailability. This must be done by reference to monetary values that can be said to provide some indication as to the value placed by the plaintiff. The exercise can never be precise and may well involve an element of artificiality.

Australian and English courts have refused to calculate damages by reference to the rent to be paid for a substitute property where none has been rented. This is justified on principle. The rent to be paid for a substitute property provides no indication of the value the plaintiff placed on the availability of the subject property. Even where the subject property and the substitute have the same market value, the cost of short-term rent will be higher than the proportionate cost of purchase. The fact that the plaintiff purchased the subject property indicates that the plaintiff would not have been willing to spend a higher amount for permanently renting it instead.

By contrast, the amount of rent that the plaintiff could have obtained from letting the subject property during the period of unavailability (provided that someone would have been willing to rent it) does provide an indication of the value the plaintiff placed on the property's availability during that period. The fact that the plaintiff would not in fact have let it is no obstacle. On the contrary, the fact that the plaintiff was prepared to forego the rental income in order to personally use the property indicates that the plaintiff valued the personal use at least at the amount of rental income. Nevertheless, the Victorian Court of Appeal in *Leeda Projects* rejected the letting value method in the context of the delay of building work. The Court's reliance on the compensatory principle and the contractual remoteness test was misplaced, and its suggestion of a distinction between essential and non-essential property is not convincing.

The use of the letting value as the measure of the inconvenience of not having access to one's property would exclude the additional use of any other figure. If the letting value is not used, there are potentially three other figures that can be used, and they can be used cumulatively. A cumulative use of the three figures can be justified by the hypothetical scenario of the plaintiff selling the property at the beginning of the period of unavailability and repurchasing it at the end of the period. It is a purely

theoretical model which does not presuppose that a sale and repurchase could in fact have occurred. The transaction costs are usually prohibitive.

The first figure is the interest on the capital value of the property during the period of unavailability. It represents the income that the plaintiff could in theory have obtained by placing the money on an interest-bearing bank account rather than using it to purchase the property. The fact that the plaintiff has foregone that income indicates that the plaintiff valued the availability of the property at least in that amount. Interest on capital value has been used as the measure of damages in cases involving a chattel. But there is no reason why it should not also be used in cases involving real property. It represents the holding cost of any property. Justice of Appeal McLeish's argument in *Leeda Projects* that interest on capital value can only be used in the case of depreciable property is not convincing. During the period of unavailability, the plaintiff could in theory have earned interest from placing the value of the property in a bank account regardless of whether the property depreciates. Any depreciation constitutes an additional figure to be taken into account.

This leads to the second figure: the rate of depreciation of the property during the period of unavailability. It represents the amount that the plaintiff could in theory have obtained by selling the property at the beginning of the period of unavailability and repurchasing it for a lower price at the end of the period. The fact that the plaintiff has forgone that income indicates that the plaintiff valued the availability of the property at least in that amount. Since real property does not depreciate over a short period, the rate of depreciation has practical relevance only for chattels, in relation to which Australian courts have recognised it as a possible measure of damages.

The third and final figure is the amount of expenses that the plaintiff incurred for the upkeep of the property during the period of unavailability and that are wasted as the plaintiff was not able to use the property. It includes items such as owners' corporation fees, utility bills and registration fees. The fact that the plaintiff spent that amount in order to have access to the property during a particular period indicates that the plaintiff valued the access at least at that amount. Wasted expenditure was used in *Leeda Projects* to value the inconvenience of not having access to an apartment. It is also an appropriate figure in cases involving a chattel and has been used in such cases in England.

Overall, in valuing the inconvenience of not having access to one's property, there is no justification for a principled distinction between chattels and real property, acknowledging that the depreciation method has little relevance to real property simply because real property experiences little or no depreciation. Nor is there a justification for a principled distinction between actions in contract and actions in tort, except that the difference in the rules on the remoteness of loss and the recoverability of non-pecuniary loss may produce different outcomes on the facts of individual cases. Apart from those particular differences between contract and tort, the value that the owner of particular property places on having access to it during a particular period does not depend upon whether the defendant breached a promise to provide the plaintiff with possession of the property during that period or whether the defendant forced the plaintiff out of an existing possession of the property.

*Edward SW Ti**

COMPENSATING AND TAXING LAND REGULATIONS

Abstract

In this article, I synthesise the literature regarding the law and economics approach dealing with compulsory acquisition. Contrary to the status quo, I reason that regulations not amounting to an acquisition, but which adversely affect economic value, should also be compensable from an efficiency lens. This can be accommodated within the existing jurisprudence by recognising that acquisition 'gains' can also include environmental amenities, rather than only limiting these to land or property in specie by the acquiring authority. Similarly, where landowners enjoy an uplift in value from regulations, some part of this windfall profit should be taxable. The article takes reference from South Australia and Victoria's statutory frameworks, the latter primarily because of the commencement of the *Windfall Gains Tax and State Taxation and Other Acts Further Amendment Act 2021* (Vic) in July 2023. The broader principle advocated however is that more efficient and just outcomes would ensue if both acquisitions and regulations affecting land value are compensated on the same yardstick.

I Introduction

Compulsory acquisition is of perennial interest given the substantial number of government infrastructure projects in South Australia ('SA'),[1] and the consequential media attention this attracts.[2] Generally, the contentions raised ask whether the acquisition is premised on a legitimate basis, and how much should be paid for the acquired land. The former concerns questions of law, with

* PhD (Cantab); Associate Professor of Law, Singapore Management University. I am very grateful to the anonymous referees for their astute comments, as well as the excellent editorial work by the Review.

1 As the Deputy Premier Vickie Chapman MP noted, '[t]he *Land Acquisition Act 1969* establishes a process for the acquisition of land by acquiring authorities. Land is generally acquired to accommodate various road and infrastructure projects, and this process will continue to assist South Australia growing and our economy developing into the future': South Australia, *Parliamentary Debates*, House of Assembly, 12 December 2019, 9150 (Vickie Chapman).

2 Don Mackintosh, 'Compulsory Acquisition of Land: Navigating the Intersection between Executive Powers and Individual Property Rights' (2021) 43(8) *Bulletin: The Law Society of SA Journal* 24, 24.

local government having to satisfy the applicable statutory standard of purpose or legitimacy where challenged. The latter is a question of fact as the consensus yardstick is market-price compensation, where land is forcefully acquired by a state.

Compulsory acquisition and regulating what can be done on land are distinct but conceptually similar urban planning tools. However, while both may be regarded as justifiable incursions to property for the greater good, landowners are not compensated when their land is not physically acquired but made subject to an adverse rezoning plan or development restriction. Conversely, the principle that property should not be acquired 'without payment of compensation has emerged as a settled feature of legal doctrine in both common law and civilian systems since at least the seventeenth century'.[3] This is trite and intuitively satisfies normative legal and moral expectations. In this vein, the High Court of Australia has taken the position that the legislature would not intend to confiscate property without compensation unless their intention to do so is made absolutely clear.[4] Because regulations are largely not compensable, it is possible for a government to render a site less valuable before acquiring it at its prevailing market value. This conceptual overlap, discussed in more detail below, is observed in the recent amendments to South Australia's *Land Acquisition Act 1969* (SA) which permit the State to acquire underground land without compensation.[5] I refer to 'acquisitions' as physical takings of land by the state. Where land is not acquired but is subject to a change, restriction or enhancement in use through legislative or administrative discretion, I refer to these as 'regulations'.

This article argues that economic efficiency requires regulations and acquisitions to be treated similarly. Regulations which adversely affect land value should be compensable on the same yardstick as acquisitions. Conversely, regulations which enhance a site's value — perhaps by increasing the permitted intensity of the use of the land[6] — are equivalent to the state granting the landowner more *property*, and at least some of such windfalls should be taxed. In this vein, Victoria's *Windfall Gains Tax and State Taxation and Other Acts Further Amendment Act 2021* (Vic) is cited as a possible approach.

By synthesising the literature regarding the law and economics approach to compulsory acquisitions, the efficiency justifications regarding market-price compensation are presented. I seek to extend these reasonings to also justify the government paying compensation for regulatory incursions, as well as taxing unearned windfalls accruing to land from regulation. A necessary premise for my arguments is that accepting that compensation for compulsory acquisition is efficient provides the rationale to similarly conclude that compensation or taxation for land regulations is also efficient. This follows from the perspective that any

3 JW Harris, *Property and Justice* (Oxford University Press, 1996) 95.

4 *Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552, 563 (Griffith CJ and Rich J).

5 *Land Acquisition Act 1969* (SA) pt 4A, as inserted by *Land Acquisition (Miscellaneous) Amendment Act 2019* (SA) s 22.

6 See *Planning, Development and Infrastructure Act 2016* (SA) s 4(1)(d).

restriction (or enhancement) of a particular right reduces (or enhances) the value of property proportionately and an acquisition, 'which deprives the owner of all rights, is simply one end of a continuum'.[7] This article's thesis is significant to both landowners and government and provides a governance framework for land regulations. While I refer to SA's and Victoria's legal frameworks, the principles outlined are broadly agnostic and apply, mutatis mutandis, in the Commonwealth and the Anglo-Saxon common law world.

Following this Introduction, Part II explains why regulations are generally not compensable, while Part III outlines the economic approach to law. Part IV analyses why: (1) the power of the State to acquire is efficient; and (2) why market-price compensation should be the yardstick for compensation. Part V presents Victoria's windfall gains tax ('WGT'), arguing that efficiency rightly cuts both ways and just as efficiency is promoted by taxing rezoning decisions which give landowners an uplift, compensation should ensue if planning decisions render land less valuable. Part VI concludes.

II Land Regulations Are Largely Not Compensable

Given SA's historic legacy of pioneering the Torrens system of recording land titles in the common law world, exacting land use control has long been a feature of the State's planning law landscape.[8] Thus, planning regulations, rules, decisions, or discretion dictate what can be built or done on the land.[9] It is evident that all things being equal, a site where more intensive use is permitted is worth more than a site where this is not permitted. Equally, if a site's development potential is reduced by regulation, perhaps because of a change of zoning, such property has suffered financial degradation. Despite the stark effects of such discretions, government is not obliged to compensate where planning decisions adversely affect land value. Indeed in the Commonwealth context, there is high authority that compensation is only triggered when the acquirer obtains an interest in land,[10] as '[t]he extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property'.[11] Thus, legislation which 'adversely

7 Thomas J Miceli, *The Economic Theory of Eminent Domain: Private Property, Public Use* (Cambridge University Press, 2011) 113.

8 Anthony P Moore, 'Environmental Decision-Making: South Australia's Planning Authorities' (1975) 5(3) *Adelaide Law Review* 260, 262. Notably, SA's *Planning and Design Code* is a lengthy tome comprising some 5,000 pages: State Planning Commission, *Planning and Design Code* (No 2023.6, 27 April 2023).

9 In SA, the *Planning and Design Code* (n 8) is the single source of planning policy. It is given legal force as a public document via the *Planning, Development and Infrastructure Act 2016* (SA) s 72(3).

10 *Commonwealth v Tasmania* (1983) 158 CLR 1, 145–6 (Mason J) ('*Tasmanian Dam Case*').

11 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 185 (Deane and Gaudron JJ).

affects or terminates a pre-existing right' that a landowner enjoys without an acquisition does not bring the *Australian Constitution*'s protection of the acquisition of property on other than just terms into play.[12] In SA, the regulation of land use via a Development Plan would not attract compensation.[13] Conversely, there are also no universal principles that require increases in land value to be taxed where regulation or planning permission renders a site more valuable, though additional levies are imposed when a site is rendered more valuable by the Valuer-General. One way my suggested arguments could be accommodated within the jurisprudence would be to characterise deprivation of a landowner's property rights to land as environmental amenity 'gains' on the part of society (acting through the agency of the acquiring authority).

In *Trade Practices Commission v Tooth & Co Ltd*, Stephen J noted the 'universality of the problem' in relation to distinguishing between compensable acquisitions and non-compensable regulations.[14] Academically, Rachelle Alterman presents the first large-scale comparative research devoted entirely to regulatory takings.[15] Alterman's collection reviews 14 jurisdictions across both common law and civilian jurisdictions to show that globally, compensation for regulations affecting land values is typically absent and at best minimal.[16] In the Australian context, A Lanteri similarly observes that '[i]n cases where the loss is occasioned by restrictions on the use of the claimant's land imposed by legislative controls, relief is rare'.[17] This is true as exhibited in both SA and Victoria.

A *Overview of South Australia and Victoria*

1 *South Australia*

Under South Australian law, the right to compensation is restricted to situations when the government acquires a legal or equitable estate or interest in the land, or when the government physically takes possession or occupies land.[18] As with other jurisdictions in Australia, market value is the yardstick of compensation. In interpreting the statutory phrase 'the actual value of the subject land',[19] Blue J in *Nelson v*

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12 *Tasmanian Dam Case* (n 10) 145 (Mason J), quoted in *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 499–500 (Mason CJ, Brennan, Deane and Gaudron JJ); *Australian Constitution* s 51(xxxi).

13 *Tavitian v City of Playford* (2014) 202 LGERA 87, 96 [26] (Kourakis CJ, Blue J agreeing at 100, Stanley J agreeing at 100).

14 (1979) 142 CLR 397, 415.

15 Rachelle Alterman (ed), *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (American Bar Association, 2010).

16 Ibid ch 1.

17 A Lanteri, 'Compensation under the Town and Country Planning Act 1961 (Vic)' (Pt I) (1980) 12(3) *Melbourne University Law Review* 311, 313.

18 See *Land Acquisition Act 1969* (SA) ss 6(1) (definition of 'Authority'), 22B, 29.

19 Ibid s 25(1)(b)(i).

Commissioner of Highways (SA) held that this refers to 'its market value in accordance with the definition in *Spencer v The Commonwealth*, namely, "what would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell"'.[20] No compensation is payable where land is rendered less valuable by regulation. Unlike Victoria (from 2023),[21] there are equally no 'windfall gains' taxes or betterment levies if a site is rendered more valuable.[22] Under s 163(6)(e) and pt 13 div 1 sub-div 7 of the *Planning, Development and Infrastructure Act 2016* (SA), the costs of a defined infrastructure project may be recovered through a Ministerial charge on land within a designated growth area, without the affected landowners having to agree to the charge. Essentially, the infrastructure improvements are co-paid by landowners within the defined area. As the infrastructure improvements enhance the site's market value, these contributions are defensible. However, such charges are distinct from imposing a betterment levy on a particular site where development potential has been enhanced.

As mentioned above, amendments in July 2020 to the *Land Acquisition Act 1969* (SA) allow the government to acquire underground land without paying compensation[23] — compensations are thus limited to physical takings of the surface of the land. By essentially defining underground land to have no economic value to the landowner, the SA Government can be said to have executed a State-wide acquisition. Treasurer Rob Lucas MP candidly stated prior to the amendments taking effect:

> In South Australia, landowners also own the underground parts of their land with no limit as to depth, and therefore an acquisition needs to take place in order to tunnel under private property …
>
> The Act will be amended to provide that no compensation will be payable for underground acquisitions, as landowners will not suffer any detriment or loss of enjoyment of their land.[24]

It is difficult to see why landowners would not suffer a loss. As Tom Koutsantonis MP rightly observed, having a tunnel underneath one's property would have an

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20 [2020] SASC 109, [80] (citations omitted), quoting *Spencer v Commonwealth* (1907) 5 CLR 418, 432 (Griffith CJ). See also *Nelson v Commissioner of Highways [No 2]* [2023] SASC 7, [71] (Blue J).

21 See below nn 162–3 and accompanying text.

22 SGS Economics & Planning, *Technical Paper on Value Capture* (Final Report, Infrastructure Australia, September 2016) 49 <https://www.infrastructureaustralia.gov.au/sites/default/files/2019-06/sgs_technical_paper_on_value_capture-september_2016.pdf>.

23 *Land Acquisition Act 1969* (SA) pt 4A, as inserted by *Land Acquisition (Miscellaneous) Amendment Act 2019* (SA) s 22.

24 South Australia, *Parliamentary Debates*, Legislative Council, 31 October 2019, 4820 (Rob Lucas, Treasurer).

adverse impact on its real estate value.[25] Lucas was also inaccurate to state that the prior silence of the *Land Acquisition Act 1969* (SA) 'on the question of compensation for underground acquisitions' caused 'legal and operational confusion'.[26] It follows from his own logic that since landowners own underground parts of their land with no limit as to depth, the right to compensation would naturally have followed prior to the amendments. The quantum of compensation would then be a question of fact, and it may well be that where the underground land acquired is sufficiently deep below the surface, no economic loss to the landowner results.

As it is inaccurate to state that the loss of underground land would never cause 'detriment or loss of enjoyment'[27] to landowners, no matter how shallow below the surface such an acquisition takes place, it would be interesting if such an acquisition were governed by the *Australian Constitution*, supposing there was a sufficient nexus between the acquisition in SA and the Commonwealth.[28] Referring to the placitum under s 51(xxxi) of the *Australian Constitution* prohibiting acquisition of property other than on just terms in *Minister of State for the Army v Dalziel*, the High Court of Australia held:

> Property, in relation to land, is a bundle of rights exercisable with respect to the land. The tenant of an unencumbered estate in fee simple in possession has the largest possible bundle. But there is nothing in the placitum to suggest that the legislature was intended to be at liberty to free itself from the restrictive provisions of the placitum by taking care to seize something short of the whole bundle owned by the person whom it was expropriating.[29]

As it stands, the South Australian position is a significant derogation of the *cuius est solum* principle which, while shown to be untenable as an absolute principle, nevertheless presents the starting position of common law land rights.[30] Troublingly, the

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25 South Australia, *Parliamentary Debates*, House of Assembly, 15 October 2019, 7711 (Tom Koutsantonis). Koutsantonis was appointed Minister Infrastructure and Transport on 24 March 2022: South Australia, *Government Gazette*, No 19, 24 March 2022, 894.

26 South Australia, *Parliamentary Debates*, Legislative Council, 31 October 2019, 4820 (Rob Lucas, Treasurer).

27 Ibid.

28 Sean Brennan observes that the federal constitutional provision is engaged when the land is acquired in a state by the Commonwealth (either singly or jointly), where the Commonwealth imposes as a condition of state funding a requirement that the state acquire property compulsorily, and where the Commonwealth exercises its power to vest property in another person or entity within the state: Sean Brennan, 'Section 51(xxxi) and the Acquisition of Property under Commonwealth–State Arrangements: The Relevance to Native Title Extinguishment on Just Terms' (2011) 15(2) *Australian Indigenous Law Review* 74, 75–76.

29 (1944) 68 CLR 261, 285 (Rich J).

30 In *Bocardo SA v Star Energy UK Onshore Ltd* [2011] 1 AC 380, 398 [26], Lord Hope held that the maxim in relation to underground land rights 'still has value in English law as encapsulating, in simple language, a proposition of law which has commanded general acceptance'.

Land Acquisition Act 1969 (SA) does not define what 'underground land' is, and there is no *de minimis* provision for reasonable enjoyment of subterranean space.[31] At common law, *Bernstein of Leigh (Baron) v Skyviews & General Ltd* establishes the principle that rights over airspace extend to a height 'necessary for the ordinary use and enjoyment' of the landowner.[32] While there is no unitary position on how 'ownership and use of underground land ought to be regulated',[33] applying the rights over airspace test of 'ordinary use and enjoyment' to underground land is not unprincipled. The Australian High Court has recognised 'the elementary principle of the common law that a freeholder … is entitled to take from his land anything that is his. Except for those minerals which belong to the Crown, the soil and everything naturally contained therein is his.'[34] In this vein, the *Land Acquisition Act 1969* (SA) can be said to redefine the meaning of land, if the principle that all acquisitions of land should be compensable is maintained. This observation again demonstrates the overlap between acquisition and regulation.

2 *Victoria*

Apart from situations where land is physically acquired or occupied by the government,[35] under Victorian law, there is an additional ground when compensation arises — when the land is 'expressly'[36] stated to be reserved or gazetted for a public purpose.[37] As this provision merely accelerates compensation for landowners whose land has been identified for a public taking, regulations or planning decisions which render land less valuable per se are not compensable. Under s 98(2) of the *Planning and Environment Act 1987* (Vic), an owner or occupier of land may claim compensation from the State 'for financial loss suffered as the natural, direct and reasonable consequence of a refusal by the responsible authority to grant a permit to use or develop the land *on the ground that the land is or will be needed for a public*

31 Cf *State Lands Act 1920* (Singapore) s 9 which sets aside a depth of 30 metres below the surface for the landowner's reasonable use and enjoyment of the land. Thus, acquisitions within that depth are compensable under Singapore law. The only mention of a depth reference is found in *Land Acquisition Act 1969* (SA) s 26EA(1) where it is stated that the acquiring authority must prepare and submit to the Public Works Committee a report where the land to be acquired is for the purpose related to subterranean works less than 10 metres below the surface.

32 [1978] 1 QB 479, 488 (Griffiths J).

33 Elaine Chew, 'Digging Deep into the Ownership of Underground Space: Recent Changes in espect of Subterranean Land Use' [2017] (March) *Singapore Journal of Legal Studies* 1, 2.

34 *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177, 185 (Windeyer J).

35 *Land Acquisition and Compensation Act 1986* (Vic) s 26, 47.

36 *Planning and Environment Act 1987* (Vic) ss 98(1A)–(1B).

37 See ibid ss 98(1)–(1B).

purpose'.[38] The jurisprudence demonstrates that the italicised words are construed with exacting strictness. In *Minister for Planning v S B Partitions Pty Ltd*,[39] the Victorian Supreme Court dealt with a case where some land was proposed to be reserved for a road on the communicated basis that granting the planning permission sought by the landowner would prevent the proper future planning of the area.[40] As the plan was subject to statutory public participation procedures that had not been completed, Osborn J held that at the date of the planning refusal it was apparent that while 'the land may be required for a public purpose', it was inconclusive 'whether it was or would be so needed'.[41] Accordingly, the Court held that the refusal to grant the development permit 'did not give rise to a right to compensation under s 98(2)' of the *Planning and Environment Act 1987* (Vic).[42] A fortiori, where a height or development restriction is imposed to enhance environmental amenities but where the land itself will not be used for a public purpose, no compensation is payable.

The Victorian Supreme Court has observed that while planning control affects the use and enjoyment of land, planning matters do not amount to defects in title as planning does not affect any estate or interest in land.[43] In contrast, it has been argued that '[t]he interest that underpins the right to property is the interest we have in purposefully dealing with things'[44] as property is the interest we have in the use of things.[45] If that were true then even on a conceptual basis when land is regulated, a landowner has lost property because their interest to determine the use of their land exclusively has been reduced. Indeed, Paul Babie rightly states that 'planning law is, in *itself*, property'.[46] Regardless, it is reiterated that an efficiency rather than a conceptual lens is adopted by this article. In other words, rather than asking whether there are conceptual differences between a physical acquisition and regulatory incursions to

38 *Planning and Environment Act 1987* (Vic) s 98(2) (emphasis added). The phrase 'the natural, direct and reasonable consequence' in s 98 of the *Planning and Environment Act 1987* (Vic) was held by Batt J in *Halwood Corporation Ltd (admin apptd) v Roads Corporation* (1995) 89 LGERA 280, 302–3 ('*Halwood*') to 'connote a very close and limited connection between' the event giving rise to the compensation and the financial loss suffered. In particular, the word 'direct' stood out as being 'eloquent of the immediacy' required between the imposition of the land reservation and the financial loss suffered: *Halwood* (n 38) 303–4. *Halwood* was cited with approval by the Victorian Supreme Court in *Provans Timber Pty Ltd v Secretary, Department of Economic Development, Jobs, Transport and Resources* [2019] VSC 390, [221] (Emerton J).

39 [2009] VSC 333.

40 Ibid [10]–[14].

41 Ibid [19].

42 Ibid [54].

43 *Yammouni v Condidorio* [1959] VR 479, 487–8.

44 JE Penner, *The Idea of Property in Law* (Oxford University Press, 1997) 70–1.

45 Ibid 49.

46 Paul Babie, 'Three Tales of Property, or One?' (2016) 25(4) *Griffith Law Review* 600, 612 (emphasis in original).

land justifying their disparate treatment,[47] the question posed is whether efficiency requires both diminutions in land value to be made compensable.

B *Regulatory Land Takings in the United States — An Outlier*

It has been observed that in drafting the constitutional property clause, the Australian founders were concerned to limit the acquisition power, just as the Americans had done with their Fifth Amendment.[48] Indeed, in *Wurridjal v Commonwealth*, Kirby J stated that s 51(xxxi) was inspired by the Fifth Amendment to the *United States Constitution*.[49] This is even though the Australian acquisition clause is worded as a grant of legislative power, rather than being expressed as a specific limitation on power — the takings clause of the Fifth Amendment reads: 'nor shall private property be taken for public use, without just compensation'.[50]

Notwithstanding this, while the compensation differences between acquisitions and regulations existing in SA and Victoria are in line with other parts of the Commonwealth and the common law world, the position in the United States ('US') is a key exception to the general position that regulations affecting land value are generally not compensable. The peculiarities regarding the US law of regulatory takings have arisen because of the overly expansive yet restrictive position adopted by the US Supreme Court. In a nutshell, any regulation could qualify as a Fifth Amendment taking under the property clause, so long as the Constitutional Court considers that the effect of the regulation sufficiently constitutes a taking. Such 'regulatory takings' are only compensable if the regulation goes too far, essentially depriving the landowner of all or nearly all the land's economic benefits. The test is pragmatic rather than principled, being limited to situations where the regulation results in complete or very substantial loss in land value.

In *Palazzolo v Rhode Island* for instance,[51] even a 93.7% diminution in land value was held by the Court to be insufficient to require compensation.[52] In the US context, the government appears to compensate for physically taking land but not when regulating land because of practical considerations related to causation and administrative feasibility. Examples cited by Richard Posner include the difficulties in identifying and compensating everyone whose properties were affected by government regulation affecting the price of heating oil[53] — the rationale being that

47 See Edward SW Ti, 'Justice as Fairness: A Rawlsian Perspective in Compensating Regulatory Land Takings' (2022) 14(2–3) *Journal of Property, Planning and Environmental Law* 45.

48 Duane L Ostler, 'The Drafting of the Australian Commonwealth Acquisition Clause' (2009) 28(2) *University of Tasmania Law Review* 211, 211.

49 (2009) 237 CLR 309, 425 [306].

50 *United States Constitution* amend V.

51 533 US 606 (2001).

52 See ibid 615–6, 632.

53 Richard Posner, *Economic Analysis of Law* (Wolters Kluwer, 9th ed, 2014) 60.

higher market value would be attributable to better insulated homes if energy prices were high, and vice versa. Another example Posner gives is a zoning ordinance forbidding the development of land used exclusively for residential use to prevent, for instance, one landowner from creating a pigsty on their land.[54] Certainly, it would be going too far to argue that every regulation affecting land value should attract compensation. It would be administratively unworkable and therefore economically inefficient to isolate and quantify every state-sanctioned externality that affected land values. The legitimate concern is that in the context of determining when compensation is due, defining 'regulation' in its widest sense would indeed mean that the 'progress of civilised society would effectively grind to a halt if every minor regulatory act of the state provoked an immediate entitlement to some carefully calculated cash indemnity for the affected landowner'.[55]

Outside of the US context, these implementation problems may be resolved by properly defining what a land regulation is. Regulations may be understood to mean planning rules or discretions which directly impinge or enhance the economic value of land without involving a physical taking (or addition) of land.[56] Accordingly, regulating the price of heating oil or interest rates are not land regulations, though they certainly impact real estate values. For zoning ordinances, these should be limited to only when the regulation adversely affects the lot in question, or those lots within a statutorily defined boundary. While this is consistent with s 55(2)(a)(iii) of the *Lands Acquisition Act 1989* (Cth), which limits compensation to the value of the land taken and any reduction in value of the remaining (contiguous) property of the landowner, it would also include situations where the development potential of a site has been reduced.

There are many approaches to determine why rules operate differently in two different albeit similar contexts. The purpose of this article is not to argue for the transplantation of American takings jurisprudence to Australia. Neither am I arguing for or against either compulsory acquisition or the regulation of land. Instead, I highlight that there is a tangible outcome difference (between compensation and non-compensation) when land is acquired and when land is regulated, even where the economic loss suffered by the landowner may be the same. Second and principally, I argue that from a normative perspective, efficiency outcomes are enhanced if compulsory acquisition and adverse regulations are both compensable and, in the case where regulation enhances the value of land, there is the imposition of a land value-gain tax.

III An Economic Approach to Law

Speaking extra-curially, Kirby J has remarked that 'amongst some of those who now hold (or have held) senior judicial office, there is occasionally an uncomfortable

54 Ibid.

55 Kevin Gray, 'Land Law and Human Rights', in Louise Tee (ed), *Land Law: Issues, Debates, Policy* (Routledge, 2014) 211, 223. See also *Pennsylvania Coal Co v Mahon*, 260 US 393, 413 (Holmes J) (1922).

56 See Edward Seng Wei Ti, 'Compensating Regulation of Land: UK and Singapore Compared' (2019) 11(2) *Journal of Property, Planning and Environmental Law* 135, 135.

feeling that the economic implications of judicial decisions ought to be given more attention than they typically are'.[57] Arguing that a 'filter' of economic analysis to aid decision-making would be useful, the learned Justice laments that 'the conventional and traditional way of our system' in Australia has led to courts largely shying away from dealing with a case's economic implications.[58] David Partlett similarly notes that while '[t]he lens of economic analysis has been used extensively in the United States to examine' legal rules and doctrines, its use has been limited 'elsewhere in the common law world'.[59] Justice Kirby reminds us of the practical benefits of legal values that maximise benefits and minimise costs.[60] While these comments were made in the context of judge-made case law,[61] it is equally important to have a law and economics framework to analyse regulations, particularly those which govern something as critical as property ownership.

Legal doctrinal concepts based on justice and fairness are the traditional prisms through which law is viewed.[62] Thus, Alan must compensate Bob if Alan causes attributable harm to Bob. This traditional approach does not, however, seek to maximise net utility. The introduction of economic concepts to augment the study of jurisprudence allows rules to be constructed that seek to maximise efficiency.[63] These are not based on traditional concepts of justice and fairness *inter partes* per se, although it could be argued that efficient outcomes are ultimately what is most just and fair for society. As Kirby J notes, an important challenge facing Australian jurists is reconciling 'the universal human rights movement in the law' with law and economics.[64]

In a marked departure from the legal approach that looks at where the cause of harm runs from,[65] Ronald Coase innovatively sought the establishment of legal rules that

57 Justice Michael Kirby, 'Law and Economics — Is There Hope?' (Speech, Law School of the University of Melbourne, 4 July 1997) <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_lawecon.htm>.

58 Ibid.

59 David Partlett, 'Economic Analysis and Some Problems in the Law of Torts' (1982) 13(3) *Melbourne University Law Review* 398, 398.

60 Kirby (n 57).

61 Ibid.

62 See Nicholas Mercuro and Steven G Medema, *Economics and the Law: From Posner to Post-Modernism* (Princeton University Press, 1997) 13.

63 See also ibid.

64 Kirby (n 57).

65 It is hoped that both his critics (see, eg: Richard A Posner, 'Nobel Laureate: Ronald Coase and Methodology' (1993) 7(4) *Journal of Economic Perspectives* 195; Dan Usher, 'The Coase Theorem Is Tautological, Incoherent or Wrong' (1998) 61(1) *Economics Letters* 3) and supporters alike (see, eg, Robert C Ellickson, 'The Case for Coase and against "Coaseanism"' (1989) 99(3) *Yale Law Journal* 611) will at least agree that Coase's economic analysis of law is one that seeks to promote economic efficiency.

instead encourage efficiency in the assignment of costs and liabilities.[66] He believed that economic actors that are able to minimise their transaction costs enhance efficiency.[67] To minimise transaction costs Coase argues that the assignment of liabilities should not simply be based on who harmed whom; rather, the goal is to identify and avoid the more serious harm[68] so that there is a greater net value in any exchange which, at least in theory, could be split, leaving all interested parties better off.[69] As an economic term 'efficiency' may be defined as process outcomes that tend toward maximising output for any given input.[70] The economic approach to law holds that from a societal perspective, laws that bring increased net wealth, or to use economic nomenclature, bring us closer to Pareto[71] or Kaldor–Hicks[72] improvements, are more efficient than those that do not.

Robin Paul Malloy notes, 'it is a misconception to believe that economics can help us identify the most efficient legal rule or the optimal-rule choice in a given set of circumstances', nevertheless, '[*s*]*ome choices can be shown to be suboptimal and these can be eliminated*'.[73] Thus, I synthesise the literature to evaluate the relative efficiencies pertaining to compulsory acquisitions and regulation vis-à-vis compensation. The standard law and economics assumption that deems actors to be rational *homo economicus* is adopted.

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66 See RH Coase, 'The Problem of Social Cost' (1960) 3 (October) *Journal of Law and Economics* 1, 2.

67 Ibid 27, 32–4. In referring to the costs of contracting, Coase states: 'There are negotiations to be undertaken, contracts have to be drawn up, inspections have to be made, arrangements have to be made to settle disputes, and so on': RH Coase, 'The Institutional Structure of Production' (1992) 82(4) *American Economic Review* 713, 715.

68 Coase, 'The Problem of Social Cost' (n 66) 2.

69 Kaldor–Hicks efficiency, described below n 72 (or as described by Posner (n 53) 14, wealth maximisation) is thus the goal.

70 Robert Cooter and Thomas Ulen, *Law & Economics* (Berkeley Law Books, 6th ed, 2016) 13 state that a production process is 'productively efficient if either of two conditions holds': (1) '[i]t is not possible to produce the same amount of output using a lower-cost combination of inputs'; or (2) '[i]t is not possible to produce more output using the same combination of inputs'.

71 Pareto efficiency is the allocation of resources in which it is it is impossible to make any one individual better off without making at least one individual worse off. A Pareto improvement is one where at least one individual is better off and no individual is worse off: Posner (n 53) 14.

72 The Kaldor–Hicks criterion holds that an outcome is an improvement if those that are made better off could in principle compensate those that are made worse off, so that a Pareto improving outcome could (though does not have to) be achieved. Kaldor–Hicks efficiency is achieved when no further Kaldor–Hicks improvement can be made: Posner (n 53) 14–15.

73 Robin Paul Malloy, 'Economics as a Map in Law and Market Economy' (2009) 24(1) *Research in Law and Economics* 3, 8 (emphasis added).

IV Acquisitions, Regulations and Efficiency

Many scholars have considered the issue of efficiency, or the maximisation of aggregate utilities, vis-à-vis compulsory acquisitions. A review of the literature unpacks two questions: (1) is it more efficient than not to allow the government to exercise the power of compulsory acquisition? (2) if so, should compensation be paid for compulsory acquisition — and if so — how much? In arguing that regulations, like acquisitions, should be compensable, I am thus relying on how these two questions have been answered in order to assert 'a connection between the failure to compensate landowners and the generation of some quantum of disutility that would not exist' if compensation were made.[74]

A *The Power Compulsorily To Acquire Enhances Efficiency*

To a rational landowner, the economic value of land and its utility are interchangeable and would be determined by the sum of all future income streams or rent that can be generated from the property, discounted to its present value. This is the standard approach adopted to appraise the value of investment property, which in theory would also be the market price. Ignoring transaction costs, a utility-maximising individual would sell their land if the net present value of all future income generated is matched or exceeded by the offer price. Utility from land is, however, sometimes subjective — owners may view it as a status good or attach sentimental value to their property.[75] 'Therefore, the price of land has two components: an objective component that is relatively easy to measure and a subjective component that is difficult to measure.'[76]

Compulsory acquisition assigns no value to any compensation for 'dignitary harms' suffered by property owners who feel unsettled or vulnerable in the compulsory acquisition process.[77] At common law, Lord Romer held that compensation at 'market value' is referenced on an objective basis, with the 'disinclination of the vendor to part with his land' disregarded.[78] This is largely true under both the South Australian and Victorian statutes. Section 25(1)(g) of the *Land Acquisition Act 1969* (SA) states in relation to compensation that 'no allowance shall be made on account of the fact that the acquisition is effected without the consent, or against the will, of any person'. In interpreting that subsection, a Full Court of the South Australian State Supreme Court held that psychiatric injury stemming from having one's land

74 Gregory S Alexander and Eduardo M Peñalver, *An Introduction to Property Theory* (Cambridge University Press, 2012) 162–3.

75 Sanjoy Chakravorty, *The Price of Land: Acquisition, Conflict, Consequence* (Oxford University Press, 2013) 140, 142–3.

76 Ibid 143.

77 See Nicole Stelle Garnett, 'The Neglected Political Economy of Eminent Domain' (2006) 105(1) *Michigan Law Review* 101, 109.

78 *Vyricherla Narayana Gajapatiraju v The Revenue Divisional Officer, Vizagapatam* [1939] AC 302, 312 (Lord Romer for the Court).

acquired is not compensable under this Act.[79] However since 2 July 2020, s 25A of this Act provides for a statutory solatium, albeit only for owner-occupiers whose principal place of residence is acquired.[80]

Under the Victorian statute, the general principles on which compensation for acquisition is based include not just the market value of the land,[81] but also 'any special value to the claimant on the date of acquisition'.[82] While this does not take into account any disinclination to part with the land, it nonetheless has a subjective element as 'special value' is defined to mean 'the value of any pecuniary advantage, in addition to market value, to a claimant which is incidental to his ownership or occupation'.[83] In *Spyropoulos v Commissioner of Highways*, Parker J held that 'an emotional attachment to land d[oes] not entitle a dispossessed owner to compensation under the head of special value'.[84] Nonetheless, the slight concessions in both SA and Victoria present a response to Posner's arguments that the heterogeneous nature of real estate means that a land 'parcel in the hands of a particular owner will generally yield [that owner] an idiosyncratic value that is on top of the market value'.[85] The Acts surveyed can thus be said to adopt a more nuanced approach than frameworks that look solely to market value for guidance.

Compulsory acquisition nevertheless creates disutilities as landowners may have emotional attachments to their property and no statutory scheme may be able to fully capture these sentiments. Landowners may also be disadvantaged because they not only cannot set the sale price, but they also lose the right to determine when the property should be acquired. While s 23(1) of the *Land Acquisition Act 1969* (SA) directs the acquiring authority and landowner to 'negotiate in good faith', this pertains only to the compensation payable and not whether the acquisition will take place. This may lead to compulsory acquisition inevitably taking place when property prices are suppressed. In Singapore, state planners have observed that even if not by intentional design, acquisitions 'generally occur during an economic slowdown when public [infrastructure] projects are often introduced to pump-prime the economy'.[86] Owners may thus lose out as they may be forced to relinquish their property 'when land prices are low or at a time when it is inconvenient for the owner

79 *Anderson v Commissioner of Highways* (2019) 134 SASR 543, 561 [65] (Stanley J, Kelly J agreeing at 544 [1], Blue J agreeing at 544 [2]).

80 Section 25A(4) provides for an additional payment of up to the lesser of $50,000 or 10% of the market value of the land: *Land Acquisition Act 1969* (SA) s 25A(4), as inserted by *Land Acquisition (Miscellaneous) Amendment Act 2019* (SA) s 20.

81 *Land Acquisition and Compensation Act 1986* (Vic) s 41(1)(a).

82 Ibid s 41(1)(b).

83 Ibid s 40 (definition of 'special value').

84 (2018) 234 LGERA 467, 476 [42].

85 Posner (n 53) 56.

86 Bryan Chew et al, 'Compulsory Acquisition of Land in Singapore: A Fair Regime?' (2010) 22 (Special Issue) *Singapore Academy of Law Journal* 166, 177.

to vacate [their] property'.[87] Seen in this light, the market value benchmark not only ignores sentimental value, but may lead 'to an excessive transfer of private property to public use because the government does not have to pay the true opportunity cost of the resources it acquires'[88] as the external assembly gains from joining parcels of land goes to the condemnor.[89] As Douglas J states in *United States v Causby*, '[i]t is the owner's loss, not the taker's gain, which is the measure of the value of the property taken'.[90]

Despite these inherent weaknesses, Thomas Miceli[91] and Posner[92] separately point out that the power to acquire is justified on an efficiency basis due to the problem of holdout. When the state endeavours to acquire land for a public project, 'individual owners whose land is necessary for the project acquire monopoly power in their dealing with the government'.[93] This allows them to 'hold out for prices in excess of their true (subjective) valuation of the land' since it would be too costly or even impossible for government to seek alternative locations or abandon the project.[94] Rational landowners will be reluctant to declare their true subjective valuation, and even if they did state a price, it would be impossible for the state to know if such an account were true. Therefore, Yun-chien Chang's suggestion for 'full compensation' which he defines as 'fair market value plus "(unique) subjective value" … derived from, say, the memory of growing up in the family house',[95] may prove unwieldly. Notwithstanding, while valuing an acquired property based wholly on its

87 Robin Goodchild and Richard Munton, *Development and the Landowner: An Analysis of the British Experience* (George Allen and Unwin, 1985) 35.

88 Thomas J Miceli, *Economics of the Law: Torts, Contracts, Property, Litigation* (Oxford University Press, 1997) 139 ('*Economics of the Law*').

89 In contrast to this benchmark adopted by governments, Richard Epstein discusses the possibility of using project value compensation, meaning condemnees share the enhanced value arising from the public project facilitated by eminent domain: see Richard A Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press, 1985) 3–5.

90 328 US 256, 261 (1946).

91 Miceli, *Economics of the Law* (n 88) 138.

92 Posner (n 53) 56.

93 Miceli, *Economics of the Law* (n 88) 138.

94 See ibid.

95 Yun-chien Chang, *Private Property and Takings Compensation: Theoretical Framework and Empirical Analysis* (Edward Elgar Publishing, 2013) 5, citing Lawrence Blume and Daniel L Rubinfeld, 'Compensation for Takings: An Economic Analysis' (1984) 72(4) *California Law Review* 569, 619; Lee Ann Fennell, 'Taking Eminent Domain Apart' [2004] (Winter) *Michigan State Law Review* 957, 963–5; Thomas J Miceli and Kathleen Segerson, *The Economics of Eminent Domain: Private Property, Public Use, and Just Compensation* (Now Publishers, 2007) 20; Michael Heller and Rick Hills, 'Land Assembly Districts' (2008) 121(6) *Harvard Law Review* 1465, 1475.

subjective value cannot be the guiding principle, jurisdictions such as SA provide for a solatium to partially mitigate subjective losses.[96]

Since holdouts are a form of transaction cost which could very easily spiral uncontrollably, the state's power compulsorily to acquire land at market value is the lesser evil on an efficiency scale. Thus, the metamorphosis of what is ordinarily a property rule into that of a liability rule[97] — in relation to an individual landowner's property vis-à-vis the state — is justified because of the unique location of each plot of land and the need to acquire contiguous lots for the greater good of society. In short, the transaction costs to maintain land ownership based strictly on a property rule are debilitating. Despite the subjective unfairness to individual landowners, therefore, the power of compulsory acquisition, if not wielded capriciously, enhances efficiency. To prohibit it altogether would mean that government projects would be curtailed, either by sentimental landowners who would not sell for any price, or by landowners who would set extortionate prices for their property.

B *It Is Efficient To Pay Compensation for Acquisitions*

Requiring the government to treat all land with a property entitlement and therefore compensate landowners for the entire subjective value they attribute to their property is unworkable and will lead to strategic holdouts. Market value should thus be the *upper limit* paid when a state exercises its right compulsorily to acquire property. I thus consider whether compensation could bring about greater efficiency than a no-compensation policy. If that is accepted, the contention that compensation for regulatory takings should also be paid would likewise have force.

It has been observed that '[t]yrannies sometimes finance government and enrich officials by taking property from individuals' without compensation.[98] This may be seen as a form of ad hoc, narrow base taxation.[99] Requiring compensation for compulsory acquisition can therefore be viewed as a device for channelling government finance into broad base taxation (eg income tax, consumption tax, corporate tax, etc) rather than uncompensated acquisitions.[100] No compensation or low compensation is tantamount to an arbitrary tax in respect of certain landowners. Disutility emerges because of the skewed wealth outcomes post-acquisition. As mentioned earlier, the SA statute now allows the SA Government to acquire underground land without compensation.[101] Though universally affecting all landowners in principle, only a small subsection of owners will have their property acquired.

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96 Such special concessions include moving costs, inconvenience, etc, as exhibited in SA's statutory solatium: see *Land Acquisition Act 1969* (SA) s 25A.

97 Guido Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85(6) *Harvard Law Review* 1089, 1092–3.

98 Cooter and Ulen (n 70) 175.

99 See generally ibid 175–6.

100 See ibid 175.

101 See above Part II(A)(1).

The non-compensation for underground land may thus lead to economic disutilities for some landowners, especially to those who are subject to shallow subterranean takings just beneath their surface.

Robert Cooter and Thomas Ulen explain that while any kind of tax 'distorts people's incentives and causes economic inefficiency', broad base taxation 'distort[s] far less than uncompensated takings' because economic actors cannot change their behaviour to avoid such taxes.[102] In other words, 'goods should be taxed at a rate inversely proportional to their elasticity of demand and supply'.[103] Since uncompensated acquisitions have a very narrow base, landowners may go to great expense, such as engaging in protracted litigation, to prevent the government from taking away their property, with the possibility of diverting effort and resources from societal wealth production.[104] Assuming the total tax that needs to be raised is a constant, broad base taxation results in greater efficiency than uncompensated land takings.[105] Posner explains it succinctly — taxes that take 'a little bite out of many hides' are more efficient than the compulsory acquisition 'tax' that 'takes a big bite out of a few'.[106] Accordingly, small adjustments to broad based taxes such as property, income or consumption tariffs affecting a broad base of taxpayers lead to more efficient outcomes than piecemeal, uncompensated land acquisitions.

Accepting these arguments depends, at least in part, on the worldview one takes of government; in other words, what motivates government action. Like all economic models, conclusions are dependent on assumptions. As stated earlier, this article assumes that individuals act rationally. While the vast bulk of literature also assumes that individuals are *homo economicus*, the view is not unanimous. Cass Sunstein observes that some landowners could be *homo reciprocans*,[107] meaning they have a desire to act fairly 'even when it is against their financial self-interest *and no one will know*'.[108] In truth a mixture of individuals at both ends of the spectrum, and possibly many more in the middle, makes up the body of landowners and interested individuals. Posner gives a simple example of how, even though it may not be rational to feel frightened when watching a horror movie, many of us are.[109] Another well-accepted lack of rationality is loss aversion, the phenomenon

102 Cooter and Ulen (n 70) 175.

103 Ibid 175 n 63.

104 See ibid 175–6.

105 Edward SW Ti, 'Fair Differentiations or Ignominious Distinctions: Compulsory Acquisitions and Regulatory Incursions to Land' (PhD Thesis, University of Cambridge, 2017) ('Fair Differentiations or Ignominious Distinctions').

106 Posner (n 53) 57.

107 Cass R Sunstein, 'Introduction' in Cass R Sunstein (ed), *Behavioral Law and Economics* (Cambridge University Press, 2000) 1, 8.

108 See Christine Jolls, Cass R Sunstein and Richard H Thaler, 'A Behavioral Approach to Law and Economics' in Cass R Sunstein (ed), *Behavioral Law and Economics* (Cambridge University Press, 2000) 13, 23 (emphasis in original).

109 Posner (n 53) 4.

that losses loom larger in the minds of most individuals than corresponding gains. This has been identified in Amos Tversky and Daniel Kahneman's famous paper which discusses past empirical studies.[110] Notwithstanding the limitations of *homo economicus*, it remains a 'fundamental pillar … of the neoclassical paradigm' that has not been overcome.[111] Assuming that all landowners are *homo economicus* represents, therefore, a workable economic model, and one that accords more closely with reality than a model that assumes all landowners either act selflessly or irrationally. Thus, while the assumption of rational utility maximisation is not a complete description of reality, it is a useful tool of analysis with considerable truth value.

The literature is, however, more divided in its description of governments' motives to acquire and compensate for compulsory acquisition. Unsurprisingly, the assumptions built into the theoretical models that have resulted in varying conclusions therefore differ not in their assumptions of how landowners behave, but in their interpretation of government officials' incentives. Adopting Chang's framework, three assumed theories of government are discussed: the benevolent, the fiscal illusion and the political interest theories.[112]

1 *Three Theories of Government*

> 'If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary.'[113]

(a) Benevolent Theory of Government

As its name suggests, the benevolent theory assumes a Pigovian model of government that aims to maximise social welfare.[114] This model assumes that government is unmoved by how much (or if any) compensation must be paid, as 'officials will always take into account all relevant social benefits and costs' when

110 Amos Tversky and Daniel Kahneman, 'Loss Aversion in Riskless Choice: A Reference-Dependent Model' (1991) 106(4) *Quarterly Journal of Economics* 1039.

111 Dante A Urbina and Alberto Ruiz-Villaverde, 'A Critical Review of *Homo Economicus* from Five Approaches' (2019) 78(1) *American Journal of Economics and Sociology* 63, 80.

112 Chang (n 95) 13.

113 James Madison, 'The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments' (Federalist No. 51) *The New York Packet* (New York, 6 February 1788) reproduced in Philip B Kurland and Ralph Lerner, *The Founders' Constitution* (University of Chicago Press, 1987) vol 1, 330, 330.

114 Chang (n 95) 13. See also William A Fischel and Perry Shapiro, 'A Constitutional Choice Model of Compensation for Takings' (1989) 9(2) *International Review of Law and Economics* 115, 120–1.

making acquisition decisions.[115] A well-cited article by Lawrence Blume, Daniel Rubinfeld and Perry Shapiro that has received much academic attention, suggesting that non-compensation brings about the greatest efficiency,[116] has been described by Chang as adhering to a benevolent theory of government.[117] Using a general equilibrium model, Blume, Rubinfeld and Shapiro found that a rule of not compensating for compulsory acquisition results in efficient investment decisions by landowners because fully compensable takings result in overinvestment on the part of the landowners ('BRS model').[118]

Miceli describes the BRS model by explaining that rational landowners would realise that they would either have to pay a tax to fund the acquisition if their land were not taken, or they would receive market value compensation if their land were taken.[119] Landowners would therefore overinvest in their property since there is a positive correlation between improvements made to their property and the amount for which they would be compensated.[120] A moral hazard is therefore created as overinvesting provides the landowner with insurance against the possibility of an acquisition vis-à-vis having to pay a higher tax.[121] Since all landowners act rationally and overinvest, the total amount of compensation (and therefore tax levied) through the remaining landowners for the land acquired is therefore higher than efficiency would demand. Because the BRS model assumes that government will not be tempted to acquire more land even if to do so were costless, it focuses on the effects of compensation on landowners. An obvious weakness of 'the benevolent theory is that we do not live in an ideal world in which government officials are omniscient angels'.[122] It also seems incongruous to hold that landowners are purely self-interested while government condemners are 'unswervingly devoted to acquiring resources only when it is efficient to do so'.[123]

(b) Fiscal Illusion Theory of Government

The model closest to *homo economicus* applicable to the behaviour of governmental officials is the fiscal illusion theory. This popular theory has wide acceptance

115 Chang (n 95) 13.

116 See Lawrence Blume, Daniel L Rubinfeld and Perry Shapiro, 'The Taking of Land: When Should Compensation Be Paid?' (1984) 99(1) *Quarterly Journal of Economics* 71, 90.

117 Chang (n 95) 13, 13 n 2.

118 See Blume, Rubinfeld and Shapiro (n 116).

119 See Miceli, *Economics of the Law* (n 88) 139–40.

120 Ti, 'Fair Differentiations or Ignominious Distinctions' (n 105).

121 Ibid.

122 Chang (n 95) 13–14.

123 Miceli, *Economics of the Law* (n 88) 141.

in the literature,[124] having 'the advantage of being easy to model mathematically because condemnors and condemnees make decisions using the same measure — the monetary value of condemned properties'.[125] Fiscal illusion theory holds that 'government officials will not internalize the costs of [land] takings unless paying compensation'[126] and will therefore tend to over acquire if this is costless. Compensation is therefore needed to enhance efficiency and prevent the 'fiscal illusion' under which governments would labour, should they be empowered to take land without cost. It does not seem unreasonable to assume that government may be expected to act like any other economic agent who responds to economic incentives. Vicki Been and Joel Beauvais describe the model as assuming governments behave like profit-maximising firms.[127] Martin Johnson suggests that if compensation is zero, then acquired resources under the control of the government will be perceived to be costless.[128] With opportunity costs ignored, compulsory acquisition and land use regulation without compensation will lead to overproduction of public goods.[129] In the absence of a compensation requirement, therefore, rational government actors may treat private property as a commons and tend to overregulate, as there is nothing to deter government from undertaking projects that are not necessarily utility-enhancing, since there would be no costs to bear.

In the context of describing the US government, Posner states that the assumption 'that the government makes its procurement decisions approximately as a private entrepreneur would do, that is, on the basis of private rather than social costs, unless forced to take social costs into account', is realistic, as the 'government is sensitive to budgetary expense'.[130] Blume, Rubinfeld and Shapiro describe such a government as suffering from 'fiscal illusion'.[131] This implies that the government, by comparing the benefit of the public good (more than zero) with the amount of compensation it must pay the owners of the land it takes (zero), would tend to over acquire. In this vein, Blume and Rubinfeld argue that the no-compensation result is

124 Abraham Bell and Gideon Parchomovsky, 'A Theory of Property' (2005) 90(3) *Cornell Law Review* 531, 605 n 386; Abraham Bell and Gideon Parchomovsky, 'Givings' (2001) 111(3) *Yale Law Journal* 547, 580–1. See also William A Fischel, *Regulatory Takings: Law, Economics, and Politics* (Harvard University Press, 1995) 61. But see Louis Kaplow, 'An Economic Analysis of Legal Transitions' (1986) 99(3) *Harvard Law Review* 509, 569.

125 Chang (n 95) 15.

126 Ibid 14.

127 Vicki Been and Joel C Beauvais, 'The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine' (2003) 78(1) *New York University Law Review* 30, 92.

128 See M Bruce Johnson, 'Planning without Prices: A Discussion of Land Use Regulation without Compensation' in Bernard H Siegan (ed), *Planning without Prices: The Taking Clause As It Relates To Land Use Regulation without Compensation* (Lexington Books, 1977) 63, 91.

129 See ibid 93.

130 Posner (n 53) 57.

131 Blume, Rubinfeld and Shapiro (n 116) 88.

bad because compensation acts as a form of public insurance for landowners against the risk of government expropriation of their property;[132] market failure would result otherwise as the private market is not able to provide such insurance.[133] The need for public rather than private insurance is clear because of moral hazard — government may be encouraged to acquire more if a private market insurance bears the cost.[134] Further, adverse selection — where only landowners with a higher risk of having their land acquired (eg properties near roads) would buy premiums — would prevent the formation of a private insurance market for hedging compulsory acquisition risk.[135] One provision in the South Australian statute may well tempt the State Government to acquire land, increase its value regulatorily and have the land resold: section 35 of the *Land Acquisition Act 1969* (SA) explicitly states that the acquiring authority 'may sell, lease, or otherwise deal with or dispose of any land acquired … that it does not require'. At the same time, the former government has also stated that the legislation 'contemplates the future use of tunnels to avoid above-ground land acquisition where possible'.[136] While Vickie Chapman's statement was made in the context of avoiding inconvenience to landowners,[137] it is worth reiterating that underground land acquisitions are costless.

(c) Political Interest Theory of Government

A forceful critic of fiscal illusion is Chang, who asserts that the model fails to clarify why money is taken as a proxy for government utility, given that governments may also weigh other more sophisticated considerations.[138] Chang thus favours the political interest theory, which 'argues that government officials make decisions according to their own calculus of personal political costs and benefits, rather than minimizing compensation payments or maximizing their agencies' budget'.[139]

While adopting a fiscal illusion theory would lead to the conclusion that only full compensation can induce efficient acquisition, political interest theory may result in different answers since it would then be accepted that government officials

132 Blume and Rubinfeld (n 95) 572.

133 Ibid 582.

134 Susan Rose-Ackerman, 'Regulatory Takings: Policy Analysis and Democratic Principles' in Nicholas Mercuro (ed), *Taking Property and Just Compensation: Law and Economics Perspectives of the Takings Issue* (Springer Science+Business Media, 1992) 25, 32.

135 Ibid.

136 South Australia, *Parliamentary Debates*, House of Assembly, 12 December 2019, 9151 (Vickie Chapman, Deputy Premier).

137 See ibid 9150.

138 See Chang (n 95) 14.

139 Ibid 16. See generally Daryl J Levinson, 'Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs' (2000) 67(2) *University of Chicago Law Review* 345.

think in political and not monetary terms.[140] This suggests that what motivates the government is the 'political opportunity cost'[141] — whether the government compensates or not (and if so, how much) is dependent on political interest maximisation.[142] The fiscal illusion and the political interest theories are similar in that both adopt a cynical view of government, while the benevolent theory believes governments always act for the benefit of society. While the fiscal illusion theory models the government as an economically rational being, political interest theorists seek to provide a more expansive description of how governments act. Heuristically, the political interest theory is attractive because it seems to accord best with reality as politicians may not always act out of concern for societal welfare, nor simply to swell government coffers, but to remain in power. Jacob Rowbottom notes that describing 'a decision as "political" is sometimes pejorative, suggesting that the decision is the product of a cynical calculation to maximise professional or partisan interests and taken with little regard for the broader public interest'.[143] The decisions whether to acquire land and if so, whether and by how much to compensate, may therefore depend on a political cost and benefit analysis.

Adopting the political opportunity cost as the model to test efficiency is, however, problematic. Tautologically, a government guided by vote maximisation or popularity in its consideration of whether and how much to compensate, is not seeking to act efficiently. Even if the outcome is efficient, this occurs by sheer chance and not design. Political interest is not measurable in the same way that rationality, proxied by prices and money, is. The law and economics query — asking whether a rule is efficient or can be made more efficient — presupposes economically, and not politically, rational actors. Notwithstanding the limitations of fiscal illusion however, this model of government is adopted as it provides the best fit to judge how to maximise efficiency through the land acquisition interactions of *homo economicus* landowners, with correspondingly rational government officials. As stated above, fiscal illusion is also adopted by a sizeable portion of the literature. Thus, while Gregory Alexander and Eduardo Peñalver note that mandating takings compensation is a blunt way to induce government officials to condemn efficiently because their political calculus seldom overlaps with an efficiency calculus, they nevertheless conclude that 'there is widespread (though not universal) agreement that compensating property owners is utility enhancing when the government expressly seizes land (or other property) for a public project'.[144]

140 See Chang (n 95) 16.

141 Ibid 16.

142 See ibid 16, 16 n 9.

143 Jacob Rowbottom, 'Political Purposes, Anti-Entrenchment and Judicial Protection of the Democratic Process' (2022) 42(2) *Oxford Journal of Legal Studies* 383, 383.

144 Alexander and Peñalver (n 74) 161.

C *Like Acquisitions, It Is Efficient To Pay Compensation for Regulations*

> 'There is nothing so dangerous as the pursuit of a rational investment policy in an irrational world.'[145]

John Maynard Keynes' statement, meant to warn investors that the market does not always behave rationally, is a fortiori applicable to a land market fuelled by uncertainty. An important conclusion drawn from Coase's work is that a clear delineation of property rights is essential to market transactions.[146] Uncertainty stifles the market because buyers and sellers who are uncertain about what they are transacting will not trade. The Australian High Court's decision in *Newcrest Mining (WA) Ltd v Commonwealth* ('*Newcrest Mining*')[147] can be said to implicitly support this proposition. There, a majority of the Court extended the law with respect to compulsory acquisition within s 51(xxxi) of the *Constitution*, which empowers the Commonwealth to make laws with respect to '[t]he acquisition of property on just terms'. In *Newcrest Mining*, mining leases were granted over Crown land which was subsequently added to Kakadu National Park.[148] The *National Parks and Wildlife Conservation Act 1975* (Cth) stated that operations for the recovery of minerals in the park were prohibited, and further that there was no liability to pay compensation for that reason.[149] Notwithstanding this, the High Court held that Newcrest was entitled to compensation on just terms for any leases which were contractually valid at the time of the park's acquisition.[150] This decision may be said to enhance efficiency because to hold otherwise would result in the investor, despite paying for such rights, having valuable property being taken away without compensation. At a macro level, this may lead to future cases of underinvestment as rational actors would consider the probability of uncompensated appropriation. To be clear, it is not argued that the government should not be entitled to regulate such environmental externalities, but simply that the owner in question should not be made to unilaterally bear the cost of the societal benefit.

The *Real Property Act 1886* (SA) embodies the original Torrens system of land registration now loyally embraced in dozens of jurisdictions across the world. One of the three key principles of the Torrens system is the mirror principle where the register effectively reflects all interests affecting land. As observed in the context of the *Land Registration Act 2002* (UK), one of the key goals of registration is to

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145 Werner De Bondt, 'Bubble Psychology' in William C Hunter, George G Kaufman and Michael Pomerleano (eds), *Asset Price Bubbles: The Implications for Monetary, Regulatory, and International Policies* (MIT Press, 2003) 205, 206 quoting John Maynard Keynes.

146 See RH Coase, 'The Problem of Social Cost' (n 66) 19–28.

147 (1997) 190 CLR 513 ('*Newcrest Mining*').

148 Ibid 525–6.

149 See ibid 530–1.

150 Ibid 635–7 (Gummow J, Toohey J agreeing at 560, Gaudron J agreeing at 561, Kirby J agreeing at 661).

ensure that the 'price paid reflects [the lot's] true economic and social value'.[151] The mirror principle thus encapsulates the idea that the register should reflect the full character of the land and the totality of rights and interests concerning title.[152] Regulating land without compensation is an affront to the mirror principle because planning decisions, changes in land use or permitted density are not reflected in the land register.[153] To that extent, registration fails in its purpose as legitimate economic expectations on the part of owners procuring land prior to adverse regulation are scuttled if no compensation is paid.

Should rational buyers assume the risk of uncompensated downzoning? Frank Michelman argues that when a buyer purchases land subject to the threat of a regulation, they paid a price that discounted the possibility of that regulation.[154] 'Consequently, the argument goes, they have already received implicit compensation.'[155] The Massachusetts Supreme Judicial Court in *Callender v Marsh* commented to this effect when it held, '[t]hose who purchase house lots … are supposed to calculate the chance of [regulations] … and as their purchase is always voluntary, they may indemnify themselves in the price of the lot which they buy'.[156] On this argument, adverse retrospective effects to purchasers are nullified by their explicit or implicit assumption of risk. Several authors have, however, pointed out that such an assertion is flawed.[157] It has been argued that 'even if the purchaser had full knowledge of the threat of a regulation when he bought the land, and therefore paid a discounted price, the threat had to arise at some previous point in time, and the owner at that point suffered a capital loss',[158] since successive buyers would demand a discount for the risk. Miceli therefore asserts that the only way to fully protect the original landowner is to provide full compensation for any decrease in value of their property brought about by regulation.[159] The risk of adverse retrospective effects cannot therefore be fully captured by the asset's market price.

The fear of landowners' jettisoning efficiency by overinvesting presupposes a utopic Pigovian government. The assumed government behaviour of fiscal illusion carries real risk of moral hazard — any government may conceivably be tempted to overregulate and hence act inefficiently, if to do so were costless. Given that regulating land and physical acquisitions are both, economically speaking, takings of property, then if it is accepted that paying compensation for compulsory acquisition is

151 Martin Dixon, *Modern Land Law* (Routledge, 10th ed, 2016) 33.

152 Ibid 34.

153 Edward SW Ti, 'An Overlooked Overriding Interest in Singapore's Torrens System?' (2018) 82(3) *Conveyancer and Property Lawyer* 280, 283.

154 Frank I Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law' (1967) 80(6) *Harvard Law Review* 1165, 1238.

155 Miceli, *Economics of the Law* (n 88) 153.

156 18 Mass 418, 431 (Parker CJ for the Court) (1823).

157 Miceli, *Economics of the Law* (n 88) 153.

158 Ibid 153–4.

159 Ibid 154.

efficient, it may also be argued that, similarly, it is efficient to pay market-price compensation for regulations. Any administrative difficulties in identifying which, or indeed how regulation impacts land value can be ameliorated by adopting, as this article suggests, a more focused definition of land regulation such that it is limited to planning outcomes directly impacting the lot in question.

V Windfall Gains Tax when Regulations Enhance Value

Just as '[t]he promulgation of legal controls on land use may result in depreciation in the value of some lands', it may equally result in the 'appreciation in the value of others'.[160] In the same way that compensation for regulations adversely affecting land values should be paid, efficiency (as well as fairness) also requires that society should be compensated if planning decisions or rezoning result in additional property rights being granted to landowners. Cameron Murray and Joshua Gordon note 'that rezoning to provide [additional] rights to airspace for existing landowners is not costless. It involves transferring valuable property rights from the public to existing private landowners'.[161] The same logic dictates that where rezoning enhances environmental amenities to the public (by curtailing a landowner's development rights), this should likewise be compensable as there are 'gains' for the purposes of acquisition law in Australia.

From 1 July 2023, Victoria will apply a WGT to land that is subject to a government rezoning resulting in a value uplift to the capital improved value of the land where this exceeds $100,000.[162] The owner of the land subject to the rezoning pays the WGT, with the obligation to pay deferable until the next dutiable transaction (such as a sale).[163] The Parliamentary Secretary to the Victorian Treasurer explained that because rezoning decisions originate from the government and are premised on 'a community need or benefit', 'it stands to reason that a portion of that windfall gain … is shared with the community'.[164] Murray observes that the tax brings about community benefits because it transfers part of the (enhanced) value from the private property owner to the public.[165] Because 'the value of the property

160 Lanteri (n 17) 311.

161 Cameron K Murray and Joshua C Gordon, 'Land as Airspace: How Rezoning Privatizes Public Space (and why Governments Should Not Give It Away for Free' (Working Paper, OSF Preprints, September 2021) 1 <https://doi.org/10.31219/osf.io/v89fg>.

162 *Windfall Gains Tax and State Taxation and Other Acts Further Amendment Act 2021* (Vic) pts 2–3. For a rezoning of land that results in a taxable value uplift, a marginal rate of 62.5% will apply for value uplifts of between $100,000 and $500,000 and a rate of 50% will apply to uplifts beyond $500,000: at s 9.

163 Ibid s 8, pt 4.

164 Victoria, *Parliamentary Debates*, Legislative Assembly, 26 May 2022, 2046 (Nick Staikos).

165 Cameron K Murray, 'Explainer: Taxing Rezoning Windfalls (Betterment)' (Explainer, Henry Halloran Trust, The University of Sydney, May 2021) 3–4 <https://doi.org/10.31219/osf.io/n78m4>.

rights that are privatised via [an enhanced] rezoning are economically equivalent to government budget spending', taxing this 'betterment will reduce required tax contributions elsewhere'.[166] As enhanced land values are distributed arbitrarily — in the sense that not all landowners will benefit from uplift rezoning and such planning decisions are presumably not correlated with the identity of the landowner — taxing such windfalls smoothens out distortive, unearned gains so that the public also captures a portion of such value uplifts. The advisory body to the Government, Infrastructure Victoria, reasons that taxing windfall gains is 'much more efficient than current revenue and funding options' because a WGT can be implemented 'without distorting economic activity' as land 'cannot be relocated or reduced in supply'.[167]

While some media reports appear to have sensationalised Victoria's WGT,[168] betterment levies are not a novel concept and have historically been adopted in various forms (and rates) across multiple jurisdictions including the Australian Capital Territory,[169] New South Wales[170] and internationally in the United Kingdom[171] and Singapore.[172] The efficiency arguments in support of Victoria's WGT when land is rendered more valuable apply equally when land is rendered less valuable. As far as practicable, neither the landowner nor the community should be arbitrarily enriched through land regulations because that would be distortive. Murray is right to state that '[a] tax on the value gain from rezoning at anything less than 100% is equivalent to selling the new property rights from the community to the current property owner at a discount.'[173] However, there is wisdom in the Victorian Government taking a more centrist approach as there would be no incentives to develop or intensify land if 100% of the value gain were taxed. To encourage development, Singapore, for instance, generally applies a 70% tax rate on value uplifts.[174] Even considering the realities of not living in a frictionless world, the law and economics approach provides guidance towards enhancing efficiency.

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166 Ibid 4.

167 See Infrastructure Victoria, 'Value Capture: Options, Challenges and Opportunities for Victoria' (Policy Paper, October 2016) 20 <https://www.infrastructurevictoria.com.au/wp-content/uploads/2019/04/IV18-Value-Capture-Options_Final-web_v2_0.pdf>.

168 See, eg, Paul Sakkal and Noel Towell, 'Treasurer to Whack Landlords, High-End Property Buyers with $2.4b Tax Hike', *The Age* (online, 15 May 2021) <https://www.theage.com.au/national/victoria/treasurer-to-whack-landlords-high-end-property-buyers-with-2-7b-tax-hike-20210514-p57s4j.html>.

169 *Planning and Development Act 2007* (ACT) s 277.

170 RW Archer, 'The Sydney Betterment Levy, 1969–1973: An Experiment in Functional Funding for Metropolitan Development' (1976) 13(3) *Urban Studies* 339.

171 C Lowell Harriss, 'Land Value Increment Taxation: Demise of the British Betterment Levy' (1972) 25(4) *National Tax Journal* 567.

172 *Land Betterment Charge Act 2021* (Singapore).

173 Murray (n 165) 1.

174 *Land Betterment Charge (Table of Rates and Valuation Method) Regulations 2022* (Singapore) reg 3.

Victoria's decision to impose a windfall tax when regulation increases the value of land may thus be of interest to SA and other jurisdictions in the Commonwealth. The economic logic underpinning the tax also requires that regulations which adversely affect the value of land should be compensated on the same basis as acquisitions.

VI Conclusion

It has been argued that restrictions on the use of land may reduce its market value, and the debate regarding compensation essentially creates a tension 'between government intervention for the public good and the traditional rights associated with private property'.[175] This is not always true. Restricting land use and compulsory acquisition can both be for public benefit, but there is no utility to treat losses stemming from acquisition differently than losses stemming from regulation. Efficiency is achieved when legal rules reduce transaction costs. Murray Raff observes that the object of compensation is to determine 'where the limitations and obligations inherent in the property end and … where an uncalled for individual sacrifice is being required'.[176] Compensating for acquisitions while not compensating regulations which adversely affect land value is internally inconsistent because if it is accepted that paying compensation for acquisitions is more efficient than not, it cannot follow that not paying compensation for regulations which adversely affect land value promotes efficiency.

A crude distinction, however, now holds — one that hinges compensation upon the need to have property acquired or expressly reserved for a public purpose. As Donald Denman argues, it is flawed to think of the economic value of land as an attribute of land — its economic value is an attribute of the property rights to land.[177] Regrettably, governmental decisions that prescribe a change of use or impose other kinds of economically debilitating measures on land without compensation exist because of pedantic distinctions rather than tangible outcomes. Insofar as compensation is directed to the acquisition gains or benefits by the acquiring authority of the land or property in question rather than the deprivation of landowner's property rights,[178] regulatory land control is sub-optimal from an economic perspective. One way of accommodating the suggestions made in this article within the existing jurisprudence is to recognise that regulations restricting development, for instance a density or height restriction, can be construed as 'acquisitions' as there would be environmental amenity gains which should not be presumed to be less valuable than the loss suffered by the landowner. The identity of a landowner is arbitrary where land is selected for regulatory control. From both a justice and efficiency perspective, such

175 See Lanteri (n 17) 311.

176 Murray Raff, 'Environmental Obligations and the Western *Liberal* Property Concept' (1998) 22(3) *Melbourne University Law Review* 657, 687.

177 See DR Denman, *Land Use and the Constitution of Property: An Inaugural Lecture* (Cambridge University Press, 1969) 6.

178 See generally *Tasmanian Dam Case* (n 10) 146 (Mason J).

landowners should not be singly required to sponsor societal benefits. Indeed, given the rational adoption of taxing windfall gains in Victoria in July 2023, perhaps it is timely to consider whether compensation and taxation for land regulations should also be correspondingly expanded in SA and beyond.

*Kenneth Ugwuokpe**

EVIDENCE EXCLUSION AND THE EPISTEMIC SEARCH FOR TRUTH IN CRIMINAL TRIALS IN THE UNITED STATES, CANADA, NIGERIA AND AUSTRALIA

Abstract

The controversy surrounding the exclusion of evidence in criminal trials has continued with renewed vigour. At one end are those who believe that a piece of evidence should be admitted based solely on its inherent epistemic value without reference to any other external considerations. At the other end are those who contend that criminal justice systems are meant to serve many societal ideals of which the search for truth is only one, and that criminal trials must be designed to ensure balanced resolutions of all conflicting interests. Naturally, legal systems across the world exemplify these divergencies with many variations along the spectrum regarding the scope of the exclusionary powers of the fact finder or court and the justifications for such powers. This article sets out to analyse the illegally or improperly obtained evidence exclusion regimes in the United States, Canada, Nigeria and Australia, and their respective levels of commitment to the search for truth. This article provides an insightful frame of comparative reference for stakeholders in these jurisdictions.

I Introduction

Criminal justice systems across the globe vary between those where evidence is admitted based solely on its intrinsic epistemic integrity and those where other competing societal ideals constrain or trump the search for truth.[1]

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1 See generally: Hock Lai Ho, 'The Fair Trial Rationale for Excluding Wrongfully Obtained Evidence' in Sabine Gless and Thomas Richter (eds), *Do Exclusionary Rules Ensure a Fair Trial?: A Comparative Perspective on Evidentiary Rules* (Springer, 2019) 283, 283–303; Shannon E Fyfe, 'Truth, Testimony, and Epistemic Injustice in International Criminal Law' in Morten Bergsmo and Emiliano J Buis (eds), *Philosophical Foundations of International Criminal Law: Foundational Concepts* (Torkel Opsahl Academic EPublisher, 2019) 269, 293–4.

The purpose of this article is to discuss the regimes of exclusion of illegally or improperly obtained evidence in criminal trials in United States ('US'), Canada, Nigeria and Australia, so as to analyse their comparative commitment to truth and offer critical insights that could assist stakeholders in these jurisdictions to navigate the ever-present tensions between the public need for crime control and the societal interest in upholding the liberties and rights of criminal suspects. The US, Canada, Nigeria and Australia, were chosen for the comparisons because of their common law heritage.[2]

Legal procedures and rules of evidence need to be designed to produce truths about the facts at issue in trials.[3] In the adversarial systems of justice as they exist in the US, Canada, Nigeria and Australia such epistemic efficiency is achieved when the criminal justice system eliminates or at least reduces truth distortions or erroneous verdicts.[4] However, because of the imperfect nature of the systems as human creations, errors are inevitable and the best that can be done is to engage in some error distribution that trades false convictions for false acquittals.[5] This is because as the English jurist William Blackstone stated — in articulating a doctrine that has been sustained to this day as the cornerstone of criminal jurisprudence in at least the common law world — it is 'better that ten guilty persons escape, than that one innocent suffer[s]'.[6] This bias for false acquittals over false convictions has given life to principles such as the presumption of innocence for the accused, the burden of proof resting on the prosecution or state, and the requirement of proof beyond reasonable doubt by the prosecution, among others.[7] This is also why any doubt about the existence or non-existence of a relevant fact or about a relevant issue in criminal trials is resolved in favour of the accused.[8] For the same reason, trial judges have the discretion, at least under the common law of England, to exclude illegally or improperly obtained evidence if its prejudicial effect will outweigh its probative value.[9]

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2 See generally Kemi Odujirin, 'Admissibility of Unfairly or Illegally Obtained Evidence in Nigeria' (1987) 36(3) *International and Comparative Law Quarterly* 680, 680.

3 Ronald J Allen and Brian Leiter, 'Naturalized Epistemology and the Law of Evidence' (2001) 87(8) *Virginia Law Review* 1491, 1500–1.

4 See generally: Danny Marrero, 'Cognitive Agendas and Legal Epistemology' (MA Thesis, University of Arkansas, 2011) 13; Larry Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (Cambridge University Press, 2006) 1.

5 Laudan (n 4) 1.

6 Sir William Blackstone, *Commentaries on the Laws of England* (Garland Publishing, 1978) vol 4, 358. See also: William S Laufer, '*The Rhetoric of Innocence'* (1995) 70(2) *Washington Law Review* 329, 333; *Re Winship*, 397 US 358, 372 (1970) (Harlan J).

7 Michael S Pardo, 'On Misshapen Stones and Criminal Law's Epistemology' (2007) 86(2) *Texas Law Review* 347, 354.

8 Ibid; Mission to Skopje, Organization for Security and Co-operation in Europe, *Doubt in Favour of the Defendant, Guilty Beyond Reasonable Doubt* (Comparative Study, 8 September 2016) 7–8.

9 Ho (n 1) 291; *R v Sang* [1980] AC 402, 437 (Lord Diplock) ('*Sang*').

This article has six parts: Part I is this introduction; Part II explores the legal basis for exclusionary powers in the US, Canada, Nigeria and Australia; Part III analyses the policy rationales that underlie the exclusion of illegally or improperly obtained evidence in these jurisdictions; Part IV discusses some factors that impact the contextual analysis of the policy rationales for the exercise of the exclusionary discretion; Part V discusses the burden of proof; and Part VI contains the concluding remarks. Although the exclusionary rule applies to both real and self-incriminating evidence,[10] the analysis below will be concerned principally with evidence resulting directly or indirectly from illegal searches, seizures or arrests.

II Legal Basis For the Exclusion of Improperly Obtained Evidence in Criminal Trials

A *Common Law Origin*

The modern exclusionary rules in all common law jurisdictions have, to varying degrees, been influenced by the trajectory of the common law of England.[11] As early as 1783, the common law had allowed certain evidence to be admitted notwithstanding the manner of its acquisition.[12] Among other early decisions which provided strong foundations for the subsequent consolidation of the rigid formulation of the common law against exclusion of illegally or improperly obtained evidence, was the 1862 decision in *R v Leatham*,[13] where Crompton J said that '[i]t matters not how you get [the evidence]; if you steal it even, it would be admissible'.[14] However, English courts have always had the discretion to exclude confessional statements obtained illegally or improperly such as through threats, coercion or improper inducements, since in such circumstances, the manner of their acquisition casts doubt on their credibility.[15] In other words, a trial court had no power to interrogate how a piece of evidence was obtained except when the manner of its acquisition affected its value.

Kuruma v The Queen ('*Kuruma*')[16] changed the fortunes of criminal defendants at common law for the better by recognising the judicial discretion to exclude

10 Steven M Penney, 'Unreal Distinctions: The Exclusion of Unfairly Obtained Evidence under S 24(2) of the *Charter*' (1994) 32(4) *Alberta Law Review* 782, 789.

11 See generally: Priscilla H Machado, 'The Design and Redesign of the Rule of Exclusion: Search-and-Seizure Law in the United States and Canada' (1993) 23(4) *Canadian Review of American Studies* 1, 2; Pontian N Okoli and Chinedum I Umeche, 'Attitude of Nigerian Courts to Illegally Obtained Evidence' (2011) 37(1) *Commonwealth Law Bulletin* 81, 83.

12 See *R v Warickshall* (1783) 1 Leach 263; 168 ER 234, 235, cited in Machado (n 11) 2.

13 [1861–73] 1 All ER Rep 1646 (Crompton, Hill, Blackburn and Wightman JJ).

14 Ibid 1648, quoted in GL Peiris, 'The Admissibility of Evidence Obtained Illegally: A Comparative Analysis' (1981) 13(2) *Ottawa Law Review* 309, 311.

15 Penney (n 10) 784.

16 [1955] AC 197 ('*Kuruma*').

illegally or improperly obtained real or physical evidence if it worked unfairly against the accused.[17] This case was an appeal to the Privy Council from the former British colony of Kenya, involving the unlawful search of Kuruma's ammunitions, possession of which was contrary to the repressive emergency regulations in place at the time.[18] Although the Privy Council restated its inclusionary stance and ultimately admitted the evidence in question, Goddard CJ, in delivering the Court's reasons for its judgment, articulated a judicial exclusionary discretion:

> No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. … If, for instance, some admission of some piece of evidence, eg, a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out.[19]

Because Goddard CJ had, in support of his above quoted statement, cited *Mohamed v The King*[20] and *Harris v Director of Public Prosecutions*,[21] both of which concerned the exclusion of similar fact evidence, there was confusion as to whether his Honour's dictum was a creation or recognition of a novel general judicial discretion to exclude unfairly obtained evidence, or merely a restatement of the well-entrenched exclusionary rules against prejudicial evidence such as similar fact evidence and improperly procured confessional statements.[22]

R v Sang ('*Sang*'),[23] which provided the House of Lords with the opportunity to clarify the relevant legal principles in the wake of the ambiguity and confusion engendered by *Kuruma*,[24] effectively trimmed down the scope of the courts' exclusionary discretion.[25] The central issue before the House of Lords was whether evidence of a crime committed by an accused, procured by an agent provocateur, was subject to the general judicial exclusionary discretion simply because the accused was induced to commit the crime.[26] The House of Lords held that other than improperly obtained

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17 Ibid 204; Machado (n 11) 2–3; Penney (n 10) 785.

18 Penney (n 10) 785. See also Larry Glasser, 'The American Exclusionary Rule Debate: Looking to England and Canada for Guidance' (2003) 35(1) *George Washington International Law Review* 159, 163.

19 *Kuruma* (n 16) 204.

20 [1949] AC 182.

21 [1952] AC 694 ('*Harris*').

22 Penney (n 10) 786.

23 *Sang* (n 9).

24 See generally: Rosemary Pattenden, 'The Exclusion of Unfairly Obtained Evidence in England, Canada and Australia' (1980) 29(4) *International and Comparative Law Quarterly* 664, 665–8; James Stribopoulos, 'Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate' (1999) 22(1) *Boston College International and Comparative Law Review* 77, 86.

25 Machado (n 11) 3.

26 Pattenden (n 24) 664.

confessions, admissions or self-incriminating evidence obtained from the accused after the commission of the offence, no judge has any general discretion to exclude relevant evidence on the ground of its unfair acquisition unless its probative value is less than its prejudicial effect.[27] The House of Lords also went on to clarify that even then, the vitiating unfairness is not unfairness in the procurement of the evidence prior to court proceedings but unfairness in its use at trial, if accompanied by prejudicial effects outweighing its probative value.[28] For all intents and purposes, *Sang* returned the English common law to its traditional inclusionary regime.[29] While the limited common law exclusionary discretion is retained in s 82(3) of the United Kingdom's *Police and Criminal Evidence Act 1984* (UK) ('*PACE Act*'), wider discretion has been granted to the courts under s 78(1) of the *PACE Act*[30] to

> refuse to allow evidence on which the prosecution proposes to rely … if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.[31]

Justice Williams interpreted the above provision in *Egeneonu v Egeneonu*:

> There is no automatic exclusion unless the circumstances reach such a high level or impropriety as to offend the courts conscience or sense of justice. The court must consider all the circumstances and decide whether relevant evidence should be excluded so as to ensure a fair hearing.[32]

However, s 78 has been criticised as offering nothing more than a codification of the narrow *Sang* discretion.[33]

B *The United States*

The US is the cradle of the exclusionary rule against the illegal and improper acquisition of evidence.[34] In 1914, in *Weeks v United States* ('*Weeks*'),[35] the US Supreme Court upheld the exclusionary rule and barred the use of evidence obtained in breach

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27 *Sang* (n 9) 437 (Lord Diplock). See also ibid 666.

28 *Sang* (n 9) 441 (Viscount Dilhorne). See also Machado (n 11) 3.

29 Stribopoulos (n 24) 86.

30 CJW Allen, 'Discretion and Security: Excluding Evidence under Section 78(1) of the Police and Criminal Evidence Act 1984' (1990) 49(1) *Cambridge Law Journal* 80, 81–2.

31 *Police and Criminal Evidence Act 1984* (UK) s 78(1).

32 *Egeneonu v Egeneonu* [2018] EWHC 1392 (Fam), [15].

33 David M Paciocco, 'Section 24(2): Lottery or Law — The Appreciable Limits of Purposive Reasoning' (2011) 58(1) *Criminal Law Quarterly* 15, 18.

34 See ibid 19.

35 232 US 383 (1914) ('*Weeks*').

of the *United States Constitution*'s Fourth Amendment freedom from unreasonable searches and seizures in federal criminal prosecutions.[36] Despite the constitutional guarantee against unreasonable search and seizure being part of US law since 1791, it was virtually unenforced until 1914,[37] when the remedial mechanism of the exclusionary rule — as a separate conception from its closely allied constitutional guarantee against unreasonable search and seizure[38] — was declared in the *Weeks* decision.

The exclusionary rule exists principally for the service of other rights or freedoms. While the protection from unreasonable search and seizure is an independent personal right, the exclusionary rule is a practical gateway to the judicial protection of that guarantee.[39] As Frank Devine put it, 'the Exclusionary Rule is not an independent entity existing for its own sake. It exists exclusively in the service of the protection against unreasonable search and seizure'.[40] In 1961, in *Mapp v Ohio* ('*Mapp*'),[41] the US Supreme Court expanded the reach of the exclusionary rule to include state criminal trials.[42]

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36 Yale Kamisar, 'A Defense of the Exclusionary Rule' (1979) 15(1) *Criminal Law Bulletin* 5, 5.

37 Harry M Caldwell and Carol A Chase, 'The Unruly Exclusionary Rule: Heeding Justice Backmun's Call to Examine the Rule in Light of Changing Judicial Understanding about its Effects Outside the Courtroom' (1994) 78(1) *Marquette Law Review* 45, 46.

38 FE Devine, 'American Exclusion of Unlawfully Obtained Evidence with Australian Comparison' (1989) 13(3) *Criminal Law Journal* 188, 192.

39 See generally Morris D Forkosch, 'In Defense of the Exclusionary Rule: What It Protects Are the Constitutional Rights of Citizens, Threatened by the Court, the Executive and the Congress' (1982) 41(2) *American Journal of Economics and Sociology* 151, 152–3. See also *Terry v The Queen* [1996] 2 SCR 207, where it was held that s 24(2) of the *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*') is not an independent source of *Charter* rights but exists only as a remedial instrument for redressing substantive *Charter* rights breaches: at 218 [23] (McLachlin J for the Court).

40 Devine (n 38) 188.

41 367 US 643 (1961).

42 Ibid 655 (Clark J for the Court); Norman M Robertson, 'Reason and the Fourth Amendment: The Burger Court and the Exclusionary Rule' (1977) 46(1) *Fordham Law Review* 139, 139.

C *Canada*

Prior to 1982, the Canadian evidential regime had been unequivocally inclusionary.[43] In 1971, in *R v Wray*,[44] the Supreme Court of Canada had held that there was no judicial discretion to exclude evidence of substantial probative value simply on the basis of its illegal or unfair acquisition, unless the evidence was such as would be 'gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling'.[45]

By incorporating the *Canadian Charter of Rights and Freedoms* into the Canadian constitution in April 1982, Canada made a clean break with the strict common law inclusionary rule by expressly granting power to the courts under s 24(2) to exclude evidence obtained in contravention of any of the *Charter* rights.[46] Although the Canadian evidential exclusionary rule has been described as an ingenious blend of the British common law inclusionary traditions with the American exclusionary innovation, its interpretations seem to have tilted it more towards the American model.[47]

D *Nigeria*

Nigeria's evidence law is currently contained principally in its *Evidence Act 2011* (Nigeria) ('*Nigerian Evidence Act*').[48] Nigeria's position has evolutionary affinity to *Kuruma*.[49] Accordingly, prior to the enactment of the *Nigerian Evidence Act* in 2011, Nigerian courts deferred to English judicial pronouncements on the subject, and the provisions of s 14 of the *Nigerian Evidence Act* are essentially a statutory codification of the common law position previously existing in Nigeria.[50]

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43 Debra Osborn, 'Suppressing the Truth: Judicial Exclusion of Illegally Obtained Evidence in the United States, Canada, England and Australia' (2000) 7(4) *Murdoch University Electronic Journal of Law* 1, 5 [16]–[17]. See also Wayne K Gorman, 'The Admission and Exclusion of Unconstitutionally Obtained Evidence in Canada' (2018) 54(3) *Court Review* 108, 108.

44 [1971] SCR 272.

45 Ibid 293 (Martland J, Fauteux, Abbott, Ritchie and Pigeon JJ agreeing).

46 Peter Sankoff and Zachary Wilson, 'A Jurisprudential "House of Cards": The Power to Exclude Improperly Obtained Evidence in Civil Proceedings' (2021) 99(1) *Canadian Bar Review* 145, 148.

47 See generally Machado (n 11) 1, 10.

48 *Evidence Act 2011* (Nigeria) ('*Nigerian Evidence Act*'). See generally Odujirin (n 2) 680.

49 *Kekong v State* (2017) 18 NWLR (Pt 1596) 108, 135 (Ejembi Eko JSC for the Court) ('*Kekong*'), citing *Igbinovia v State* (1981) 12 NSCC 63, 68–9 (Supreme Court of Nigeria) ('*Igbinovia*'), citing *Kuruma* (n 16) with approval. See also Odujirin (n 2) 680.

50 *Kekong* (n 49) 135. See also Stephen Oluwaseun Oke, 'The Nigerian Law on the Admissibility of Illegally Obtained Evidence: A Step Further in Reform' (2014) 40(1) *Commonwealth Law Bulletin* 3, 5–6.

In *Musa Sadau v State* ('*Musa Sadau*')[51] and *Igbinovia v State*,[52] Nigeria's Supreme Court, in deference to the developments in England,[53] and drawing specific inspiration from *Kuruma*, adopted the inclusionary common law position but held further that the power to admit illegally or improperly obtained evidence in criminal trials is subject to the discretion of the trial judge to reject the evidence if the strict application of the inclusionary rules would operate unfairly against the accused.[54] However, despite the availability of this judicial discretion at common law even prior to its codification in the 2011 *Nigerian Evidence Act*, Nigerian courts had always admitted illegally and improperly obtained evidence against the accused.[55] This prompted one Nigerian legal commentator to doubt whether the provisions of ss 14 and 15 of the new *Nigerian Evidence Act* would bring about any real change in Nigerian judicial attitudes towards illegal or improper evidence acquisition.[56]

Under s 14 of the *Nigerian Evidence Act*, the court has a mandatory duty to admit illegally and improperly obtained evidence except where it concludes that it is more undesirable to admit the evidence than to exclude it.[57] And in determining whether the desirability of admitting a piece of improperly obtained evidence is outweighed by the undesirability of admitting it, the courts are guided by the mandatory factors contained in s 15 of the *Nigerian Evidence Act*. Section 15 of the *Nigerian Evidence Act* specifically contains a non-exhaustive list of factors to be considered by the courts in exercising their discretion. These factors include:

> (a) the probative value of the evidence;
>
> (b) the importance of the evidence in the proceeding;
>
> (c) the nature of the relevant offence, cause of action or defence, and the nature of the subject-matter of the proceeding;
>
> (d) the gravity of the impropriety or contravention;
>
> (e) whether the impropriety or contravention was deliberate or reckless;
>
> (f) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
>
> (g) the difficulty, if any, of obtaining the evidence without impropriety or contravention of law.[58]

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51 (Supreme Court of Nigeria, SC 394/1967, 4 April 1968) ('*Musa Sadau*').

52 *Igbinovia* (n 49) 68–9.

53 See Okoli and Umeche (n 11) 83–4.

54 See Odujirin (n 2) 681, 683.

55 Oke (n 50) 7.

56 Ibid.

57 See *Nigerian Evidence Act* (n 48) s 14.

58 Ibid s 15; Oke (n 50) 6.

E *Australia*

The exclusionary authority of Australian courts derives from both the common law and statutes.[59] *Bunning v Cross*[60] which is regarded as comprising the locus classicus for the Australian common law exclusionary position,[61] endorsed the English common law discretion to exclude illegally or improperly obtained evidence on considerations of fair trial or fairness to the accused, but rejected the position that fairness to the accused was the only ground for the exercise of the discretion.[62] Accordingly, in *Bunning v Cross*, the Court articulated the more expansive public policy-centric Australian common law exclusionary doctrine as rooted in balancing the public need for the accountability of criminals with the public interest in safeguarding citizens' liberties from the impropriety and illegalities of those in authority.[63]

The Court in *Bunning v Cross* further laid down five important factors to guide the trial court in exercising its broad discretion.[64] These factors are: (1) 'the seriousness of the offence'; (2) 'the cogency of the evidence'; (3) 'the nature of the criminality'; (4) 'the ease with which the evidence could have been obtained legally'; and (5) 'whether an examination of the legislation indicates a deliberate intent on the part of the legislature to circumscribe the power of the police in the interests of the public'.[65]

There is also statutory exclusionary authority in some Australian jurisdictions where the common law exclusionary discretion has been largely codified.[66] But for any Australian jurisdiction with no such codification — such as Queensland — the discretion will continue to be guided by the common law as modified by any relevant existing statutes.[67] In Jackson J's 2017 decision in *R v KL*,[68] which concerned an

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59 William Van Caenegem, 'New Trends in Illegal Evidence in Criminal Procedure: General Report, Common Law Countries' (Conference Paper, World Congress of the International Association of Procedural Law, 16 September 2007) 3. See generally Osborn (n 43) 13–14 [58]–[63].

60 (1978) 141 CLR 54 (Barwick CJ, Stephen, Jacobs, Murphy and Aickin JJ) ('*Bunning v Cross*').

61 Ibid 72–5 (Stephen and Aickin JJ); Caldwell and Chase (n 37) 63. See generally Frank Bates, 'Improperly Obtained Evidence and Public Policy: An Australian Perspective' (1994) 43(2) *International and Comparative Law Quarterly* 379, 379.

62 *Bunning v Cross* (n 60) 74–5, 77 (Stephen and Aickin JJ); Caldwell and Chase (n 37) 63; Pattenden (n 24) 671.

63 *Bunning v Cross* (n 60) 74–6 (Stephen and Aickin JJ). See also *R v Ireland* (1970) 126 CLR 321, 335 (Barwick CJ).

64 Osborn (n 43) 13 [61].

65 Ibid, citing *Bunning v Cross* (n 60) 78–80 (Stephen and Aickin JJ).

66 See Osborn (n 43) 13–14 [63].

67 Van Caenegem (n 59) 3. See also *R v KL* [2017] QSC 144, [35] (Jackson J) ('*KL*').

68 *KL* (n 67) [35].

application to exclude evidence for non-compliance with s 161(1) of the *Police Powers and Responsibilities Act 2000* (Qld), his Honour confirmed the continuing authority of the common law:

> Next, both parties submit that whether evidence seized during the unlawful search should be excluded is to be decided by the application of the common law principles that apply in relation to the discretionary exclusion of evidence obtained under an unlawful search in accordance with *Bunning v Cross*. Again *R v P* supports that proposition and I proceed on that basis in order to decide this case.[69]

The analysis in this article is principally concerned with the relevant provisions of the *Evidence Act 1995* (Cth) ('*Australian Evidence Act*'), representing the uniform evidence law which has been adopted into the laws of various Australian jurisdictions[70] except in Queensland, South Australia and Western Australia which still apply the common law discretion.[71] Just as under the *Nigerian Evidence Act*, the *Australian Evidence Act* contains an (essentially similar) non-exhaustive list of factors to guide the Australian judicial discretion.[72]

III Policy Justifications for Exclusion in the US, Canada, Nigeria and Australia

It is apposite to state upfront that the analysis below will not delve into the unending dialectics among epistemologists and legal scholars regarding the appropriate or best models of abstraction or theoretical frameworks for formation or acquisition of judicial beliefs.[73] Instead, it will focus on the more practical and forensic debates

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69 Ibid.

70 See: *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic); *Evidence Act 2011* (ACT); *Evidence (National Uniform Legislation) Act 2011* (NT). There are minor differences in application of the uniform evidence law across these states and territories. See Van Caenegem (n 59) 3.

71 Jeremy Gans and Andrew Palmer, *Uniform Evidence* (Oxford University Press, 2nd ed, 2014) 1.

72 *Evidence Act 1995* (Cth) s 138(3) ('*Australian Evidence Act*').

73 See, eg: Marvin Backes, 'Epistemology and the Law: Why There is No Epistemic Mileage in Legal Cases' (2020) 177(9) *Philosophical Studies* 2759 for the Lockean view. See Allen and Leiter (n 3) for naturalised epistemology. For foundherentism, see: David Atkinson and Jeanne Peijnenburg, 'Crosswords and Coherence' (2010) 63(4) *Review of Metaphysics* 807; Susan Haack, 'Précis of *Evidence and Inquiry: Towards Reconstruction in Epistemology*' (1997) 112(1) *Synthese* 7. See Richard Lempert, 'The New Evidence Scholarship: Analyzing the Process of Proof' (1986) 66(3) *Boston University Law Review* 439 for new evidence scholarship. See Alvin I Goldman, 'Social Epistemology' (1999) 31(93) *Crítica: Revista Hispanoamericana de Filosofía* 3 for social epistemology. See Alan Holland and Anthony O'Hear, 'On What Makes an Epistemology Evolutionary' (1984) 58(1) *Proceedings of the Aristotelian Society, Supplementary Volumes* 177 for evolutionary epistemology. See also Fyfe (n 1) 275, 287–8.

about the best criteria for assessing the admissibility of evidence, which are different from the epistemological controversies about the best formulations for acquisition of judicial truths.[74] The age long policy debates between those who defend the exclusionary rule and those who question its justification and efficacy[75] are a species of the forensic category and have equally continued to rage to this day.[76] Interestingly, there seems to be equal commitment on both sides of the divide.[77]

Among the most faithful disciples on the epistemic integrity side of the divide are Jeremy Bentham and Larry Laudan.[78] Bentham's view of evidence is rooted in a utilitarian conception of law. For Bentham, the primary aim of criminal procedure and evidential rules is truth discovery and elimination of false acquittals, and all relevant evidence should be admissible because exclusion will almost always not produce the greatest good for the greatest number.[79] Laudan similarly places emphasis on epistemic integrity and the paramountcy of factual accuracy.[80] Under that ideology, criminal evidential rules must be fully committed to the search for truth as the ultimate goal of criminal trials.[81] John Wigmore, for his part, likened the exclusion of relevant but illegally or improperly obtained evidence to the sentimental coddling of criminals.[82] And writing on behalf of the New York Court of Appeals, Justice Cardozo decried the exclusionary rule's willingness to confer upon criminal defendants immunity from serious criminal liability simply because of the overzealousness and indiscretion of police officers in their pursuit of evidence.[83] In a similar vein, Warren Burger, later the Chief Justice of the US Supreme Court, in his 1964 seminal article on the exclusionary rules, wondered 'whether any community

74 Brian Leiter, 'The Epistemology of Admissibility: Why Even Good Philosophy of Science Would Not Make for Good Philosophy of Evidence' [1997] (4) *Brigham Young University Law Review* 803, 805–6.

75 See Randy E Barnett, 'Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice' (1983) 32(4) *Emory Law Journal* 937 for the proposition that these debates are 'as old as the rule itself': at 938.

76 See generally Ronald J Rychlak, 'Replacing the Exclusionary Rule: Fourth Amendment Violations as Direct Criminal Contempt' (2010) 85(1) *Chicago-Kent Law Review* 241, 241.

77 See generally Barnett (n 75) 938–9.

78 See: Alanah Josey, 'Jeremy Bentham and Canadian Evidence Law: The Utilitarian Perspective on Mistrial Applications' (2019) 42(4) *Manitoba Law Journal* 291, 292; Laudan (n 4) 2.

79 Josey (n 78) 291–2, 296–7, 301.

80 Laudan (n 4) 2.

81 Ibid 1–3.

82 John Henry Wignore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Little, Brown, 2nd ed, 1923) vol 4, 637. See also: Donald E Wilkes Jr, 'A Critique of Two Arguments against the Exclusionary Rule: The Historical Error and the Comparative Myth' (1975) 32(4) *Washington and Lee Law Review* 881, 897; Osborn (n 43) 4 [13].

83 *People v Defore*, 150 NE 585, 588 (NY, 1926).

is entitled to call itself an "organized society" if it can find no way to solve this problem except by suppression of truth in the search for truth'.[84]

Expectedly, the policy side of the doctrinal divide equally does not lack committed watchmen. Monrad Paulsen, for example, admitted that '[t]he case against the rule is an impressive one'.[85] But he went on to conclude that '[i]t is the most effective remedy we possess to deter police lawlessness'.[86] Writing about the American exclusionary rule, Morris Forkosch equally argued that '[a]n analysis of the reasons for this rule's promulgation shows why the current attacks upon its interpretations and applications are misguided, erroneous, and dangerous', and that, even if 'criminals skew its protections and go free, still, by and large, as a nation and as individuals we are nevertheless better off'.[87] As part of Day J's endorsement of the exclusionary rule in *Weeks*, his Honour frowned upon official lawlessness in pursuit of criminal evidence.[88] Justice Holmes, in his classic dissenting judgment in *Olmstead v United States* ('*Olmstead*'),[89] also reasoned that while

> [i]t is desirable that criminals should be detected, and to that end that all available evidence should be used … [i]t also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained'.[90]

Based on the above premise, the learned Justice concluded that if a choice must be made, it is 'a less evil that some criminals should escape than that the Government should play an ignoble part'.[91] In the 1846 case of *Pearse v Pearse*,[92] Knight Bruce V-C emphasised that while

> [t]he discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them …

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84 Warren E Burger, 'Who Will Watch the Watchman?' (1964) 14(1) *American University Law Review* 1, 23.

85 Monrad G Paulsen, 'The Exclusionary Rule and Misconduct by the Police' (1961) 52(3) *Journal of Criminal Law, Criminology, and Police Science* 255, 257.

86 Ibid.

87 Forkosch (n 39) 152.

88 *Weeks* (n 35) 392. See also: Mike Madden, 'A Model Rule for Excluding Improperly or Unconstitutionally Obtained Evidence' (2015) 33(2) *Berkeley Journal of International Law* 442, 451.

89 277 US 438 (1928) ('*Olmstead*').

90 Ibid 470.

91 Ibid.

92 (1846) 1 De G & Sm 11; 63 ER 950.

> Truth, like all other good things, may be loved unwisely — may be pursued too keenly — may cost too much.[93]

The foregoing shows that the usual policy justifications for excluding relevant and reliable criminal evidence are one or more of: (1) deterrence; (2) rights vindication; and (3) protection of the integrity of the criminal justice system. To ease their exclusionary analysis, the courts usually seek the aid of counterbalancing or countervailing considerations. Such countervailing factors are judicially created, statutorily approved, or both.

There is no guide in the form of a statutory list of decisional criteria under Canadian law as exists under s 15 of the *Nigerian Evidence Act* or s 138(3) of the *Australian Evidence Act*. However, the jurisprudence of the Canadian courts has offered some insights into the kinds of countervailing circumstances envisaged under s 24(2) of the *Canadian Charter of Rights and Freedoms*. In *Grant v The Queen* ('*Grant*'),[94] the Supreme Court of Canada articulated and categorised the main organising principles or countervailing factors into those related to the seriousness of the violation, those affecting the impact on the rights of the accused, and those related to society's interest in adjudicating the case on its merits.[95] This followed the Court's similar earlier categorisation of the relevant factors: (1) those related to the seriousness of the violation; (2) those related to the fairness of the trial; and (3) those related to the reputation of the administration of justice.[96]

The factors required to be considered by both the Nigerian and Australian courts before exercising their exclusionary discretion can also be grouped into those related to the seriousness of the violation, those related to the fairness of the trial and those related to upholding the integrity of criminal justice delivery. The strict American exclusionary rule, having undergone continuous relaxation since 1961, has also come to accommodate some judicially created exceptions.[97] Thus, an American court's exclusionary decision will always involve some multifactor or circumstantial analysis. The discussion below will now focus on the three policy justifications and their countervailing considerations.

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93 Ibid 957, quoted in *Bunning v Cross* (n 60) 72 (Stephen and Aickin JJ).

94 [2009] 2 SCR 353 ('*Grant*').

95 Ibid 394 [71] (McLachlin CJ and Charron J for McLachlin CJ and LeBel, Fish, Abella, and Charron JJ).

96 See generally: *Jacoy v The Queen* [1988] 2 SCR 548, 558–9 (Dickson CJ for Dickson CJ, Beetz, Lamer and La Forest JJ) ('*Jacoy*'); Robert Harvie and Hamar Foster, 'When the Constable Blunders: A Comparison of the Law of Police Interrogation in Canada and the United States' (1996) 19(3) *Seattle University Law Review* 497, 507–8, citing *Collins v The Queen* [1987] 1 SCR 265, 284–6 (Lamer J for Dickson CJ, Lamer, Wilson and La Forest JJ) ('*Collins*').

97 Machado (n 11) 4.

A *Deterrence of Police Misconduct*

One of the policy rationales underlying the exclusion of illegally or improperly obtained evidence in many jurisdictions is deterrence of official lawlessness or police investigative misconduct.[98] For example, 'the US Supreme Court institute[d] the Fourth Amendment exclusionary rule in order to deter police misconduct'.[99] And this has been the pre-eminent rationale animating the remedy of evidential exclusion in the US.[100] It is noteworthy that deterrence was not part of the US Supreme Court's analytical equation until *Wolf v Colorado*[101] was decided about 35 years after *Weeks*.[102] Also, the deterrence rationale does not seem to enjoy as much enthusiasm today as before even though it is still central to the invocation of the American exclusionary remedy.[103] Arguably, the shift in the centrality of the deterrence rationale in the US may be associated with many existing scholarly attacks against it as well as the lack of convincing empirical data on, and the courts' skepticism about, its efficacy in deterring police misconduct in particular cases.[104]

In contrast with the American exclusionary rule, 'in interpreting 24(2), Canadian jurists specifically state that controlling the police is neither the purpose nor intent of the remedy of exclusion'.[105] But even though it is not a central underlying value for the invocation of the exclusionary rule as it is in the US, deterrence still plays some role in Canadian courts' exercise of their exclusionary discretion, particularly in regard to their analysis of the likely impact of the admission of impugned evidence on the integrity of the administration of justice as well as in regard to the award of damages.[106] As Peter Sankoff observed:

> The wording of the clause requires an expansive assessment of circumstances and whether admission of the disputed evidence would bring the administration of justice into disrepute, a task that has always focused upon broader public objectives beyond the individual accused, concentrating on the need to

98 Madden (n 88) 447.

99 Machado (n 11) 24.

100 Paciocco (n 33) 25; TF Bathurst and Sarah Schwartz, 'Illegally or Improperly Obtained Evidence: In Defence of Australia's Discretionary Approach' (2016) 13(1) *Judicial Review* 79, 85.

101 338 US 25, 31–2 (Frankfurter J for the Court) (1949).

102 Kamisar (n 36) 6.

103 Machado (n 11) 7.

104 See generally Myron W Orfield Jr, 'The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers' (1987) 54(3) *University of Chicago Law Review* 1016, 1016–18, 1023.

105 Machado (n 11) 24. See also Yves-Marie Morissette, 'The Exclusion of Evidence under the *Canadian Charter of Rights and Freedoms*: What to Do and What Not to Do' (1984) 29(4) *McGill Law Journal* 521, 535.

106 See generally Paciocco (n 33) 24–5.

> dissociate the judiciary from unconstitutional conduct, or to deter state actors from contravening the Charter over the long term.[107]

Vancouver (City) v Ward[108] provides an instance of judicial vindication of deterrence as one of the analytical values in the exclusionary dialectics in Canada. In that case, the Supreme Court of Canada identified deterrence as one of the remedial rationales that guide its analysis of damages as a possible *Charter* remedy under a s 24(2) inquiry.[109] And it had, in *Ontario v 974649 Ontario Inc*[110] and other earlier decisions, affirmed its objective of using the award of damages or costs in favour of criminal defendants as an instrument of deterrence against investigative and prosecutorial misconduct, particularly when the *Charter* violations in question are intentional, reckless or grossly negligent.[111]

Disciplining the police is not an independent remedial rationale for exclusion of illegally or improperly obtained evidence in Nigeria since '[i]t appears the principle espoused in *Karuma v Queen* (supra) adopted as part of Nigerian Jurisprudence in *Igbinovia v The State* (supra) is what has now been enacted as section 14 of the Evidence Act, 2011'.[112] However, in *Ayaka v State*,[113] the Nigerian Court of Appeal held that illegally or improperly obtained evidence is admissible in Nigeria unless consideration of the factors contained in s 15 of the *Nigerian Evidence Act* compels its exclusion. Some of those factors, particularly that in s 15(f) — namely, whether any other judicial or non-judicial proceeding 'has been or is likely to be taken in relation to the impropriety or contravention' — speak to police misconduct concerns.[114]

In Australia, though the Court in *Bunning v Cross* both recognised and emphasised the need to avoid an appearance of curial approval of police misconduct or official lawlessness, it did not see its exclusionary discretion as a device for disciplining the police.[115] But more recent academic commentaries and case law view deterrence as one of the dominant public policy justifications for exclusion of illegally or improperly obtained evidence.[116] For example, in support of his own position,

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107 Peter Sankoff, 'Rewriting the Canadian Charter of Rights and Freedoms: Four Suggestions Designed to Promote a Fairer Trial and Evidentiary Process' (2008) 40(1) *Supreme Court Law Review* 349, 353 ('Rewriting the Canadian Charter').

108 [2010] 2 SCR 28.

109 Ibid 43 [29] (McLachlin CJ for the Court); Paciocco (n 33) 20, 25.

110 [2001] 3 SCR 575.

111 Ibid 615–16 [80]–[82] (McLachlin CJ for the Court). See generally Paciocco (n 33) 25.

112 *Kekong* (n 49) 135.

113 *Ayaka v State* (2020) 3 NWLR (Pt 1712) 538, 576-577-H-E (Joseph Tine Tur JCA for the Court).

114 See generally Bathurst and Schwartz (n 100) 93.

115 Pattenden (n 24) 672.

116 Bathurst and Schwartz (n 100) 94; Andrew Hemming, 'Illegally or Improperly Obtained Evidence: Time to Reform S 138 of the Uniform Evidence Legislation?' (2021) 31(2) *Journal of Judicial Administration* 92, 93–4; Van Caenegem (n 59) 4–5.

Andrew Hemming submitted that 'Van Caenegem also stressed that the public policy discretion is based on the twin pillars of deterrence and public confidence in the courts'.[117] This could be because, as the High Court noted in *Kadir v The Queen* ('*Kadir*'),[118] the public interests encapsulated in the s 138 discretion are broader than those weighed in *Bunning v Cross*.[119] However, as recently as 2001, Bram Presser also noted that '[t]he public policy discretion is, therefore, exclusively concerned with police conduct, although its justification is not purely disciplinary'.[120] Therefore, it is arguable that although deterrence is a pre-eminent element or justificatory factor in the exercise of the extant exclusionary discretion in Australia, it is considered more as part of the balancing act in the context of the dilemma between the two competing policies of holding criminals accountable while still ensuring investigative due process, rather than as an underlying public policy in and of itself.[121]

The deterrence policy is essentially futuristic, general and society-centric.[122] This is because, typically, deterrence is not pursued to specifically benefit the suspect or criminal defendant as an individual but rather focuses on influencing official respect for the fundamental and due process rights of the members of the larger society.[123] Accordingly, it serves as a tool of institutional regulation through judicial creation or validation of binding investigative and prosecutorial standards.[124] Through such judicial signalling, it is believed that governments or police will, in future, pursue greater conformity with constitutional rights provisions in their hunt for criminal evidence.[125] Critics of the exclusionary rule have however, continued to question its wisdom and efficacy.[126] They argue it: (1) is an all or nothing remedy that protects the guilty from criminal responsibility;[127] (2) exposes the innocent to freed

117 Hemming (n 116) 94.

118 (2020) 267 CLR 109 (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ) ('*Kadir*').

119 Ibid 125 [13].

120 Bram Presser, 'Public Policy, Police Interest: A Re-Evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence' (2001) 25(3) *Melbourne University Law Review* 757, 761.

121 See generally: Meng Heong Yeo, 'The Discretion to Exclude Illegally and Improperly Obtained Evidence: A Choice of Approaches' (1981) 13(1) *Melbourne University Law Review* 31, 36; Caldwell and Chase (n 37) 63; Hemming (n 116) 94–5.

122 Paciocco (n 33) 24.

123 Madden (n 88) 447.

124 Kerri Mellifont, *Fruit of the Poisonous Tree: Evidence Derived from Illegally or Improperly Obtained Evidence* (Federation Press, 2010) 25–6; Paciocco (n 33) 24–5.

125 See generally Dallin H Oaks, 'Studying the Exclusionary Rule in Search and Seizure' (1970) 37(4) *University of Chicago Law Review* 665, 668.

126 Bathurst and Schwartz (n 100) 85–9; Glasser (n 18) 160; Barry F Shanks, 'Comparative Analysis of the Exclusionary Rule and its Alternatives' (1983) 57(3) *Tulane Law Review* 648, 655–8; Stribopoulos (n 24).

127 Shanks (n 126) 658.

criminals;[128] (3) does not deter criminals;[129] (4) disincentivises efforts to find better alternative models;[130] and (5) imposes undue costs on the society compared to the negligible benefits that it yields.[131]

Detailed treatment of these deterrence claims and counterclaims does not fall within the purview of this article. It suffices to say that even if exclusion fails to directly deter illegal searches and seizures in particular situations,[132] instantaneously depriving law enforcement officers of the fruits of their illegality or impropriety will generally fulfil the short-term goal of compelling police accountability.[133] Moreover, at least, on the institutional level, it can be argued that the exclusionary rule has successfully incentivised relevant authorities to develop programmes and procedures for ensuring respect for the rights of criminal suspects during their investigation and prosecution.[134] For instance, findings from a 1963 study by Stuart Nagel show that an overwhelming majority of the police chiefs, prosecutors, judges, defence attorneys, and human rights advocacy officers surveyed in 47 states of the US believed that the remedy of exclusion had lessened illegal searches.[135] Michael Murphy, the former New York Police Commissioner, also admitted how the decision in *Mapp* compelled the New York Police to initiate retraining of its personnel and re-evaluation and modification of its procedures, policies and instructions.[136] In Australia, legislation such as the *Police Powers and Responsibilities Act 2000* (Qld) and the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), have been passed to regulate the conduct of Australian police officers including the exercise of their search and seizure powers.[137] Section 161(1) of the *Police Powers and Responsibilities Act 2000* (Qld) specifically imposes a mandatory obligation on the Queensland Police to obtain a post-search approval order from a Magistrate within a reasonably practicable time after obtaining evidence through an unlawful search in situations where delay may result in the evidence being concealed or destroyed.[138] Therefore, as argued in the 1981 McDonald Commission's report on the Royal Canadian Mounted

128 See generally ibid 659, quoting *Irvine v California*, 347 US 128 (1954).

129 Shanks (n 126) 657; Stribopoulos (n 24) 79.

130 Glasser (n 18) 160; Bathurst and Schwartz (n 100) 85.

131 Stribopoulos (n 24) 79.

132 Orfield Jr (n 104) 1016–18, 1020.

133 See ibid 1054. See generally Bathurst and Schwartz (n 100) 84.

134 See: Orfield (n 104) 1017; Albert W Alschuler, 'Studying the Exclusionary Rule: An Empirical Classic' (2008) 75(4) *University of Chicago Law Review* 1365, 1372–3.

135 Stuart S Nagel, 'Testing the Effects of Excluding Illegally Seized Evidence' [1965] (2) *Wisconsin Law Review* 283, 283–4.

136 Michael J Murphy, 'Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments' (1966) 44(5) *Texas Law Review* 939, 941.

137 Van Caenegem (n 59) 28.

138 See, eg, *KL* (n 67).

Police abuses, an exclusionary rule, together with adequate training, supervision, discipline, and policy review, would prevent (or at least reduce) police misconduct.[139]

B *Rights Vindication*

Another public policy that frequently underlies the invocation of the exclusionary powers of the courts is protecting due process rights of an accused.[140] In the US, protecting the due process search and seizure safeguards of the Fourth Amendment is one of the normative bases for the invocation of the exclusionary rule.[141] As far back as *Weeks*, the US Supreme Court emphasised that

> [i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment … is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.[142]

In Canada as well, safeguarding the individual rights of the accused is one of the central values of the Canadian exclusionary rule.[143] This is not surprising given that the trigger for the exclusionary discretion in s 24(2) of the *Canadian Charter of Rights and Freedoms* is a breach of any of an accused's *Charter* rights. This much was confirmed by Sankoff when he noted that

> [t]he Canadian Civil Liberties Association and other organizations fought diligently to have an exclusionary clause introduced into the Charter, and it is easy to see why. In addition to being a 'boon' for defence lawyers, the clause gives teeth to the Charter's substantive rights, and provides state actors with a significant incentive to comply with Charter rulings.[144]

Apart from the *Nigerian Evidence Act*, and other relevant legislation such as criminal law and procedure statutes, the *Constitution of the Federal Republic of Nigeria 1999* ('*1999 Nigerian Constitution*'), like its forebears,[145] has elaborate provisions guaranteeing the rights to personal liberty and private and family life.[146] The latter protects

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139 *Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police: Freedom and Security Under Law* (Second Report, August 1981) vol 2, 1044–61. See Robert A Harvie, 'The Exclusionary Rule and the Good Faith Doctrine in the United States and Canada: A Comparison' (1992) 14(4) *Loyola of Los Angeles International and Comparative Law Journal* 779, 793.

140 Bathurst and Schwartz (n 100) 86.

141 Machado (n 11) 7; Kamisar (n 36) 9; Caldwell and Chase (n 37) 47, 48.

142 *Weeks* (n 35) 393 (Day J for the Court).

143 Machado (n 11) 24.

144 Sankoff, 'Rewriting the Canadian Charter' (n 107) 350.

145 See generally Odujirin (n 2) 680.

146 *Constitution of the Federal Republic of Nigeria 1999* (Nigeria) ss 35, 37; *Governor of Borno State v Gadangari* (2016) 1 NWLR (Pt 1493) 396, 416–17 (Joseph Tine Tur JCA for the Court).

the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications.[147] In *Kekong v State*,[148] the Supreme Court of Nigeria stated that an unconstitutional acquisition of evidence could subject the exclusionary provision of s 14 of the *Nigerian Evidence Act*, to the supremacy provision under s 1(3) of the *1999 Nigerian Constitution*. Section 14 may thus be declared void for being inconsistent with the *1999 Nigerian Constitution*. Also, some of the deciding criteria in s 15 of the *Nigerian Evidence Act* — including the question of whether the illegality or impropriety was wilful, reckless or negligent — speak to rights vindication being their underlying policy motivation.[149]

In sowing the judicial seed for subsequent formulation and refinement of Australian domestic public policy driven exclusionary discretion,[150] Barwick CJ insisted that, 'there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price'.[151] Approving Barwick CJ's dicta above,[152] Stephen and Aicken JJ affirmed that

> [i]t is not fair play that is called in question … but rather society's right to insist that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired.[153]

Including investigative and prosecutorial contraventions of the *International Covenant on Civil and Political Rights* ('*ICCPR*')[154] as one of the deciding factors under s 138(3) of the *Australian Evidence Act*,[155] aims to strengthen the Australian rule's commitment to protecting pretrial liberties of criminal defendants according to international human rights standards.[156]

147 *Ezeadukwa v Maduka* (1997) 8 NWLR (Pt 518) 635, 665-D (Niki Tobi JCA for the Court).

148 *Kekong* (n 49).

149 See generally Bathurst and Schwartz (n 100) 93.

150 Hemming (n 116) 94. See Presser (n 120) 760.

151 *Ireland* (n 63) 335 (Barwick CJ, McTiernan, Windeyer, Owen and Wilson JJ agreeing at 335).

152 Yeo (n 121) 35, 37; Osborn (n 43) 13 [58].

153 *Bunning v Cross* (n 60) 75. See also Pattenden (n 24) 672.

154 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

155 *Australian Evidence Act* (n 72) s 138(3)(f); Bathurst and Schwartz (n 100) 81.

156 See generally Wendy Lacey, 'Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere' (2004) 5(1) *Melbourne Journal of International Law* 108, 113.

C *Protection of Judicial Integrity*

Protecting the integrity and legitimacy of the judicial process is another frequently cited and important policy value that can ground the exclusion of illegally or improperly obtained criminal evidence.[157] Some commentators view this court integrity-centric principle as the most convincing of all the policy rationales for excluding illegally or improperly obtained evidence.[158] This rationale requires the courts not to tarnish their image by condoning investigative lawlessness by admitting illegally or improperly obtained evidence.[159] Courts, 'as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves'.[160]

In *Weeks*, the US Supreme Court held that '[t]o sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action'.[161] Justice Day made it very clear in the case that 'unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution'.[162] In his dissenting judgment in *Olmstead*, Brandeis J argued against admission of the evidence offered by the Government because of the illegality of its acquisition and 'in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination'.[163] According to Harry Caldwell and Carol Chase, '*Mapp* reiterated the dual rationales enunciated in *Weeks:* protection of citizens' Fourth Amendment rights, and preservation of judicial integrity'.[164]

But even though upholding the integrity of the court was part of the justificatory criteria for the invocation of the exclusionary rule in its early days in the US, its honeymoon has been over since the mid-1970s and it has since been largely abandoned.[165] Corroborating this view, Mike Madden noted that 'American exclusionary law, while now grounded narrowly and exclusively in deterrence theory, was also initially somewhat concerned with dissociating the judiciary from other state actors who participated in rights breaches'.[166]

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157 Bathurst and Schwartz (n 100) 87.

158 Ibid.

159 Madden (n 88) 450. See *Collins* (n 96) 280 (Dickson CJ, Lamer, Wilson and La Forest JJ).

160 Paciocco (n 33) 23, quoting *Grant* (n 94), 394 [72] (McLachlin CJ and Charron J for McLachlin CJ, Lebel, Fish, Abella and Charron JJ).

161 *Weeks* (n 35) 394.

162 Ibid 392.

163 *Olmstead* (n 89) 484.

164 Caldwell and Chase (n 37) 48.

165 Machado (n 11) 7–8.

166 Madden (n 88) 451.

Unlike the current exclusionary regime in the US, the main policy ground in Canada for rejection of evidence obtained in violation of the *Canadian Charter of Rights and Freedoms* is to insulate the integrity or reputation of justice administration from contamination.[167] In *Grant*, the Supreme Court of Canada emphasised the need to preserve public confidence in the administration of justice by the exclusion of tainted evidence as its admission may send wrong signals to the public, of condoning official misconduct, and/or of abdication of the Court's constitutional duty to uphold *Charter* rights.[168] In *Collins v The Queen* ('*Collins*'), the Supreme Court of Canada had rejected the evidence in question since according to it, 'the administration of justice would be brought into greater disrepute … if this Court did not exclude the evidence and dissociate itself from the conduct of the police in, this case'.[169]

Maintaining the integrity of the judicial process or administration is not an animating policy rationale for exclusion in Nigeria. In contrast, Australian case law points to a strong public interest in maintaining the integrity and legitimacy of the criminal justice system within the context of the exercise of the judicial evidence exclusion discretion.[170] Thus, 'a separate judicial discretion that applies solely to illegal evidence, based not on fairness but on public policy concerns related to deterrence and the standing of courts, has emerged both at common law and under statute'.[171] In *Kadir*, the High Court of Australia reiterated that public interests require criminal courts to avoid giving curial approval or encouragement to evidence illegally or improperly acquired by the police.[172] However, it is noteworthy that, just as under s 138 of the *Australian Evidence Act*, Nigerian courts may also insulate their reputation from any associated perceptive contamination by operationalising some of the deciding factors under s 15 of the *Nigerian Evidence Act* such as the gravity of the official lawlessness.[173]

IV Contextual Analysis of the Exclusionary Rules and Their Policy Rationales

A *The Seriousness of the Violation*

Under this head of inquiry, the courts in US, Canada, Nigeria and Australia, determine the level of impropriety or infraction on a spectrum of seriousness. An inadvertent or negligible infraction is not likely to move the court to exclude

167 Ibid 450.

168 *Grant* (n 94) 396 [76] (McLachlin CJ and Charron J for McLachlin CJ, LeBel, Fish, Abella, and Charron JJ); Paciocco (n 33) 24.

169 *Collins* (n 96) 288 (Lamer J for Dickson CJ and Lamer, Wilson and LA Forest JJ).

170 Presser (n 120) 760–1. See, eg: *Pollard v The Queen* (1992) 176 CLR 177, 203 (Deane J) ('*Pollard*'); *Bunning v Cross* (n 60) 74–5 (Stephen and Aickin JJ, Barwick CJ agreeing at 65).

171 Hemming (n 116) 93.

172 *Kadir* (n 118) 125 [12]–[13].

173 See generally Bathurst and Schwartz (n 100) 93–4.

evidence that resulted from or is associated with such an infraction.[174] On the other hand, where the infraction is severe, wilful or reckless, the court will most probably exclude the evidence to register its aversion to the offending state misconduct and preserve public confidence in the criminal justice system.[175] Likewise, in Australia, a widespread erroneous belief among police may strengthen the case for exclusion.[176]

Speaking about the good faith exception under the American exclusionary rule, George Thomas III and Barry Pollack observed that '[i]n effect, the Court had its "thumb on the scales" when it created a good-faith exception to the exclusionary rule while ignoring the consequences of bad-faith violations'.[177] Thus, a US Court will admit the evidence if the illegality or impropriety resulted from good faith mistakes.[178] The American exclusionary rule has also been subordinated to the doctrines of inevitable discovery and independent source.[179] Accordingly, the availability of the evidence by means other than through the illegal acquisition will materially impact the exclusionary analysis.[180] Under this doctrine or exception, the improperly obtained evidence will not be excluded if it would otherwise have been discovered absent the police misconduct.[181] Closely related to the inevitable discovery exception, is the independent source doctrine that allows admission so long as the evidence was procured through a source independent of the police misconduct.[182] And just as exclusion is peremptory upon proof of vitiating breach of the Fourth Amendment, admission is also inflexible and automatic once the applicable exceptions are established.[183]

The Supreme Court of Canada, in *Collins*, listed non-exhaustive factors that impact the question of the seriousness of the violations in the exclusionary analysis. These factors include

> whether [the violation] was committed in good faith, or was inadvertent or of a merely technical nature; or whether it was deliberate, wilful or flagrant.

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174 See, eg: *United States v Leon*, 468 US 897, 908 (White J for the Court) (1984) ('*Leon*'); *Collins* (n 96) 285 (Lamer J for Dickson CJ, Lamer, Wilson and La Forest JJ).

175 Harvie (n 139) 779–81.

176 See *McElroy v The Queen* (2018) 55 VR 450, 469–71 [128]–[134] (Santamaria, Beach and Ashley JJA) ('*McElroy*').

177 George C Thomas III and Barry S Pollack, 'Balancing the Fourth Amendment Scales: The Bad-Faith "Exception" to Exclusionary Rule Limitations' (1993) 45(1) *Hastings Law Journal* 21, 23.

178 *Leon* (n 174) 926 (White J for the Court).

179 Penney (n 10) 789–90. See Machado (n 11) 8.

180 Bates (n 61) 390. See also *R v Stead* (1992) 62 A Crim R 40, 45 (Davies and Pincus JJA and McPherson SPJ).

181 *Nix v Williams*, 467 US 431, 446–8 (Burger CJ for the Court) (1984).

182 *Silverthorne Lumber Co v United States*, 251 US 385, 392 (Holmes J for the Court) (1920).

183 Bathurst and Schwartz (n 100) 90.

> Another relevant consideration is whether the action which constituted the constitutional violation was motivated by urgency or necessity to prevent the loss or destruction of evidence; and … the availability of other investigatory techniques …[184]

Nigerian jurisprudence on this question is not as developed, but there is no reason to believe that Nigerian courts will not adopt the same incremental approach to the question of the seriousness of state violations in the acquisition of evidence. In *Musa Sadau*, under a validly issued search warrant, a search of the accused's premises was conducted without the presence of two respectable neighbours as required.[185] The accused was convicted largely based on blank printed vehicle licences recovered during the search. On appeal, the Supreme Court of Nigeria — after observing that the execution of the concerned search may have been irregular — held that the 'consequence of an irregularity will attach to the persons executing the warrant and not to the evidence which is thereby obtained', and consequently upheld the admission of the evidence in question.[186] Furthermore, ss 15(d) and (e) of the *Nigerian Evidence Act*, provide respectively for consideration of the gravity of the contravention and whether it was deliberate or reckless as factors in determining the seriousness of the investigatory misconduct. In Australia, there is a reasonable expectation of minimum standards of propriety that the actions of law enforcement agents must meet, and any clear inconsistency with these standards in the acquisition of evidence may result in exclusion.[187]

Factors that may affect the courts' exclusionary decision include motivations for the conduct.[188] According to the Supreme Court of Canada, whether the violation was: (1) part of a larger pattern of disregard for guaranteed rights;[189] or (2) committed in good faith, is important.[190] It is the same in Australia where it has been held that the more deliberate and reckless the violations, the graver they are.[191] In assessing the seriousness of violations, what is relevant is the specific conduct in the case.[192] But the relationship between the difficulty of obtaining the evidence and the seriousness

184 *Collins* (n 96) 285 (Lamer J for Dickson CJ and Lamer, Wilson and La Forest JJ), quoting *R v Therens* [1985] 1 SCR 613, 652 (Le Dain J). See also Jordan Hauschildt, 'Blind Faith: The Supreme Court of Canada, S 24(2) and the Presumption of Good Faith Police Conduct' (2010) 56(4) *Criminal Law Quarterly* 469, 477.

185 *Musa Sadau* (n 51).

186 Ibid.

187 *Ridgeway v The Queen* (1995) 184 CLR 19, 36–7 (Mason CJ, Deane and Dawson JJ).

188 *R v Gallagher* [2015] NSWCCA 228, [53] (Beech-Jones JA, Gleeson JA agreeing at [1], Adams J agreeing at [2]).

189 *Strachan v The Queen* [1988] 2 SCR 980, 1007 (Dickson CJ for Dickson CJ, Beetz, McIntyre, La Forest and L'Heureux-Dubé JJ).

190 *Hamill v The Queen* [1987] 1 SCR 301, 307–8 (Lamer J for Dickson CJ, Lamer, Wilson, Le Dain and Forest JJ); *Jacoy* (n 96) 558 (Dickson CJ for Dickson CJ, Beetz, Lamer and La Forest JJ).

191 *Kadir* (n 118) 133 [37].

192 *McElroy* (n 176) 468 [124] (Santamaria, Beach and Ashley JJA).

of the impropriety or violation is inversely proportional.[193] However, epistemic integrity defenders will vehemently insist on admission of evidence so long as it will contribute to factual accuracy in the trial notwithstanding the seriousness of the violations of an accused's rights in the process of its acquisition.[194]

B *The Fairness of the Trial*

Under this head, the courts will evaluate the extent to which the state's misconduct infringes the accused's protected interests. The impact could be merely fleeting, technical, profoundly intrusive or any degree in-between.[195] The disqualifying unfairness is concerned only with the unfairness in its use during trial.[196]

US commentator, Ronald Rychlak, has proposed that the American exclusionary question be determined by reference to: (1) the character and extent of the constitutional violation; (2) the seriousness of the charge; (3) the prejudicial effect of the evidence; and (4) the potential negative impact of its admission on the integrity of the proceedings.[197] Chief Justice Roberts also ruled, in *Herring v United States*,[198] that the US rule is inapplicable to breaches of the Fourth Amendment so long as the infraction resulted from mere negligence and the negligence is non-recurring and attenuated.[199] The US rule also permits using illegally obtained evidence to impeach the credibility of the accused.[200] The evidence will also be allowed if it was obtained from a third party or through the Fourth Amendment violations of someone other than the accused.[201]

In *Grant*, McLachlin CJ of the Supreme Court of Canada stated that '[t]he more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for the courts to dissociate themselves from that conduct … and ensure state adherence to the rule of law'. [202] In *Harrison v The Queen*,[203] it was also observed that the police's 'disregard for *Charter* rights was aggravated by the officer's

193 *Kadir* (n 118) 133 [37].

194 See, eg, Laudan (n 4) 187.

195 See generally Thomas III and Pollack (n 177) 23.

196 Pattenden (n 24) 665–6.

197 Rychlak (n 76) 241.

198 555 US 135 (2009).

199 Ibid 143–4 (Roberts CJ for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ).

200 Peiris (n 14) 317. See, eg: *Walder v United States*, 347 US 62, 64 (1954) (Frankfurter J for the Court); *Harris v New York*, 401 US 222, 225 (1971) (Burger CJ for the Court).

201 Peiris (n 14) 317; *Nardone v United States*, 308 US 338, 243 (1939) (Frankfurter J for the Court).

202 *Grant* (n 94) 394 [72] (McLachlin CJ and Charron J for McLachlin CJ, LeBel, Fish, Abella and Charron JJ).

203 [2009] 2 SCR 494 ('*Harrison*').

misleading testimony at trial'. [204] In the US, as in Canada, even evidence indirectly arising from illegal activities is caught up with the exclusionary rule under the doctrine of 'fruit of the poisonous tree'.[205] As a general principle, evidence obtained as consequence of an impropriety or illegality is also subject to exclusion in both Nigeria and Australia.[206] However, in *Kadir* the High Court of Australia upheld a search warrant and its resulting evidence, despite excluding evidence comprising surveillance video footage that formed the basis for granting the warrant. The desirability of admitting the surveillance footage did not outweigh the undesirability of admitting evidence obtained through trespass and in breach of the *Surveillance Devices Act 2007* (NSW).[207] The desirability of admitting the other evidence was however sufficient given its high probative value with a more tenuous connection to the illegality.[208]

Unlike in Canada, there is no robust jurisprudence regarding this head of inquiry in Nigeria. But the provisions of ss 15(d) and (f) of the *Nigerian Evidence Act*, just like those of ss 138(3)(d) and (g) of the *Australian Evidence Act*, speak to the violation's impact on the protected rights of an accused in the exclusion discretion analysis. Respectively, they provide for consideration of the gravity of the contravention and whether any other judicial or non-judicial proceeding has been or is likely to be taken in relation to the contravention. The evidence will, therefore, be excluded where no other proceedings could be taken regarding inexcusable violations.[209] Furthermore, the Supreme Court of Nigeria has stated in obiter dicta, that illegal acquisition of evidence may trigger the operation of the supremacy provision of s 1(3) of the *1999 Nigerian Constitution* against the *Nigerian Evidence Act* for inconsistency with the constitution.[210] Considerations of the impact of violations on the protected rights of Australians will be by reference to their protected rights under various state and Commonwealth legislation.[211] These instruments compel courts to exercise their exclusionary discretion with reference to the *ICCPR*'s guarantee regarding excluding illegally or improperly obtained evidence.[212] Although contravention of any of the rights guaranteed in the *ICCPR* would most likely constitute breaches of fundamental rights guaranteed under the Nigerian, American and Canadian constitutions, explicitly tying the integrity of evidential acquisition to

204 Ibid 508–9 [27] (McLachlin CJ for McLachlin CJ, Binnie, LeBel, Fish, Abella and Charron JJ).

205 Kamisar (n 36) 5.

206 *Nigerian Evidence Act* (n 48) s 14(b); *Australian Evidence Act* (n 72) s 138(1)(b).

207 *Kadir* (n 118) 137.

208 Ibid 114.

209 See: *McElroy* (n 176) 471 [137] (Santamaria, Beach and Ashley JJA); *Gallagher* (n 188) [45] (Beech-Jones JA, Gleeson JA agreeing at [1], Adams J agreeing at [2]).

210 *Kekong* (n 49) 135.

211 Such as a suspect's right to silence, right to counsel and right to be cautioned, as provided for in, for example: *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 122, 123; *Police Powers and Responsibilities Act 2000* (Qld).

212 *Australian Evidence Act* (n 72) s 138(3)(f). See also Oke (n 50) 11.

fidelity to international human rights standards sets Australia apart from most other countries. It is worth noting that establishing a causal connection or level of sufficient proximity between the misconduct or violation and the acquisition of the evidence will aid the case of the defendant.[213]

Considering the seriousness of the violation under the first branch of inquiry necessarily involves, even if indirectly, evaluating the extent of the impact of the misconduct on the protected interests of the accused under the second head of the inquiry.[214] The more serious the impact of the violation on the accused's rights, the more chances for exclusion of the evidence by the courts.[215] This will necessarily involve identifying the interests affected by the relevant violations and the extent of their impact on those interests.[216] For example, the courts may frown much more at a violation of a person's body than at a violation of their office or home, since there is greater expectation of respect for a person's bodily integrity and greater revulsion to its breach as well.[217] Evidence derived from another impugned evidence may also be excluded if it is constrictive or self-incriminating and could not have been acquired but for the breach.[218] Factors for the court to consider include the presence or absence of unreasonable or probable grounds for the search and seizure[219] and whether the tainted evidence would have been obtained in the absence of the violation.[220] For epistemic integrity campaigners, so long as the impact of the violation on the accused's rights does not directly or indirectly compromise the truth contributing capacity of the evidence, it should be admitted.[221] However, in Canada, while illegally or improperly obtained evidence may not be excluded in service of other policy rationales, unless the illegality or impropriety is serious, such evidence will be excluded where it affects the fairness of the trial.[222]

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213 *R v Dalley* (2002) 132 A Crim R 169, 186 [86] (Simpson J) ('*Dalley*'); *Black v The Queen* [1989] 2 SCR 138, 162–3 (Wilson J for the Court).

214 See: *Nigerian Evidence Act* (n 48) s 15; *Australian Evidence Act* (n 72) s 138(3).

215 *Grant* (n 94) 396 [76] (McLachlin CJ and Charron J for McLachlin CJ, LeBel, Fish, Abella and Charron JJ).

216 Ibid 396 [77].

217 *Pohoretsky v The Queen* [1987] 1 SCR 945, 949 [5] (Lamer J for the Court). See also *Kadir* (n 118) 137 [47].

218 *Stillman v The Queen* [1997] 1 SCR 607, 669 [113] (Cory J for Lamer CJ, La Forest, Sopinka, Cory and Iacobucci JJ). See also *RJS* v *The Queen* [1995] 1 SCR 451.

219 *R v Fearon* [2014] 3 SCR 621, 665–6 [96] (Cromwell J for McLachlin CJ, Cromwell, Moldaver and Wagner JJ).

220 *Jefferson v Fountain*, 382 F 3d 1286 (11th Cir, 2004), 1296–7 (Anderson, Carnes and Marcus JJ); *United States v Watkins*, 13 F 4th 1202 (11th Cir, 2021), 1202, 1215–16 (Luck, Ed Carnes, and Marcus JJ). See also: Robert M Bloom, 'Inevitable Discovery: An Exception Beyond the Fruits' (1992) 20(1) *American Journal of Criminal Law* 79, 81; Stephen E Hessler, 'Establishing Inevitability Without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule' (2000) 99(1*) Michigan Law Review* 238, 241–2.

221 See, eg, Laudan (n 4) 187.

222 Penney (n 10) 795.

C *Upholding the Integrity of Criminal Justice Delivery*

As earlier discussed, upholding the integrity of the courts is no longer a pre-eminent remedial rationale for exclusion in the US.[223] However, it is reasonable to assume that the courts in the US, as in all other democracies, will continue to be conscious of the impact of their exclusionary decisions on the integrity of the US criminal justice system. In Canada, the courts are enjoined to exclude illegally obtained evidence if its admission in the proceedings will bring the administration of justice into disrepute.[224] Under this branch of analysis, Canadian courts have the discretion to admit impugned evidence if society's collective epistemic interest in truth determination and criminal accountability outweigh the individual accused's right to protection from state abuses.[225] The relevant question here is whether truth discovery as the avowed goal of criminal trial will be better served by excluding or admitting tainted evidence.[226] Both the likely negative impact of admission or exclusion on the repute of the administration of justice will be considered.[227]

There are similar analyses under Nigerian and Australian regimes, under what I have termed upholding the integrity of criminal justice delivery. A purposive reading of s 138 of the *Australian Evidence Act* shows that it seeks to balance two public interests in Australia — namely, ensuring criminal accountability by admitting reliable evidence and upholding the rule of law, and the legitimacy of the criminal process by vindicating individual rights and deterring state abuses.[228] Although the Nigerian criminal justice system places a heavier emphasis on the epistemic goal of truth discovery than protecting an accused's rights, Nigerian courts will exclude any impugned evidence if the desirability of admitting the evidence is outweighed by the undesirability of admitting it.[229] In other words, Nigerian courts will not admit impugned evidence no matter its probative value if upon proper consideration of all relevant factors, the balance of justice and fairness favours its exclusion.

However, the bias of the Nigerian criminal process for factual accuracy is, as the Supreme Court of Nigeria put it in *Musa Sadau*, subject to a trial judge's discretion 'to set the essentials of justice above the technical rule … where the interests of justice demand [that] it … exclude[s] evidence which would otherwise be relevant considering the circumstances of its discovery and production'.[230] Given Nigeria's inclusionary approach, it would seem that an inquiry under the branch of upholding the integrity of criminal justice delivery would be a radical departure by Nigerian

223 Madden (n 88) 451.

224 See *Canadian Charter of Rights and Freedoms* (n 39) s 24(2).

225 *Grant* (n 94) 399 [85], 413 [126] (McLachlin CJ and Charron J for McLachlin CJ, LeBel, Fish, Abella and Charron JJ).

226 Ibid 413 [127].

227 Ibid 397 [79].

228 See generally *Kadir* (n 118) 134–5 [40].

229 *Nigerian Evidence Act* (n 48) s 14.

230 *Musa Sadau* (n 51), citing *Harris* (n 21) 707 (Viscount Simon).

courts and may only arise in most egregious state abuses, whereas in US, Canada and Australia, it will be an ordinary part of the inquiry. This is because commitment to epistemic integrity is stronger in Nigeria than in US, Canada and Australia.[231] It is noteworthy that the nature of the relevant offence is a factor to consider since there may be greater public interest in ensuring criminal responsibility and accountability against serious offenders than victimless criminals.[232] However, every case should be decided on its own merit since more serious offenders may sometimes require or enjoy stricter statutory due process safeguards.[233] Moreover, the presumption of innocence in favour of an accused and the burden of proof on the prosecution, in adversarial systems, guarantee constitutional or fundamental protections for everyone including serious offenders.[234]

Another important factor to consider under this head of analysis is the probative value of the evidence. The more crucial the evidence to proving or disproving the essential elements of the alleged crimes, the more the court may be willing to allow it.[235] However, the court should be systematic in its consideration of the probative value of evidence so as not to make substantive pronouncements at a preliminary stage. The preliminary nature of the evaluation will therefore, demand careful consideration of both the nature of the evidence itself and of the triggering application.[236] And, at least in the US, Canada, Nigeria and Australia, since the probative value of the evidence is just one factor to consider, courts will not allow even highly probative evidence when the societal cost of upholding respective constitutional or statutory guarantees is less than or equal to the societal cost of factual accuracy and truth discovery.[237]

V Burden of Proof

The first point to settle in any case involving an allegation of illegal or improper acquisition of evidence for purposes of its exclusion, is whether the evidence was unlawfully or wrongly acquired as alleged. The burden of proof at any material time naturally falls on the party who will lose if no further proof is offered.[238] In all four

231 See, eg, *Grant* (n 94) 397 [80] (McLachlin CJ and Charron J for McLachlin CJ, LeBel, Fish, Abella and Charron JJ).

232 See, eg: *Pollard* (n 170) 203–4 (Deane J); *Dalley* (n 213) 171 [1]–[7] (Spigelman CJ); *R v Borden* [1994] 3 SCR 145.

233 See *Dalley* (n 213) 189 [96]–[97] (Blanch AJ).

234 See generally *Harrison* (n 203) 512 [40] (McLachlin CJ for McLachlin CJ, Binnie, LeBel, Fish, Abella and Charron JJ).

235 See, eg: *R v Camilleri* (2007) 68 NSWLR 720, 726 [35] (McClellan CJ); *R v Helmhout* (2001) 125 A Crim R 257, 265 [52] (Hulme J, Sperling J agreeing at 265 [55]–[56]).

236 See *Matthews v SPI Electricity Pty Ltd [No 31]* (2013) 42 VR 513, 551 [162] (Forrest J).

237 See generally *R v Kitaitchik* (2002) 166 OAC 169 (Ontario Court of Appeal), [47] (Doherty JA).

238 See generally Bruce L Hay, 'Allocating the Burden of Proof' (1997) 72(3) *Indiana Law Journal* 651, 655.

jurisdictions, the defendant has the initial responsibility to show that the evidence resulted directly or indirectly from illegal or improper acquisition.

Under the automatic American exclusionary rule, the evidence will then be excluded unless the police can prove that the unconstitutional acquisition falls within recognised exceptions. Since the exclusionary rule in s 14 of the *Nigerian Evidence Act* is inclusionary, the defendant has the additional burden, likely of a lower standard, of convincing the court that the desirability of admitting the tainted evidence is outweighed by the undesirability of its admission. In Canada, the defendant has the initial burden to prove a violation of the *Canadian Charter of Rights and Freedoms*, on the balance of probabilities, by establishing some causal link between the violation and the evidential acquisition.[239] The further burden of proving any potential negative impact of admission on the reputation of the justice system is also on the applicant but the standard of proof is lower.[240] The defendant 'need only show that the admission of the evidence "could" rather than "would" bring the administration of justice into disrepute'.[241]

Under s 138 of the *Australian Evidence Act*, once the defendant discharges the initial burden of proving illegality or impropriety of the evidential acquisition, the onus will be on the prosecution to justify the admission.[242] However, there is a presumption of illegality or impropriety in s 139 of the *Australian Evidence Act* against evidence of statements made or acts done by a defendant who was not cautioned of their right to silence by the arresting police officer, or during an official questioning without any caution regarding their right to silence by an investigating officer acting without legal authority or factual basis for suspicion of commission of the particular crime. Placing the burden of justifying the admission of the illegally obtained evidence on the prosecution in the US and Australia as opposed to on the defendant as in Nigeria and Canada, distributes possible errors regarding whether to admit or exclude in favour of the defendant.[243] Also, placing the burden of justifying the desirability of admitting tainted evidence on the prosecution makes the Australian regime essentially more exclusionary than inclusionary.[244]

VI Concluding Remarks

As the debates about the policy justifications and the epistemic shortcomings of excluding illegally or improperly obtained evidence drag on, countries have continued to recalibrate their criminal justice systems on a spectrum adorned with

239 Harvie and Foster (n 96) 506, citing *Collins* (n 96) 281–2; Kenneth Jull, 'Exclusion of Evidence and the Beast of Burden' (1988) 30(2) *Criminal Law Quarterly* 178, 179.

240 Jull (n 239) 178, 180–1.

241 Ibid.

242 Osborn (n 43) 14.

243 Pardo (n 7) 354.

244 Osborn (n 43) 14.

two extreme points: those with a dogmatic commitment to the epistemic goal of truth discovery; and those who assign a commanding role to other policy considerations. The US, Canada, Nigeria and Australia represent different models of criminal justice systems on this epistemic spectrum. While Nigeria operates a statutorily flavoured common law inclusionary approach, Australia and Canada adopt a legislatively guided and constitutionalised human rights based exclusionary framework respectively. The US on the other hand, operates a relaxed automatic exclusionary approach.

However, Priscilla Machado has asserted that '[w]hile the United States has become disenchanted with the exclusionary rule, Canada, somewhat ironically, has taken to emulating many American interpretations … with regard to illegally obtained evidence'.[245]

Be that as it may, it is arguable that the variations in the exclusionary models exist in these countries largely because of their distinct historical experiences and sociopolitical contexts such as 'local circumstances, national characteristics, the peculiar sociology of a nation's police force and criminal population'.[246] For example, the automatic American exclusionary rule may not be adequately accounted for without looking into the impact of the suspicion of authority by Americans which underlay the acrimonious colonial relationship between Britain and the US (one of the highlights of which was the use of oppressive and overbearing search warrants by Britain) ending in tumultuous American revolution.[247] This was different for Australia and Canada whose separation from Britain was gradual and with less suspicion of authorities by Australians and Canadians both in colonial and postcolonial periods.[248] In the words of Jordan Hauschildt, '[i]t is not controversial that the assumption that Canadian police carry out their duties in good faith has a long history, particularly in judicial pronouncements related to the subject'.[249] It is unclear how much the increase in violent crimes in Nigeria, including domestic terrorism, and its comparative institutional weakness in fighting those crimes, has influenced its lesser commitment to due process rights of criminal suspects in preference for truth discovery.[250]

Thus, in Nigeria, illegally or improperly obtained evidence is admissible so long as it is relevant, but the courts have the discretion to reject it if the essentials of justice so demand. On the other hand, in Canada and Australia, courts have a duty to exclude

245 Machado (n 11) 1.

246 JB Dawson, 'The Exclusion of Unlawfully Obtained Evidence: A Comparative Study' (1982) 31(3) *International and Comparative Law Quarterly* 513, 513; Machado (n 11) 22–5.

247 Machado (n 11) 10, 23; Jeffry R Gittins, 'Excluding the Exclusionary Rule: Extending the Rationale of *Hudson v Michigan* to Evidence Seized During Unauthorized Nighttime Searches' [2007] (2) *Brigham Young University Law Review* 451, 454–5.

248 See generally: Machado (n 11) 10; Hauschildt (n 184) 470.

249 Hauschildt (n 184) 470. See also Machado (n 11) 24.

250 See generally Machado (n 11) 26–8.

illegally or improperly obtained evidence in order to uphold the rule of law and the legitimacy and integrity of the criminal justice system, subject to their discretionary powers to accept the evidence in deserving cases. There is a strict exclusionary obligation on the American courts subject to several judicially created exceptions. Unlike the Canadian exclusionary rule, the Australian and Nigerian exclusionary rules do not have constitutional status and therefore, could be more easily tinkered with through ordinary legislation without any constitutional amendments.[251] The same conclusion could also be reached about the American exclusionary rule since the US Supreme Court has stripped it of its previously assumed constitutional status.[252]

Once a defendant in the US and Australia discharges the initial burden of proving the illegality or impropriety of an acquisition, the onus shifts to the prosecution to justify the admission of the tainted evidence. By contrast, in Nigeria and Canada, a defendant is under the double burden of having to prove not only the illegality or impropriety of the evidential acquisition but also the desirability of excluding it. Unlike in Canada and since the Nigerian model is inclusionary, the burden of justifying the exclusion of any tainted evidence will, however, be of a higher threshold. Accordingly, from a pure epistemic perspective, it is arguable that while Canada's criminal trials are essentially more truth seeking than those of the US and Australia, Nigeria's criminal trials are generally more truth seeking than those of the US, Canada and Australia. Since truth discovery is not the only goal of criminal justice systems, exclusionary flexibility allows for proper consideration of all operating policy choices and any applicable counterbalancing considerations.[253] As Kingsmill Moor J emphasised in the Irish case of *Director of Public Prosecutions v O'Brien*,[254] public interest demands that the duty of obedience to the law continues even in the investigation of crimes. Whether evidence will be excluded should depend on the nature and extent of the vitiating official misconduct and the circumstances of its commission or omission.[255] Ultimately, which competing policy objectives should trump the other must turn on balancing social costs and public goods.[256]

251 See generally ibid 11.

252 Ibid 8.

253 Peiris (n 14) 322.

254 [1965] IR 142, 160 (Maguire CJ for the Court).

255 Peiris (n 14) 322.

256 See generally Bates (n 61) 387.

Gary Edmond,* *Jason M Chin*,** *Kristy A Martire**** *and Mehera San Roque*****

A WARNING ABOUT JUDICIAL DIRECTIONS AND WARNINGS

Abstract

This article questions our criminal justice system's heavy reliance on judicial directions and warnings. Reviewing a recent case and the directions provided by the trial judge — in a trial where a police officer purported to identify defendants on the basis of listening to intercepted telephone calls — this article explains why orthodox judicial instructions were incapable of assisting the jury with their assessment of the evidence. The analysis in this article explains why judicial directions do not necessarily mediate and therefore justify the admission of opinion evidence. In some cases, judicial directions are incapable of placing decision-makers in a position to rationally evaluate evidence. These conclusions draw on scientific research on voice identification and cognitive bias to illustrate how some judicial directions are not only displaced from scientific knowledge, but sometimes encourage (or expect) jurors to perform impossible feats of cognition.

I Introduction: Trials (and Safeguards) for Show?

The criminal trial on indictment proceeds on the assumption that jurors are true to their oath, that, in the quaint words of the ancient oath, *they hearken to the evidence and that they obey the trial judge's directions. On that assumption, which I regard as fundamental to the criminal jury trial, the common law countries have staked a great deal*. If it was rejected or disregarded, no one — accused, trial judge or member of the public — could have any confidence in any verdict of a criminal jury or in the criminal justice system whenever it involves a jury trial. If it was rejected or disregarded, the pursuit of justice through the jury system would be as much a charade as the show trial of any totalitarian state. Put bluntly, *unless we act on the assumption that criminal*

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> *juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials*.[1]

Judicial directions are said to fulfil an important, perhaps essential, role in criminal prosecutions.[2] Our courts rely on directions to capture and convey the law to be used by the trier of fact. With respect to evidence, particularly evidence that might be unreliable or susceptible to misuse, directions are said to bring the collective experience of the judges to assist the trier of fact with evaluation.[3] They draw attention to the limitations and dangers of some kinds of evidence (and reasoning) that are considered by judges to threaten the fairness of proceedings and the rationality of decision-making.[4] Directions are believed to make criminal trials fair by exposing and implicitly protecting against dangers associated with the misunderstanding and misuse of evidence. But what happens if the collective experience and common sense of judges is misguided or simply wrong? What if the experience of courts and the directions provided by trial judges are not readily applied or not actually helpful?[5] This article directly questions the role played by directions in

1 *Gilbert v The Queen* (2000) 201 CLR 414, 425 [31] (McHugh J) (emphasis added). Justice McHugh continues at 426 [32]: 'In my respectful opinion, the fundamental assumption of the criminal jury trial requires us to proceed on the basis that the jury acted in this case on the evidence and in accordance with the trial judge's directions'. See also: *DPP (Vic) v Lyons (Ruling No 3)* [2018] VSC 224, [58]; *Gammage v The Queen* (1969) 122 CLR 444, 463 (Windeyer J): 'A jury in a criminal case … must be assumed to have been faithful to their duty'.

2 In this article we use the terms directions and warnings interchangeably. While some courts draw distinctions — such as directions must be followed (for example, in relation to the *Evidence Act 1995* (Cth) s 95 ('*Evidence Act*') and the prohibited use of evidence for tendency purposes), whereas warnings are intended to assist the trier of fact by drawing attention to a danger — such uses are not consistent. The warnings given in relation to evidence of a kind that might be unreliable at common law and under the uniform evidence law ('UEL') (eg, *Evidence Act* (n 2) s 165) are frequently described, as in our case study, as judicial directions. See, eg: Queensland Law Reform Commission, *A Review of Jury Directions* (Report No 66, December 2009) vol 1, 53 [4.21] ('QLRC, *A Review of Jury Directions*'); New South Wales Law Reform Commission, *Jury Directions* (Report No 136, November 2012) 2 [1.3] ('NSWLRC, *Jury Directions* 2012').

3 See, eg, *Chidiac v The Queen* (1991) 171 CLR 432: 'where part or all of the incriminating evidence against the accused consists of identification evidence, the Court will examine the case in the light of its knowledge, gained from long experience of criminal trials, that identification evidence is a potent source of miscarriages of justice': at 462 (McHugh J), citing *Davies v The King* (1937) 57 CLR 170, 180. Cf *FGC v Western Australia* (2008) 183 A Crim R 313, 317 [4]–[6] (Wheeler JA).

4 Judicial notions of fairness might be understood as emic — an actor's category. For reasons explored in this article, they are not persuasive as etic accounts.

5 We acknowledge the possibility of jury nullification, though we should be anxious about any nullification based on misunderstanding. See generally: Alan Scheflin and Jon Van Dyke, 'Jury Nullification: The Contours of a Controversy' (1980) 43(4) *American Jury* 51; Richard Lorren Jolly, 'Jury Nullification as a Spectrum' (2022) 49(2) *Pepperdine Law Review* 341.

the evaluation of evidence — particularly potentially unreliable opinion evidence. It draws attention to the practical limitations of directions, and the implications of these limitations for the fairness of criminal proceedings.[6] Indirectly, it draws attention to the limits of judicial experience and the distance between legal practice and scientific knowledge.

This article considers the provision and effectiveness of judicial directions through a concrete example. It uses the appellate decision from *Davey v Tasmania* ('*Davey*')[7] as a case study.[8] In *Davey*, the trial judge admitted the voice identification evidence of a police officer who repeatedly listened to lawful telephone intercepts during an investigation. This kind of evidence is now routinely admitted in criminal proceedings even though, as lawyers and courts acknowledge, it is a kind of evidence that may be unreliable.[9] In consequence, in order to make the trial fair, the admission of the police officer's opinion evidence was said to require careful directions to the jury. We contend, for the reasons developed in the ensuing analysis, that epistemic frailties inherent in the opinions of police officers cannot be repaired, or even meaningfully addressed, through judicial directions (or other safeguards).[10] This article is critical of the directions in *Davey*, both their content and effectiveness, and explains how threats to rational decision-making and the fairness of proceedings appear to be misunderstood and radically underestimated by both trial and appellate courts.

II Directions, Warnings and Instructions

Initially, it is useful to consider what courts, law reform commissions and attentive scholars have said about judicial directions. A good place to begin is with their

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6 See generally: David Hamer and Gary Edmond, 'Forensic Science Evidence, Wrongful Convictions and Adversarial Process' (2019) 38(2) *University of Queensland Law Journal* 185; Gary Edmond and Andrew Roberts, 'Procedural Fairness, the Criminal Trial and Forensic Science and Medicine' (2011) 33(3) *Sydney Law Review* 359.

7 [2020] TASCCA 12 ('*Davey*').

8 In researching this topic, we sought access to documents, transcripts, submissions and the detective's statements from appellate counsel and the Director of Public Prosecutions (Tasmania). We received no cooperation. The Director did not reply to our request, although his staff assured us in writing that the request had been received. Such attitudes raise questions about open justice, public accountability and public confidence in criminal justice systems. See, eg, New South Wales Law Reform Commission, 'Open Justice Review', *NSW Government Communities & Justice* (Web Page, 29 March 2023) <https://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Open-justice/Project_update.aspx>.

9 Similar critiques might be made about the reception of the voice identification and the directions in a number of cases. See, eg: *R v Leung* (1999) 47 NSWLR 405; *Nguyen v The Queen* (2002) 26 WAR 59 ('*Nguyen* 2002'); *Li v The Queen* (2003) 139 A Crim R 281; *R v Riscuta* [2003] NSWCCA 6 ('*Riscuta*'); *Kheir v The Queen* (2014) 43 VR 308 ('*Kheir*'); *Tran v The Queen* [2016] VSCA 79; *Tasmania v Farhat* (2017) 29 Tas R 1 ('*Farhat*'); *R v Phan* (2017) 128 SASR 142 ('*Phan*').

10 This applies regardless of whether it is judges directing jurors or themselves.

function(s). What is the purpose of jury directions given the time and resources they consume in trials and appeals? 'The aim of jury directions is to ensure a fair trial, where the jury's verdict is the result of the application of the law to the facts as found by the jury'.[11] Similarly:

> Ensuring that the defendant receives a fair trial may be seen as the ultimate obligation of a trial judge in presiding over a trial, whether or not the judge is the trier of fact, and as the primary objective of all jury directions and warnings.[12]

The main purpose of jury directions seems to be about making criminal proceedings fair. Ordinarily, the trial judge provides directions to the jury on the legal issues (the law), sometimes explaining the application of the law to the evidence admitted.[13] The trial judge might also direct the jury on specific evidence — providing assistance with some kinds of evidence (for example, eyewitness identification or the testimony of prison informers) thought to raise difficulties or introduce risks — or how they should not reason:

> The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. … In some cases it will require the judge to warn the jury about how they should *not* reason or about particular care that must be shown before accepting certain kinds of evidence.[14]

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11 Criminal Law Review, *Jury Directions: A Jury-Centric Approach* (Report, Department of Justice and Regulation (Vic), March 2015) iii ('CLR, *Jury Directions: A Jury-Centric Approach*'). See also: Criminal Law Review, *Jury Directions: A New Approach* (Report, Department of Justice (Vic), January 2013) 4, 18 ('CLR, *Jury Directions: A New Approach*'); New South Wales Law Reform Commission, *Jury Directions* (Consultation Paper 4, December 2008) 4–6 [1.11]–[1.14].

12 QLRC, *A Review of Jury Directions* (n 2) vol 1, 116 [7.5].

13 There may be exceptions, such as where there are few issues or the issues appear straightforward, such that directions are not considered necessary. In some cases the defence may request that one or more directions are not given.

14 *RPS v The Queen* (2000) 199 CLR 620, 637 [41] (Gaudron ACJ, Gummow, Kirby and Hayne JJ) (emphasis in original) (citations omitted), quoted in Mark Weinberg, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (Report, Supreme Court of Victoria, August 2012) 277 [5.1]. See also *Dupas v The Queen* (2010) 241 CLR 237, 248–9 [28]–[29] ('*Dupas*'). Cf: *Zoneff v The Queen* (2000) 200 CLR 234, 260–1 [65]–[67] (Kirby J) ('*Zoneff*'); *R v Yasso [No 2]* (2004) 10 VR 466, 482–3 [53]–[60] (Vincent JA); *Wilson v The Queen* (2011) 33 VR 340, 343 [2] (Maxwell P); Murray Gleeson, 'The State of the Judicature' (2007) 14(3) *Australian Journal of Administrative Law* 118, 121; Justice Geoff Eames, 'Tackling the Complexity of Criminal Trial Directions: What Role for Appellate Courts?' (2007) 29(2) *Australian Bar Review* 161; Virginia Bell, 'How to Preserve the Integrity of Jury Trials in a Mass Media Age' (2005) 7(3) *Judicial Review* 311; James Wood, 'Jury Directions' (2007) 16(3) *Journal of Judicial Administration* 151; Justice Peter McClellan, 'Looking Inside the Jury Room' (2011) 10(3) *Judicial Review* 315.

The effectiveness of directions and the fairness of trials is said to be indexed to public confidence in the criminal justice system:

> If directions are not effective, this leaves jurors to navigate the evidence and arguments in a trial on their own, which makes their job harder, and may reduce the community's confidence in the criminal justice system. It is therefore vital to ensure that jury directions are as clear and helpful as possible.[15]

In *Longman v The Queen*[16] and *Bromley v The Queen*,[17] the High Court explained that the trial judge is obliged to give all the directions required to avoid a 'perceptible risk of miscarriage of justice'.[18] In *Carr v The Queen*,[19] Brennan J expanded on this requirement:

> A warning is needed when there is a factor legitimately capable of affecting the assessment of evidence of which the judge has *special knowledge, experience or awareness* and there is a perceptible risk that, unless a warning about that factor is given, the jury will attribute to an important piece of evidence a significance or weight which they might not attribute to it if the warning were given.[20]

This is really just the converse of the requirement that criminal trials should be fair. In the preceding extracts we can observe claims about 'special knowledge' derived from 'judicial experience (actual or inherited)' and the deep institutional investment in the efficacy of directions.[21]

Ironically, directions appear to have contributed to the complexity of criminal proceedings, particularly where judges privilege legal accuracy (or correctness) over simplicity. This sometimes manifests in trial judges rehearsing the technical legal language of appellate courts.[22] However, law reform bodies have placed emphasis on

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15 CLR, *Jury Directions: A New Approach* (n 11) 15.

16 (1989) 168 CLR 79 ('*Longman*').

17 (1986) 161 CLR 315.

18 *Longman* (n 16) 86 (Brennan, Dawson and Toohey JJ). See also: ibid 324–5 (Brennan J); *RPS v The Queen* (2000) 199 CLR 620, 637 [41] (Gaudron ACJ, Gummow, Kirby and Hayne JJ); *Tully v The Queen* (2006) 230 CLR 234, 252–3 [57] (Kirby J), 259–60 [87], 261 [91] (Hayne J), 274 [132] (Callinan J), 280 [151] (Heydon J), 289 [186] (Crennan J).

19 (1988) 165 CLR 314 ('*Carr*').

20 Ibid 325 (emphasis added). See also *Jenkins v The Queen* (2004) 211 ALR 116, 121–2 [25].

21 *Carr* (n 19) 325 (Brennan J).

22 CLR, *Jury Directions: A New Approach* (n 11) 4, 10, 32. 'Jury directions are too long and too complex': at 10. See also NSWLRC, *Jury Directions* 2012 (n 2) xix.

making 'jury directions as comprehensible … as possible'.[23] This is a reaction to the 'increasing complexity' of directions, the amount of time consumed by directions at trial (particularly in New South Wales and Victoria), and the number of convictions overturned on appeal because of a mistake, irregularity or omission in the provision of directions on the law or evidence.[24]

This article is limited to directions on evidence and the use of evidence; specifically, kinds of evidence that are believed to be vulnerable to misunderstanding or misuse by jurors.[25] In addition to the kinds of evidence enumerated among the various legislative provisions (for example, identification evidence, the evidence of accomplices and bad character evidence), judges are expected (and at common law required) to provide jurors with insights drawn from their collective experience where it is in the interests of justice to do so.[26] Though, the provision of most directions follows a formal request.[27]

Directions tend to be requested (or are required) where

> the court has some *special knowledge or experience* about that kind of evidence *which the jury may not possess* and which may affect its reliability, or because it is the kind of evidence to which a jury may attribute more weight than it really deserves. The risk … may arise because of the nature of the evidence itself

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23 CLR, *Jury Directions: A Jury-Centric Approach* (n 11) iii. See also: Weinberg (n 14) 7–8; *R v Adomako* [1995] 1 AC 171, 189 (Lord Mackay). Directions on evidence and processes of reasoning, and some directions on law, may be paternalistic: see, eg, QLRC, *A Review of Jury Directions* (n 2) vol 2, 506 [16.4], 509 [16.16]. See also NSWLRC, *Jury Directions* 2012 (n 2) xii, 9, 10, 48. The NSWLRC explained at 9 [1.28]:

> The system of jury directions continues to operate according to a basic premise that jurors will have difficulty in fulfilling their responsibilities without appropriate guidance from the judge. Jury directions aim to help jurors carry out their role of deciding issues of fact in the light of the applicable principles of law.

24 Reform of directions is part of broader system reforms, concerned with (or justified by) efficiencies, particularly the goal of reducing the number of successful appeals and associated retrials. See CLR, *Jury Directions: A Jury-Centric Approach* (n 11) iii, 132.

25 CLR, *Jury Directions: A New Approach* (n 11) 15.

26 *Alford v Magee* (1952) 85 CLR 437, 466; *Longman* (n 16). The common law requirement is more exacting than the *Evidence Act* (n 2). See, eg, ss 165(2)–(3).

27 Legislatures and appellate courts have placed obligations on defendants (through defence counsel) to request directions. Defence counsel are required to identify issues and assist with the content of applicable directions. See: CLR, *Jury Directions: A New Approach* (n 11) 15; Weinberg (n 14) 309, 313, 320. While these developments might seem reasonable from the perspective of appellate courts, and be deemed appropriate by those concerned with institutional efficiencies, in practice they add to the burdens on the most poorly resourced participant(s) in the criminal trial process.

> or because of the significance which may be attached to it by the jury having regard to the evidence in the context of the trial as a whole.[28]

The so-called 'special knowledge or experience' of judges tends to be distilled into bench books, where guidelines or model directions are set out in a form that trial judges are encouraged to adapt to the circumstances of sui generis proceedings.[29]

Directions, along with the commitment to their efficacy, enable judges to admit risky evidence or evidence that might otherwise require exclusion. Our case study considers voice identification evidence, in the shadow of claims about extensive judicial experience with notoriously unreliable identification evidence.[30] The directions in the New South Wales Bench Book ('Bench Book') in relation to voice identification represent a relatively recent addition, supplementing long standing guidance on visual identification by eyewitnesses.[31] The Bench Book does not distinguish between direct and indirect witnesses (for example, those listening in real time compared to those listening to a recording), or draw attention to non-expert investigators expressing their opinions about the identity of speakers.[32] A joint report prepared by the Australian Law Reform Commission ('ALRC'), New South Wales Law Reform Commission ('NSWLRC') and Victorian Law Reform Commission ('VLRC') suggested that

> the most significant difficulty with identification evidence is that — in contrast with other categories of oral testimony — the confidence or apparent credibility

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28 *R v Stewart* (2001) 52 NSWLR 301, 322 (Howie J) (emphasis added). See also 'Supreme and District Courts Criminal Directions Benchbook', *Queensland Courts* (Web Page, 14 September 2021) Introduction <https://www.courts.qld.gov.au/court-users/practitioners/benchbooks/supreme-and-district-courts-benchbook>: 'It is the judge's duty to give the jury the benefit of the judge's knowledge of the law and to advise them in the light of the judge's experience as to the significance of the evidence'.

29 A Victorian Law Reform Commission ('VLRC') Report suggested that trial judges 'often face problems in determining when to give directions and in formulating the content of directions': Victorian Law Reform Commission, *Jury Directions* (Final Report No 17, May 2009) 8 ('VLRC, *Jury Directions*').

30 CLR, *Jury Directions: A Jury-Centric Approach* (n 11) xii.

31 Judicial Commission of New South Wales, 'Identification Evidence: Voice Identification', *Criminal Trial Courts Bench Book* (Web Page, October 2012) <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/identification_evidence-voice.html> ('Bench Book'). Drawing primarily from cases such as: *Alexander v The Queen* (1981) 145 CLR 395; *Domican v The Queen* (1992) 173 CLR 555 ('*Domican*'); *Bulejcik v The Queen* (1996) 185 CLR 375 ('*Bulejcik*'); *Festa v The Queen* (2001) 208 CLR 593; *R v Dickman* (2017) 261 CLR 601 ('*Dickman*'); *R v Dupas [No 3]* (2009) 28 VR 380, 462–3 [357] (Weinberg JA).

32 Consider the issues raised with respect to (direct) 'voice identification' suggested in: Bench Book (n 31) [3–100]–[3–120]. See also NSWLRC, *Jury Directions* 2012 (n 2) xi [0.7], 1314 [1.43].

> of an eyewitness [does] not necessarily correlate with the degree of accuracy of this person's identification.[33]

The Queensland Law Reform Commission ('QLRC') drew attention to 'some weaknesses', such as poor light or distance, as matters 'of common sense' whereas 'other potential weaknesses may be "very different from what people expect them to be"'.[34] This focus on the danger of the confident but mistaken eyewitness is consistent with a common law tradition recognising the possibility of wrongful convictions caused by misidentification.[35] The uniform evidence law (UEL)[36] includes a specific section, expressed in apparently mandatory terms, requiring a direction of special caution to be made whenever identification evidence has been admitted against a defendant in a criminal trial.[37]

One of the limitations of the UEL is the narrow scope of the definition of 'identification evidence'. The drafting of the UEL reflects peculiar concerns with eyewitnesses — prioritising the use of formal, live identification parades over other forms of visual identification procedures such as dock identifications, single suspect

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33 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law* (Report, December 2005) 428 [13.5] ('*Uniform Evidence Law Report*').

34 QLRC, *A Review of Jury Directions* (n 2) vol 2, 526–7 [16.60].

35 *Domican* (n 31). Such concerns are not new, the mistaken identification of Adolf Beck (1841–1909) led to the creation of the English Court of Criminal Appeal in 1907. See also: Hugo Münsterberg, *On the Witness Stand: Essays on Psychology and Crime* (McClure, 1908); *Davies v The King* (1937) 57 CLR 170. More recently, eyewitness error has become a very conspicuous issue in the United States following high profile DNA exonerations. See: Brandon L Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Harvard University Press, 2011); *New Jersey v Henderson*, 27 A 3d 872 (NJ) (2011); National Research Council et al, *Identifying the Culprit: Assessing Eyewitness Identification* (National Academies Press, 2014).

36 The UEL legislation has been adopted by the Commonwealth, Australian Capital Territory, New South Wales, Northern Territory, Tasmania and Victoria. The relevant acts are: *Evidence Act 2011* (ACT); *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW) ('*Evidence Act* (NSW)'); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (Tas) ('*Evidence Act* (Tas)'); *Evidence Act 2008* (Vic) ('*Evidence Act* (Vic)'). See also 'Uniform Evidence Acts Comparative Tables', *Attorney-General's Department* (Web Page, 27 August 2015) <https://www.ag.gov.au/legal-system/publications/uniform-evidence-acts-comparative-tables>.

37 *Evidence Act* (n 2) s 116. Victoria has moved most of their warnings from the *Evidence Act* (Vic) (n 36) to the *Jury Directions Act 2015* (Vic) following the formal reviews discussed in this section. It is worth noting that in *Dhanhoa v The Queen* (2003) 217 CLR 1, the High Court limited the effect of the apparently mandatory language in s 116 of the *Evidence Act* (NSW) (n 36), holding instead that such a direction was only required where identification is in issue — where 'in issue' is construed narrowly: at 9 [22] (Gleeson CJ and Hayne J), 16 [53]–[54] (McHugh and Gummow JJ), 26–7 [92]–[94] (Callinan J).

show ups and identifications based on photographs.[38] The UEL addresses identification evidence about the presence of the defendant at a relevant location that is offered by a person who was also present at that location at the same time.[39] Specific sections, designed to regulate the admission of identification evidence, apply only to visual identifications by eyewitnesses and do not regulate image comparison evidence.[40] While identification (or recognition) of a defendant's voice falls within the UEL's definition of 'identification evidence' and thus may require a direction, this does not extend to those listening to voice recordings — ie, indirect voice identification or voice comparisons.[41] Thus, any directions crafted to address the unreliability of voice comparison evidence, or voice identification evidence based on intercepted recordings, sit outside the traditional (albeit often still very limited) formulations designed to address the risks associated with eyewitness identifications. Modern jurisprudence reveals a strong preference for managing admissibility challenges by admitting opinions about identity in conjunction with the provision of a warning about dangers drawn from the experience of the courts.[42]

Given their prominent role in facilitating the admission of many kinds of evidence, and claims about their contribution to the fairness of criminal proceedings, it is informative, at the very least, to touch upon the scholarly study of directions, and characterisations of that research, by law reform bodies. Law reform commissions

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38 See, eg, Law Reform Commission, *Evidence* (Interim Report No 26, 1985) vol 1, ch 18. Since the 1980s and 1990s, cameras and recording devices have rapidly proliferated.

39 See *Evidence Act* (n 2) sch, Dictionary, pt 1 (definition of 'identification evidence'):

> ***identification evidence*** means evidence that is:
>
> (a) an assertion by a person to the effect that a defendant was, or resembles (visually, aurally or otherwise) a person who was, present at or near a place where:
>
> (i) the offence for which the defendant is being prosecuted was committed; or
>
> (ii) an act connected to that offence was done;
>
> at or about the time at which the offence was committed or the act was done, being an assertion that is based wholly or partly on what the person making the assertion saw, heard or otherwise perceived at that place and time; or
>
> (b) a report (whether oral or in writing) of such an assertion.

40 See, eg, *Evidence Act* (n 2) ss 114–15. Tasmania did not adopt these sections in the *Evidence Act* (Tas) (n 36) but has adopted s 116 regarding directions.

41 For more detail, consider the issues on (direct) 'voice identification' suggested in Bench Book (n 31) [3–120].

42 See, eg, *Dickman* (n 31) 610–11 [30], 613 [38], 619 [57]. Cf the preferable approaches adopted by the Victorian Court of Appeal: *Bayley v The Queen* (2016) 260 A Crim R 1, 12–15 [55]–[75], 19 [97]; *Dickman v The Queen* [2015] VSCA 311, [112] (Priest JA and Croucher AJA). Notwithstanding *Smith v The Queen* (2001) 206 CLR 650, a significant limitation on exclusion is the constraint imposed by *IMM v The Queen* (2016) 257 CLR 300 ('*IMM*') — making it difficult to exclude even poor and/or compromised identifications under the UEL (*Evidence (National Uniform Legislation) Act 2011* (NT) s 137). See also *Dupas v The Queen* (2012) 40 VR 182, 235–7 [199]–[206]. Judges and counsel have, on occasion, sought to engage with relevant scientific materials: see, eg, *Winmar v Western Australia* (2007) 35 WAR 159, 166–7 [26]–[30].

and a few attentive judges have acknowledged that, when considered against the results of scientific studies, many of the qualities attributed to directions by appellate courts are overstated or worse.[43] For example, a NSWLRC report on jury directions explained that the report was written 'in the context of a growing concern in Australia and overseas about the problems associated with jury directions'.[44] In terms of the recognition of problems associated with directions, the QLRC reported that

> the status afforded to jury decisions in the criminal justice system, has also led to many assumptions about the way in which juries operate and, importantly for this review, the way in which juries respond to the instructions, directions, comments and warnings given to them by judges. Some of these assumptions do not withstand scrutiny and are challenged by some of the empirical evidence, particularly from psychological and psycho-linguistic sources.[45]

A review conducted by the Victorian Department of Justice accepted that

> [w]hile it is agreed that jurors generally perform their role conscientiously, it is increasingly recognised that what is expected of jurors is unreasonable. This is due to the length and complexity of the issues and material with which they are confronted and, sometimes, the manner in which those issues are presented.[46]

A subsequent review led by Justice Weinberg concluded that 'jury directions are, by and large, unduly complex and in need of reform'.[47]

The NSWLRC report summarised the concerns as follows:

> There is growing awareness that jury directions are not always working well in guiding jurors in their task. There are concerns that jury directions are becoming too complex and uncertain to meet their intended purposes, and that they rely on outmoded communication methods that may confuse rather than assist the jury.[48]
>
> While the [scientific] research … indicates that directions can and do influence juror decision-making, it also reveals that jurors over a number of common law

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43 See, eg, NSWLRC, *Jury Directions* 2012 (n 2) 23–6. Law reform commissions and reviews reference, and appear to accept, the basic thrust of the scientific research, even though some of the authors (or judicial overseers) occasionally express impressionistic anxiety about research methods. Most of these issues, primarily concerned with the use of mock jurors and other ecological issues, have been substantially addressed. See, eg, Brian H Bornstein et al, 'Mock Juror Sampling Issues in Jury Simulation Research: A Meta-Analysis' (2017) 41(1) *Law and Human Behaviour* 13.

44 NSWLRC, *Jury Directions* 2012 (n 2) 1.

45 QLRC, *A Review of Jury Directions* (n 2) vol 1, 28 [3.11].

46 CLR, *Jury Directions: A New Approach* (n 11) 19.

47 Weinberg (n 14) vi [1.2]. See also VLRC, *Jury Directions* (n 29) 4.

48 NSWLRC, *Jury Directions* 2012 (n 2) xi [0.3]. See also at 23 [1.67], 8 [1.22].

> countries have real difficulties in understanding the directions that they are given.[49]

The executive summary in the NSWLRC report refers to challenges confronting jurors due to the volume of evidence, the complexity of evidence (for example, DNA statistics) and traditional forms of legal presentation.[50] The NSWLRC report also refers to audio and video evidence from surveillance devices, but voice identification and emerging problems with police surveillance recordings are not discussed.[51] A report by the ALRC, NSWLRC and VLRC reviewing the UEL acknowledged concern about directions on issues that are 'new, difficult or counter-intuitive to jurors' commonsense'.[52]

Most of the recent reviews and reports — for example, those from New South Wales, Queensland and Victoria — refer to critical literatures and the need to engage with empirical studies. Somewhat incongruously, reviews tend to favour persisting with prevailing practices. Most recommendations are focused on improving comprehension, reducing length and complexity and limiting scope for appeal by placing greater obligations on defendants (and defence counsel).[53]

Findings and recommendations in the various law reform commission reviews and reports (always judge-led and judge-heavy) tend to be milder than the critical, empirically based contributions of scientists (and legal scholars). Consider, for example, an assessment by researchers James Ogloff and Gordon Rose:

> jurors appear largely incapable of understanding judicial instructions as they are traditionally delivered by the judge. … the overwhelming weight of the evidence is that the instructions are not understood and therefore cannot be helpful.[54]

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49 Ibid 28 [1.82].

50 Ibid xi [0.5].

51 Ibid. See also ibid 5, 104, 123, 124. However, it should be noted that recommendation 5.6 is directed towards identification from images of the crime scene (eg, closed-circuit television (CCTV)): at xxi, 107–8 [5.119]. The report also discusses giving jurors access to transcripts of audio and video recordings to assist them to listen to or view the evidence: at 124–5.

52 *Uniform Evidence Law Report* (n 33) 593 [18.10].

53 A cynic might note that the initiatives, described as enhancing trial values, are primarily directed toward trial efficiency and reducing the frequency of appeals. There are few modifications that address the effectiveness of directions or the fairness of proceedings.

54 James R P Ogloff and V Gordon Rose, 'The Comprehension of Judicial Instructions' in Neil Brewer and Kipling D Williams (eds), *Psychology and Law: An Empirical Perspective* (Guildford Press, 2005) 407, 425. Jurors process evidence as the trial progresses, influenced by overarching narratives, assumptions and insights that are not restricted to admissible evidence: see Timothy D Wilson and Nancy Brekke, 'Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations' (1994) 116(1) *Psychological Bulletin* 117, 117. While jurors are expected

And, by Lora Levett and colleagues:

> Jurors do seem to have some problems evaluating the reliability of some types of evidence (e.g., eyewitness evidence, confession evidence, expert evidence), and the procedural safeguards intended to assist their discernment of reliability appear to be relatively ineffective. Jurors are also influenced by extra evidentiary factors …[55]

In an influential review of empirical research published in 1997, Joel Lieberman and Bruce Sales concluded that

> it has been consistently shown that jurors do not understand a large portion of the instructions presented to them. It is common to find over half the instructions misunderstood, and even the most optimistic results indicate that roughly 30% of the instructions are not understood.[56]

Citing a study from 1947, Lieberman and Sales noted that the 'strong evidence for a lack of comprehension on the part of jurors … is not new'.[57] They also observed that notwithstanding the longevity of concerns, 'not much has been done by the legal community to address the problem'.[58] A more recent review, focused on identification evidence, summarised the research as indicating 'that jurors often have difficulty understanding and utilizing instructions when determining verdicts'.[59]

While, to various degrees, law reform commissions and commentators recommend changes to directions aimed primarily at improving comprehension (in part by reducing the volume of directions required), there have been relatively few recommendations on the subject of unreliable evidence and continuing reliance on the special knowledge and experience claimed by judges. Typically, law reform bodies seem to be broadly satisfied with the way such evidence is regulated by admissibility rules and directions.[60] Satisfaction is invariably indexed to the availability of

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to bring their life experience, there are risks from both prejudices (for example, latent racism or beliefs about sexual assault) and the way certain procedures or evidence may induce prejudice (for example, through cognitive biases such as expectations and confirmation).

55 Lora M Levett et al, 'The Psychology of Jury and Juror Decision Making' in Neil Brewer and Kipling D Williams (eds), *Psychology and Law: An Empirical Perspective* (Guildford Press, 2005) 365, 396.

56 Joel D Lieberman and Bruce D Sales, 'What Social Science Teaches Us about the Jury Instruction Process' (1997) 3(4) *Psychology, Public Policy, and Law* 589, 596–7.

57 Ibid 637, citing J Hervey, 'Jurors Look at Our Judges' (1947) 25(1) *Oklahoma Bar Association Journal* 1508.

58 Lieberman and Sales (n 56) 637.

59 Christine M McDermott and Monica K Miller, 'Do Judges' Instructions about Eyewitnesses Really Work?: A 2019 Update' (2019) 55(3) *Court Review* 104, 104.

60 See Weinberg (n 14) 280 [5.14]: 's 165 does not appear to be creating significant problems in practice'.

other trial safeguards, such as scope to cross-examine witnesses.[61] The evidence at the centre of this article, a species of identification evidence, is the kind of evidence that courts and law reformers believe is currently managed reasonably well by admission, cross-examination and directions — provided trial judges 'point out significant matters affecting reliability'.[62]

There are several problems with the reliance on directions in conventional legal proceedings. First, do the directions accurately or adequately capture the law or the dangers with the evidence, and if so, do they convey them clearly and in a manner that is comprehensible and likely to be comprehended?[63] Most of the proposals for reforming directions reflect key recommendations by the VLRC based around directions being 'clear', 'simple', 'brief', 'comprehensible' and 'tailored to the circumstances of the particular case'.[64] These seem to be necessary but hardly sufficient as a foundation for the heavy and continuing reliance on directions as a fundamental safeguard. Law reformers have dedicated limited attention to the content and accuracy of directions pertaining to evidence (rather than law). While there are 'limits to jurors' powers of comprehension', the problems are more profound and extend well beyond effectively communicating content.[65] For, as we shall see, even scientifically informed directions, understood by the jury, may not be capable of addressing or remediating dangers. There would seem to be a need for judges (or legislatures) to have a clear and accurate idea of risks and dangers, such that investigations, trial procedures, admissibility and the use of evidence at trial can be managed appropriately.

There is, in addition, the problem of jury acceptance. The jury may understand a direction but not accept the content or the magnitude of the dangers.[66] The confidence of an identification witness and the impact of their testimony on the assessment of credibility is an example of an issue that might be raised, but is unlikely to be corrected, with directions. For jurors, their assessment of witness credibility is not entirely conscious and not simply managed through cognitive effort. Despite these issues, almost all of the judicial commentary on directions is positive. Much less attention is given to the limits of directions and whether some types of evidence and some threats to cognition and rationality, cannot be — or are not likely to

61 See Gary Edmond et al, 'Forensic Science Evidence and the Limits of Cross-Examination' (2019) 42(3) *Melbourne University Law Review* 858.

62 Weinberg (n 14) ix.

63 NSWLRC, *Jury Directions* 2012 (n 2) xix, for example, refers to the need for directions to be legally accurate but there is no parallel concern with the content being empirically based or scientifically informed. The closest is 'practical advice' but this is based on a concept of practicality steeped in traditional legal practice and judicial experience.

64 VLRC, *Jury Directions* (n 29) 13. See also NSWLRC, *Jury Directions* 2012 (n 2) 29.

65 Weinberg (n 14) 14 [1.47].

66 Lieberman and Sales (n 56) 609; Chantelle M Baguley, Blake M McKimmie and Barbara M Masser, 'Deconstructing the Simplification of Jury Instructions: How Simplifying the Features of Complexity Affects Jurors' Application of Instructions' (2017) 41(3) *Law and Human Behavior* 284.

be — managed or avoided. These are serious issues, for directions 'can only be effective to the extent that they are comprehended by the jury' and, we might add, accurate, accepted and actionable.[67]

This article's challenge extends beyond the clarity and comprehension of directions. Our case study exemplifies an over-reliance on jury directions. It demonstrates how well-intended directions, believed to eliminate substantial unfairness, do not work. It is not restricted to clarity and comprehension, but applies to standard directions that appear incapable of supporting the fundamental aspiration to render jury trials fair and verdicts rational. Our case study illustrates how in some cases it does not matter whether directions are given or understood because they are incapable of conveying or, more importantly, overcoming the threats to rational decision-making introduced by some evidence and some trial procedures. In these circumstances, reliance on directions deceives judges, jurors, lawyers and the public. It also encourages complacency amongst lawyers, judges and police officers.[68] The provision of directions may make claims about trial fairness seem plausible, even persuasive, without attending to the much more difficult question of whether trials are substantially fair.

To be clear, we accept that jurors typically take their task seriously and are conscientious.[69] These criticisms and concerns are not directed at jurors, but rather at the continuing and heavy reliance on directions as meaningful correctives to the misuse of evidence and other risks of unfair prejudice confronting decision-makers. The ongoing heavy reliance on directions and the unrealistic expectations routinely placed upon them seems to reflect an unwillingness to take decades of mainstream scientific research seriously and a failure by the judiciary to rigorously understand (or study) the practices and procedures they routinely preside over, review and defend. The limitations of directions explored in this article are revealing, especially given the number and magnitude of reports on jury directions which have been produced in Australia in the last decade or so. The limitations are all the more revealing because some of the reviews, including the report by the NSWLRC, explicitly referred to challenges that 'derive from the exponential increase in the use of scientific techniques to investigate and prosecute crime'.[70]

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67 Lieberman and Sales (n 56) 591.

68 Additionally, to compound matters, the prevailing confidence in their effectiveness (or adequacy), means that merely giving a direction is likely to satisfy an appellate court that a trial was (formally) fair.

69 See, eg, QLRC, *A Review of Jury Directions* (n 2) vol 1, 29 [3.16]. This article is not intended as a defence, or critique, of the modern jury. Our criticisms are directed at procedures and structures, based on misguided assumptions and commitments.

70 NSWLRC, *Jury Directions* 2012 (n 2) 75 [5.2]. Yet, apart from DNA profiling evidence and cursory comments on CCTV, the reports say almost nothing about new problems and new research. The various law reform reports are silent about emerging independent scientific reviews including, reports by the National Academy of Sciences (US), the President's Council of Advisers on Science and Technology (US), the National Institute for Standards and Technology (US) and guidelines issued by the Forensic Science Regulator (UK). See, eg: President's Council of Advisors on Science and Technology, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of*

III Introducing Our Case Study: *Davey v Tasmania* [2020] TASCCA 12

Matthew Davey, David Eaton and Daniel Cure were convicted for stealing firearms in the Supreme Court of Tasmania.[71] Davey and Eaton appealed their convictions in person.[72] Notwithstanding the numerous grounds of appeal, this article will only address the opinion evidence adduced to identify Davey and Eaton as two of the individuals involved in a joint criminal enterprise. Voice identification was central in the circumstantial cases against both appellants and 'was arguably the most significant evidence against the appellant Davey'.[73] Following an expansive investigation (named Operation Oracle) involving covert phone surveillance, the voices of Davey and Eaton were positively identified by one of the investigating police officers.[74] Detective J was called by the prosecutor and allowed 'to give opinion evidence at trial as to the identification of voices on telephone intercepts'.[75]

The admissibility of Detective J's voice identification evidence was unsuccessfully challenged on the voir dire. Following *Kheir v The Queen*,[76] *Nguyen v The Queen*,[77]

Feature-Comparison Methods (Report, September 2016) ('PCAST Report'); National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* (National Academies Press, 2009) ('NAS, *Strengthening Forensic Science*').

71 *Davey* (n 7) [3], [11]. They were charged with stealing and aggravated burglary. A caveat: before embarking on this critique it is important to make clear that we are agnostic on the question of whether it is Davey (or Eaton) speaking on one or more of the questioned voice recordings. Whether it was Davey speaking or not, the admission of Detective J's opinions and the provision of the recordings to the jury to compare, and the frailties of the jury directions, all contributed to Davey's trial being substantially unfair.

72 This seems significant because they appear to have raised several important points about the voice identification evidence, which might not have been advanced by legal counsel.

73 *Davey* (n 7) [29] (Estcourt JA). Other evidence included: insider information about the absence of the owners of the property; a DNA match with a recovered screwdriver; recovered firearms, including a gun with a fingerprint matched to a relative of Davey's; instructions over the phone; the phone numbers and possession of the phones; and names and other call content: see [15]–[17], [30], [46], [51], [98].

74 We will refer to the police officer as 'Detective J', rather than using the police officer's actual name. It is important to stress that the following discussion is not intended as personal criticism of the investigators, lawyers or judges. Investigators, lawyers and judges who operate in good faith, but are not conversant with scientific methods and knowledge, can unwittingly produce confident opinions that are much more error-prone or controvertible than they appear. We accept that each of the actors might have acted with integrity. In consequence, this critique is directed at rules, procedures and a range of misguided assumptions and beliefs, including misplaced confidence in the ability of directions to overcome serious dangers and biases.

75 *Davey* (n 7) [7].

76 *Kheir* (n 9).

77 (2017) 264 A Crim R 405 ('*Nguyen* 2017').

R v Phan,[78] and *Tasmania v Farhat*,[79] the 'learned trial judge ruled the evidence admissible as lay opinion evidence pursuant to s 78 of the *Evidence Act*'.[80] On appeal, Davey argued that 'Detective [J] was not qualified to give opinion evidence as to the identification of voices heard on telephone intercepts captured by investigating police'.[81] That contention was rejected. The Tasmanian Court of Criminal Appeal ('TASCCA') identified no fewer than four potential admissibility pathways for Detective J's opinions, concluding that 'it is likely to be unnecessary for a trial judge to devote too much time to an analysis of the authorities, as in most cases the evidence will be admissible'.[82]

At trial, Detective J testified that he was able to identify Davey because 'he listened to between 720 and 1200 calls during the operation, and that he had also compared this voice to that of the appellant Davey's in his record of interview with police'.[83] He described Davey's voice as 'consistent in his manner of speech and that his speech was deep and unique'.[84] According to the trial judge, there were two parts to Detective J's evidence. The first related to intercepted calls that 'contained markers' such as the name or nickname of Davey — including 'Matthew', 'Matty' or 'Matthew Davey'.[85] Detective J testified that 'Davey was referred to by name' in about '30 to 50' calls.[86] He used these calls, which he attributed to a single speaker (implicitly Davey), to identify other similar voices among the many intercepted calls. When attributing these calls to the named speaker, Detective J was exposed to the telephone numbers and the locations of calls and had access to transcripts of the calls, as well as other metadata.[87] Detective J was a member of Operation Oracle, understood the grounds on which the warrants had been issued, and knew about other evidence implicating Davey in the crime.[88] The second part of the identification was Detective J's belief that when he compared 'those [named] calls and the calls in question' from among the intercepts it was 'the same voice as in the interview he conducted when he spoke to Mr Davey

78 *Phan* (n 9).

79 *Farhat* (n 9).

80 *Davey* (n 7) [54]. See also *Davey* (n 7) [59]–[68].

81 Ibid [53].

82 Ibid [68] (Estcourt JA, Blow CJ agreeing at [2], Geason JA agreeing at [110]).

83 Ibid [55]. This is a large and perhaps revealing range. We are not told how long the recordings were (individually or collectively) or how many of them were alleged to include Davey and Eaton. Depending on the nature of the operation, Davey and Eaton may have been central or peripheral.

84 Ibid.

85 Ibid [56]–[57].

86 Ibid. The broad range suggests that these are estimates or guesses rather than based on an actual count. See also *R v Solomon* (2005) 92 SASR 331, 344 [49] (Doyle CJ).

87 *Davey* (n 7) [57].

88 Detective J presumably also knew things that were inadmissible, such as prior involvement with police and offending, and even subsequent offending. See *Causon v Tasmania* [2021] TASCCA 13.

in person'.[89] Detective J attended Davey's police interview in order to listen to his voice and compare it with the voice(s) he had attributed to Davey on the intercepted recordings. The comparison was said to have confirmed Detective J's voice identification. The many hours spent listening and re-listening to the intercepted calls was the basis advanced and relied upon for the admission of Detective J's lay opinions.[90]

The trial judge provided directions to the jury on Detective J's voice identification evidence in conventional legal terms. These are reproduced in Part IV of this article. The jurors were told that the reliability and significance of Detective J's opinion evidence was a matter for them to determine.[91] While the directions were not challenged on appeal — a fact that might imply they were understood as appropriate or difficult to impugn — we consider their adequacy and effectiveness in detail in Part V.

In response to Davey's challenge to the admission of Detective J's opinions and the fairness of the trial, the directions were said to fulfil an important function. Writing for the TASCCA, Estcourt JA concluded:

> It follows from all that I have said that I accept the submission made by counsel for the State, that, having regard to the state of the authorities, and *in light of the directions given to the jury*, the evidence of Detective [J] was properly admitted and *there was no unfair prejudice from the admission of the evidence*.[92]

The directions facilitated the admission of Detective J's opinion evidence and were said to have removed any associated unfairness.

In addition to Detective J's testimony, the jurors were encouraged to undertake their own assessment of the voice recordings, relying on the intercepted telephone calls and the recording of Davey's police interview.[93] These recordings were said to assist the jurors with the evaluation of Detective J's opinions, but they were simultaneously available for their own voice comparison and identification. Revealingly, the jury comparison does not appear to have been raised as an issue at trial or on appeal.[94] Rather, its propriety and value for fact-finding seem to have been taken

89 *Davey* (n 7) [57].

90 He was assumed to have some advantage over the jury, even though there is no evidence of an ability and ability is not an express requirement of s 78 of the *Evidence Act* (Tas) (n 36). Its significance depends on the way 'necessary' is constructed.

91 *Davey* (n 7) [57].

92 *Davey* (n 7) [74] (Estcourt JA, Blow CJ agreeing at [2], Geason JA agreeing at [110]) (emphasis added).

93 Ibid [57].

94 See Gary Edmond, 'Against Jury Comparisons' (2022) 96(5) *Australian Law Journal* 315. A similar issue arose in *Dickman* where without apparent remark the jury were invited to compare the defendant's voice recorded during a search of his house with a voice captured in the background of an intercepted phone call: see *Dickman* (n 31) 609 [21].

for granted. The jury comparison plays a cameo role in the judicial directions. In describing the jury comparison, the TASCCA in *Davey* drew support from the Full Court of the South Australian Supreme Court in *R v Phan*,[95] quoting the following statement from Hinton J:

> If it is permissible for the jury to undertake voice comparison because '[r]ecognition of a speaker by the sound of the speaker's voice is a commonplace of human experience', it follows that evidence of voice comparison does not fall exclusively within the province of experts and expert opinion evidence.[96]

We will return to differences between recognition and comparison as we consider whether the opinions of those who are not experts should be admitted, whether jurors can be trusted to evaluate their opinions or to make their own comparisons, as well as the ability of directions to identify and reliably mitigate potential problems.

Davey's co-accused, Eaton, was also identified as one of the speakers on the incriminating recordings. The voice identification evidence admitted against Eaton was qualitatively different to the identification of Davey. According to trial testimony, Detective J and Eaton knew one another prior to the theft. There was said to be familiarity between Detective J and Eaton that was unrelated to the investigation.[97] The TASCCA described the pre-existing relationship in the following terms:

- That [Detective J] had known the appellant personally for approximately 10 years.
- That he had regular contact with the appellant in around 2010 in the course of his employment at Bread Café.
- That in this period he communicated with the appellant, they referred to each other by name and the appellant afforded him nicknames.
- That he continued to have contact with the appellant from 2010 until recently. That he spoke to the appellant on approximately 12 occasion and they continued to share a familiarity.
- That he recognised the appellant's voice in some of the telephone intercept material based on his previous dealings.
- That he considered the appellant's voice to be 'quite high pitched with a quite laconic drawl to it' and that assisted in his identification.
- That he listened to approximately 175 calls, on multiple occasions, where he was able to identify the appellant as a speaker.

95 *Phan* (n 9).

96 *Davey* (n 7) [61] (Estcourt JA), quoting *Phan* (n 9) 152 [59] (Hinton J). This is a curious statement because it involves ungrounded reasoning.

97 Without much insight into the actual detail of the prior exposure we are taking this at face value because it allows us to make a point. In practice, the degree of familiarity should be an issue that requires more than passing attention.

- That he spoke with the appellant at the conclusion of the investigation and said 'it reaffirmed the belief that I held that it was the voice of Mr Eaton'.[98]

Detective J was said to have recognised Eaton on the intercepted recordings based on prior familiarity with his voice. This evidence was also admitted at trial.[99] In the case against Eaton, jurors were not presented with a recording of his 'no comment' record of interview.[100] Consequently, the jurors were not in a position to undertake their own voice comparison. In Eaton's case, they were required to consider the opinion of Detective J, and listen to the quality of the recordings of the voice attributed to Eaton, in conjunction with the other evidence in the circumstantial case against Eaton.[101] The trial judge instructed the jurors that the question of Detective J's recognition was ultimately a matter for them and they were 'perfectly entitled to have regard to his opinion [and] ultimately … perfectly entitled to accept it *if [they] consider[ed] [it] reliable*'.[102]

Responding to Eaton's appeal, the TASCCA explained that Detective J's 'evidence was even stronger, and was in reality, voice recognition evidence':[103]

> Whilst the basis of the identification of Eaton's voice was different to that of Davey's, the evidence of Detective [J] was admissible and was properly admitted. That Eaton's otherwise inadmissible 'no comment' record of interview with police was not played to the jury, adds nothing to the argument. Nor does the suggestion that Detective [J] had never spoken to Eaton on the telephone.[104]

Curiously, the precise basis for the admission of this opinion evidence was not actually explained.[105]

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98 *Davey* (n 7) [98]. See generally: *R v Leaney* [1989] 2 SCR 393; United Kingdom Home Office, *Code D: Revised Code of Practice for the Identification of Persons by Police Officers* (Code of Practice, February 2017), brought into operation under the *Police and Criminal Evidence Act 1984 (Codes of Practice) (Revision of Codes C, D and H) Order 2017* (UK) SI 2017/103, ord 2, with respect to police use of video images. See also United Kingdom Home Office, *Advice on the Use of Voice Identification Parades* (Home Office Circular 057/2003, 5 December 2003), with respect to voice identification parades.

99 *Davey* (n 7) [101]. The penultimate dot point (above) is adequate as a description, but it is not evidence of ability. For we do not know if the identifications were accurate.

100 Ibid.

101 Ibid [99]. Allowing jurors to make voice comparisons may impinge on the defendant's decision to testify.

102 Ibid (emphasis added).

103 Ibid [98].

104 Ibid [101].

105 Interestingly, some judges — particularly judges in New South Wales (most now retired) — have characterised such evidence as recognition evidence, said to be a type of fact evidence not caught by the exclusionary opinion rule (*Evidence Act* (n 2) s 76). See, eg: *R v Smith* (1999) 47 NSWLR 419; *Riscuta* (n 9); *Nguyen* 2017 (n 77).

We accept that the trial judge's responses to Detective J's opinions are consistent with practice in Tasmania, as well as New South Wales, Queensland, South Australia, Victoria and Western Australia.[106] However, it is our contention that trial safeguards and appellate review do not adequately regulate the impressions of investigators, especially where they are inexpert (and therefore speculative) and obtained in conditions that are suggestive or likely to confirm expectations. For similar reasons, they are incapable of regulating jury comparisons. Furthermore, as explained in Parts V(A) and V(C), the suggestive context means that it is inappropriate to characterise Detective J's evidence as voice identification evidence at all. It is from this perspective that the heavy reliance on judicial directions and their effectiveness assumes considerable practical significance.

IV Jury Directions in *Davey*

Earwitness or direct voice identifications, as a type of 'identification evidence' under the UEL, tend to attract judicial warnings.[107] Notwithstanding some confusion around the application of s 116 of the *Evidence Act* to the indirect or displaced listening to recordings by police officers (such as Detective J), voice comparison and recognition evidence is typically treated as 'a kind that may be unreliable' such as to require a response to a request under s 165 of the *Evidence Act* and/or residual common law obligations to make sure that criminal proceedings are fair. Section 165 requires the trial judge to: (1) warn the jury that voice identification (or comparison or recognition) evidence might be unreliable; (2) 'inform the jury of the matters that may cause it to be unreliable'; and (3) 'warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it' if a party requests they do so.[108]

'[A]fter giving the jury lengthy directions as to the dangers of identification evidence' the trial judge 'directed the jury, specifically as to Davey', in the terms set out below.[109] We reproduce these directions because, notwithstanding their apparently exemplary or orthodox nature, we contend that they are wholly inadequate. For the reasons developed below, these directions are incapable of addressing the dangers

106 They are consistent with common law practice: see, eg, *Phan* (n 9).

107 Notwithstanding the way intermediate appellate courts have extended s 78(a) of the UEL to include the opinions of indirect listeners — those displaced in time and space from the matter or event — the definition of 'identification evidence' that guides the application of s 116 is restricted to the identification of a defendant by a person present 'at or about the time at which the offence was committed or the act was done'. It makes little sense to treat the recording (or the voice on the recording) as the matter or event (as Basten JA does in *Nguyen* 2017 (n 77)) because that approach circumvents s 79(1) and enables anyone (with a bit of time on their hands) to form a potentially admissible opinion.

108 The trial judge need not comply with such a request if there are 'good reasons for not doing so': *Evidence Act* (n 2) s 165(3).

109 *Davey* (n 7) [57].

they purport to identify, convey and mitigate. Self-evidently they are unlikely to convey or mitigate dangers that are merely alluded to or omitted. In the subsequent analysis we explain why these (and many similar) directions are incapable of placing jurors in a position to rationally evaluate Detective J's opinion evidence or undertake their own comparisons of the recordings.

Specifically, as to Davey, the trial judge directed the jury:[110]

I turn now to the specifics of the identification by Detective [J] of Mr Davey's voice in the telephone intercepts so this is part of the same direction about the need for care and caution in relation to accepting identification evidence and what I'm doing is now pointing out the specifics of the identification with respect to Mr Davey so Detective [J]'s evidence and aspects of his evidence which you'll need to carefully consider.

In brief Detective [J]'s evidence was that he was not familiar with Matthew Davey's voice prior to Operation Oracle. He gave evidence that he was though able to identify the voice of Matthew Davey in the calls. How was he able to do that? Well, he said he was able to do that based on the fact that there are a number of calls in which Mr Davey identified himself so these were the calls that we listened to on the trial, P6, from the 21 December 2015 to the 11th of February such as Relationships Australia call, the Dave Powell's car yard call, the use of the name Matthew or Matty and he said he heard other calls, other than the ones that were played in Court, in which he heard Matthew, Matty or Matthew Davey, and he said there were approximately 30 to 50 calls where Matthew, Matty or Matthew Davey were used.

Other content in the calls also gave rise to his opinion that it was Matthew Davey speaking such as address, locations, the subscriber of other phones. Detective [J] said the voice he attributed to Mr Davey was consistent throughout the calls. Following the end of the operation he conducted an interview with Matthew Davey and his evidence was that he made a comparison of what he heard on the recordings with the voice of Matthew Davey in person and he said when he met with Mr Davey, when he spoke with him, it was the same voice that he'd been hearing all along and which he had attributed to Matthew Davey.

He said, 'I was satisfied in my opinion that it was the same voice that I'd heard since the beginning of the operation.' But as you know, as I've explained, *people may be convinced that their opinion is strongly grounded but ultimately it's a matter for the jury to carefully scrutinise that* and *I've identified for you the risk of error.* There are a number of matters that have been specifically raised in this case that require your consideration in determining whether the evidence identifying the accused Matthew Davey can be safely acted upon. As I've already said, *bear in mind the difficulty of keeping a memory, an imprint of a voice in your mind as opposed to a visual image.* Essentially there are two parts to Detective [J]'s evidence. We've got recognition of the voice as being that voice which in other calls contained markers of identity such as Matty, Matthew Davey or some other marker of identity and what I say to you there is *it's a matter for you as to whether that is a reliable marker of identity.* Secondly the evidence of Detective [J] is that when he compared

110 We have added in line number references to the jury directions for ease of reference in our subsequent analysis.

those calls and the calls in question which he identified as the same, it was the same voice as in the interview he conducted when he spoke to Mr Davey in person.

Now, as to the identification call to call, *the strength of that evidence as to identification of the same voice will depend on the individual call. Obviously if hardly anything is said then the evidence of identification is not as strong as a lengthy call with a lot said, which is common sense. At the end of the day all this evidence establishes at its highest is that it is the same voice call to call at its highest.* As to that identification call to call as being the same voice when he's listening to various voices, *I warn you that mistakes can easily be made even when we're identifying the voice of someone close to us, friend or family member, although identifying the voice of a stranger is more difficult, much more difficult.*

Another question is *what opportunity did Detective [J] have to hear the voice of the person*? Well, *that's self-evident from the calls that you have and you can assess that for yourselves.* As I've said *the reliability of each identification depends on the length of each individual call, how much was said and you have that information before you. The reliability of each identification is going to vary depending on how long the person speaks for, the nature of the call and so on and so you have the calls, you can assess that.*

[Defence counsel] has pointed out that *you don't have any contemporaneous notes made by Detective [J] about his level of certainty or otherwise that would help you to scrutinise his evidence and it* would seem that there's a risk that somehow he's ultimately globalised, if you like, his opinion so that he's heard a whole lot of calls and ultimately he's decided that they're all so similar, that they're the same calls, but what is his evidence in relation to a particular call which could be significant in this case and *you don't have, if you like, the benefit of contemporaneous notes in relation to a specific call which may assist you to scrutinise the reliability of his identification.*

Another point which is similar — which is really the same point that I made in relation to Eton, is that *Detective [J] again had the summaries of metadata from TIS, Telephone Intercept Services, he's expecting the call to be the voice of Matthew Davey, the risk where in terms of reliability is the expectation has influenced his identification of the speaker.* The risk — well, *the risk is that there are voices that are similar, but they're not identical in all their characteristics and yet with an expectation of the speaker being a certain person, the opinion is filled in with that expectation if you like, and so the end opinion is, it is Matthew Davey rather than it sounds like Matthew Davey so, if you like, the person's assessment of the voice is shored up by the information they have from TIS, another fact that you've got to bear in mind.*

How clearly could the person hear the voice? How was the sound conveyed? Well, they're telephone calls, bear in mind the risk that there's some distortion and you have the call so you can consider that for yourselves. Was there anything about the voice that would've impressed itself upon Detective [J], was there something distinctive about the voice? Detective [J]'s evidence was that *the voice was difficult to hear, well that's a factor that bears on reliability.* He said, 'It was difficult to hear and understand because it was mumbly, it was deep.' He said, 'To me it was quite unique,' so his evidence was that *to him it was quite a unique voice and that may assist you in assessing the reliability of the — that recognition or identification evidence.*

How long did he have to keep the characteristics of the voice in his mind before identifying the voice as that of the accused? Well, ultimately his evidence was, 'I couldn't be certain it was Matthew Davey until I spoke to him in person,' and his evidence was that he interviewed the accused on the

26th of April 2016. Now, a final point here is that *you are, yourselves, entitled to compare the voice of the accused as you have heard it during the police interview with the voice on the recordings in order to assess Detective [J]'s opinion so you have the police interview with Mr Davey, you have the recordings and you can undertake that comparison*.

Here *bear in mind the risk that you're listening to a recording and the recorded police interview may have distorted Mr Davey's voice to some extent*. You need to *consider the risk that the callers had a voice similar to that of Mr Davey but were not Mr Davey or was not Mr Davey and that Detective [J] was honest but mistaken in his identification of Mr Davey*. In other words *the risk that Detective [J] had confused Matthew Davey's voice with another similar voice, a deep, mumbly male voice. That's a risk that you need to take into account*.

Now, I'm required by law to point out all of these factors because *all of these may bear on the reliability of Detective [J]'s opinion and you must give consideration to these matters. Any one of these circumstances may possibly lead to error*.[111]

V Evaluating Detective J's Opinion Evidence in Light of the Warnings

These directions draw attention to a range of factors that 'bear on the reliability' (lines 86–7) of Detective J's 'certain' identification of Davey's voice (lines 17–21, 74–5). They highlight the need to 'bear in mind' (lines 27, 64, 66, 69, 80, 86) or 'consider' (lines 5, 26, 67, 81, 87) features of the recordings and Detective J's identification, such as: the length of calls and the quality of the recordings (lines 43–8, 80–1); any distortion or differences in the types of listening or recording (line 80); the distinctiveness of the voice (lines 67–9), noting that Detective J considered it to be unique (lines 70–1); the opportunity Detective J had to hear the voice (line 43); Detective J's exposure to names, phone numbers, locations and metadata when listening and attributing a number of the intercepted conversations to a specific person (identified as Davey, at lines 15–21, 57–8); and that Detective J had to remember the voice from the intercepted calls when comparing (and purportedly recognising) the person speaking in the police interview (lines 27–8).

The directions also draw attention to more general issues and risks with voice comparison and identification that the jury 'need to take into account' (line 85). They distinguish between: unfamiliar and familiar voice identification (or 'recognition', at lines 29, 72) noting that 'mistakes can easily be made' when attempting to identify familiar, let alone unfamiliar voices (lines 40–2); the danger of some voices sounding similar (lines 60–2, 84); and the more general 'possibility' or 'risk of error' (line 25). Notwithstanding Detective J's testimony, the jurors were repeatedly told that the identity of the speaker was a matter for them to decide.[112] They were

111 *Davey* (n 7) [57] (emphasis added). There may have been other warnings about the dangers of identification, raised or repeated in relation to Davey's co-accused. There is, however, no suggestion that they provide anything more than the types of 'assistance' exemplified by these directions.

112 See also *Velevski v The Queen* (2002) 187 ALR 233.

instructed to 'carefully consider' or 'carefully scrutinise' Detective J's opinion evidence and testimony, and the way Detective J identified Davey, and listened to the recordings he relied upon, when making their assessment. The jurors were told that they '*must give consideration to these matters*' (line 87).

Here it is important to contemplate what these directions actually do — how do they assist rational evaluation?[113] How is the jury to evaluate Detective J's opinion evidence or approach the voice comparison, either individually or as part of the overall case against Davey? How are jurors to determine the likelihood that Detective J is correct, or assign a weight to his opinion that is not simply a guess or blind speculation? How are they to factor in the general and specific issues summarised in the previous paragraph, let alone Detective J's familiarity with the circumstantial case against Davey (and Eaton)?

In this Part we introduce scientific research on voice comparison and cognitive biases. Not raised by the parties, or perhaps within the experience of trial and appellate judges, this knowledge threatens Detective J's opinion evidence as well as the value of the voice comparison performed by the jurors. It casts durable doubts on the ability of the jurors (and the judges) to understand, let alone rationally evaluate, the voice identification evidence and, ineluctably, the case against Davey (and even Eaton). Mainstream scientific insights raise fundamental issues, both epistemic and procedural, that are not addressed, not adequately addressed, or not capable of being addressed, through directions however cautionary or legally orthodox.

We begin with research on the comparison, recognition and identification of voices.

A *Noise: The Difficulty of Voice Comparison, Familiarity and Detective J's Ability*

It is important to acknowledge, although not surprising, that the directions reproduced in Part IV are not completely mistaken or lacking in insight. However, they reveal little sensitivity to relevant scientific knowledge or the prevalence and magnitude of risks. They mistakenly imply that Detective J has an advantage over the jury. They do not convey the difficulty and frequency of error in voice comparison, and do not respond to the fact that Detective J's identification and the jury comparison are both irreparably contaminated by the circumstances in which the recordings are heard. Importantly, they overlook the fact that Detective J's opinions are not voice identification (or comparison or recognition) in a conventional sense, but rather based on a synthesis of all the information available to him through his participation in the investigation. We will start with error and familiarity before moving to consider the

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113 By way of analogy, what does it mean to say that a bridge or a vaccine might be unsafe or have risks, without clarification, and perhaps quantification to enable rational evaluation — for example, for the bridge, the weight of vehicles that might safely cross it and its anticipated life expectancy, and for the vaccine, its efficacy, the frequency of serious side effects and the length of protection? See Kristy A Martire and Gary Edmond, 'Rethinking Expert Opinion Evidence' (2017) 40(3) *Melbourne University Law Review* 967.

dangers introduced by context and expectations. The actual basis of Detective J's opinion evidence and the implications for admissibility will be considered thereafter.

First, voice identification is more error-prone than most people imagine. Unfamiliar voice identification, based on comparison (rather than recognition), is particularly susceptible to error. Judges and jurors tend to conceive of unfamiliar voice comparison in terms of the way we recognise familiar voices — as 'a commonplace of human experience'.[114] According to attentive scientists, unfamiliar voice (and face) comparison is nothing like familiar voice (or face) recognition.[115] They are fundamentally different cognitive tasks. The conflation leads judges and jurors to believe they are much more accurate at identifying unfamiliar voices (and faces) than they actually are.[116] Simultaneously it generates exaggerated confidence in identifications.[117] Popular beliefs about unfamiliar voice identification are misguided, in part, because of the lack of meaningful feedback we receive in everyday life. Most of us have little idea how error-prone we are when trying to identify speakers we do not know.[118]

In terms of error, the trial judge's comments — 'mistakes *can* easily be made even when we're identifying … [a] friend or family member' (lines 40–1)[119] — do not adequately reflect the known risks. It is not just a matter of people sometimes making mistakes with unfamiliar voices or mistakes being possible. Rather, mistakes are

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114 *Davey* (n 7) [59], citing *Phan* (n 9) 152 [59] (Hinton J).

115 Gordon E Legge, Carla Grossman and Christina M Pieper, 'Learning Unfamiliar Voices' (1984) 10(2) *Journal of Experimental Psychology* 298, 298; A Daniel Yarmey, 'The Psychology of Speaker Identification and Earwitness Memory' in R C L Lindsay et al (eds), *The Handbook of Eyewitness Psychology* (Psychology Press, 2010) vol 2, 101, 102, 116–18; Jody Kreiman and Diana Sidtis, 'Identifying Unfamiliar Voices in Forensic Contexts' in Jody Kreiman and Diana Sidtis (eds), *Foundations of Voice Studies: An Interdisciplinary Approach to Voice Production and Perception* (Blackwell, 2011) 237. On faces, see Ahmed M Megreya and Mike Burton, 'Unfamiliar Faces Are Not Faces: Evidence from a Matching Task' (2006) 34(4) *Memory and Cognition* 865.

116 On faces, and facial comparison, see Gary Edmond et al, 'Facial Recognition and Image Comparison Evidence: Identification by Investigators, Familiars, Experts, Super-Recognisers and Algorithms' (2021) 45(1) *Melbourne University Law Review* 99.

117 We note that Detective J's opinions were confident and categorical — without qualifications or caveats. Cf PCAST Report (n 70) 96, 26, 74. See also: Simon A Cole, 'Forensics Without Uniqueness, Conclusions Without Individualization: The New Epistemology of Forensic Identification' (2009) 8(3) *Law, Probability and Risk* 233; Jonathan J Koehler and Michael J Saks, 'Individualization Claims in Forensic Science: Still Unwarranted' (2010) 75(4) *Brooklyn Law Review* 1187.

118 Ironically, it is insensitivity to the different cognitive tasks and the much higher levels of error associated with unfamiliar voice comparison that enables appellate courts to characterise all voice comparison as commonplace.

119 *Davey* (n 7) [57] (emphasis added).

likely and ubiquitous.[120] Numerous studies confirm that in favourable conditions — with good quality recordings and plenty of time (and without other evidence or suggestion) — ordinary persons make mistakes frequently.[121] Depending on the conditions, error rates can be higher than 50%.[122] But it is not just the prevalence of error that creates problems. Those who purport to identify or recognise voices are surprisingly prone to confidently misattributing a voice to a particular speaker. These types of errors are particularly vulnerable to contextual bias.[123]

The judicial directions refer to the *potential* for familiars (for example, 'friend or family members')[124] to make mistakes and the task of comparison being 'much more difficult' (lines 41–2) for strangers.[125] It then moves to consider the opportunity Detective J had 'to hear the voice of the person' (line 43). The basic premise is correct, but the issue is whether Detective J is genuinely familiar with Davey, and more familiar than the jury.[126] The directions begin by noting that Detective J was 'not familiar with Matthew Davey's voice *prior to* Operation Oracle' (lines 6–7).[127] Implicitly, Detective J became familiar with Davey. According to the testimony and directions, Detective J identified Davey when he recognised the voice (from the telephone intercepts) during Davey's police interview. The issue of familiarity (and Detective J's ability relative to the jurors) is important because unless Detective J had an advantage over the jury and was capable of providing assistance to them, his opinions were, on the basis of the reasoning in *Smith v*

120 And, as we shall see, the other evidence in this case is not independent, but rather constitutive of Detective J's opinions, and so cannot be invoked as independent support or confirmation.

121 See: Harry Hollien, *Forensic Voice Identification* (Academic Press, 2002); Phil Rose, *Forensic Speaker Identification* (Taylor and Francis, 2002); Legge, Grossman and Pieper, 'Learning Unfamiliar Voices' (n 115); Yarmey, 'The Psychology of Speaker Identification and Earwitness Memory' (n 115) 102; Helen Fraser, 'The Reliability of Voice Recognition by "Ear Witnesses": An Overview of Research Findings' (2019) 6(2) *Language and Law* 1; Christopher Sherrin, 'Earwitness Evidence: The Reliability of Voice Identifications' (2016) 52(3) *Osgoode Hall Law Journal* 819.

122 See studies discussed in Gary Edmond, Kristy Martire and Mehera San Roque, 'Unsound Law: Issues with ("Expert") Voice Comparison Evidence' (2011) 35(1) *Melbourne University Law Review* 52, 87–9.

123 See Harriet Mary Jessica Smith and Thom Baguley, 'Unfamiliar Voice Identification: Effect of Post-Event Information on Accuracy and Voice Ratings' (2014) 5(1) *Journal of European Psychology Students* 59.

124 *Davey* (n 7) [57].

125 Ibid. See also *R v Bueti* (1997) 70 SASR 370, 381 (Doyle CJ), quoting directions to the jury by the trial judge: '"You may well think that mistakes in voice recognition do and can happen"'.

126 Allowing the suggestive jury comparison does not make much sense if Detective J was actually better than the jury. In such circumstances, their listening would hardly ever provide useful means for evaluation. Jurors are not encouraged to undertake fingerprint (and other feature) comparisons, so it is curious that they are encouraged to engage in unfamiliar voice comparisons.

127 *Davey* (n 7) [57] (emphasis added).

The Queen, irrelevant and therefore inadmissible.[128] The trial judge implies that Detective J became familiar with Davey's voice through the course of the investigation (lines 6–7) but such familiarity and its significance are left as matters for speculation. To ordinary persons, it might appear that Detective J had become very familiar with the relevant voices through his repeated listening. Moreover, the value of his opinion evidence appears to be supported by his role in the investigation and confirmed by his participation in the trial, along with the way his opinion was said to be formed and strategically aligned with the other evidence adduced against Davey (and Eaton) — see Part V(B) below. However, such descriptions are misguided and very likely to mislead.

Research reveals that listening to a limited set of recordings and repeated listening does not transform a listener into a familiar.[129] This kind of constrained exposure does not appear to significantly improve listener accuracy. In order to become a genuine familiar, it seems important to be exposed to a voice across a range of different settings and moods.[130] The dynamic ways we become familiar with the voices of friends and family members are quite different to the listening associated with intercepted voice recordings. Rather than passively listening to recordings of various quality and duration from a phone or listening device, our interactions with family and friends tend to be varied. We encounter them when they are happy, sad, angry, exuberant, excited, scared, and even intoxicated. We usually interact in person and across a variety of media (for example, via phone). Familiars' exposure usually extends across rather long periods of time where the identity of the interlocutor is rarely in doubt.[131] Research suggests that any limited advantage gained by investigators who are exposed to many hours of recorded speech are rapidly matched by others — such as jurors — when exposed to quite modest amounts of the same recorded materials.[132] Though counter-intuitive, it seems that the jurors would have acquired similar levels of accuracy to Detective J from listening to just an hour or so of the intercepted recordings. Detective J was not a genuine familiar and it is unlikely that he held a meaningful advantage over the jury in terms of his

128 (2001) 206 CLR 650, 655 [11] (Gleeson CJ, Gaudron, Gummow, and Hayne JJ), 669–70 [58]–[61] (Kirby J) ('*Smith*'). See also *Phan* (n 9) 152 [59] (Hinton J): 'It … follows that evidence of voice comparison led from a non-expert will be inadmissible unless the non-expert enjoys an advantage over the jury'.

129 Lori R van Wallendael et al, '"Earwitness" Voice Recognition: Factors Affecting Accuracy and Impact on Jurors' (1994) 8(7) *Applied Cognitive Psychology* 661.

130 Niels Schiller and Olaf Köster, 'The Ability of Expert Witnesses to Identify Voices: A Comparison Between Trained and Untrained Listeners' (1998) 5 *Forensic Linguistics* 1.

131 If the identity of Davey was not in doubt that was because his identity was already known or strongly implied.

132 A Daniel Yarmey, 'Earwitness Descriptions and Speaker Identification' (2001) 8(1) *International Journal of Speech, Language and the Law* 113; I Pollack, J M Pickett and W H Sumby, 'On the Identification of Speakers by Voice' (1954) 26(3) *Journal of the Acoustical Society of America* 403.

familiarity and accuracy. There are real doubts about the relevance as well as reliability of Detective J's opinions.

Not only are familiarity and its implications misunderstood and misrepresented — in the admissibility determinations, testimony and directions — the issue of Detective J's (uncertain) abilities and actual ignorance of voice comparison research, methods and limitations were not directly addressed.[133] While the jury was told that Detective J was not an expert in voice comparison, the significance and implications of his lack of specialised knowledge about voices, recordings and comparison methods were not addressed. Detective J does not seem to appreciate his own limitations or the magnitude of dangers.[134] When it comes to describing the voice, all he can say is that: '[i]t was difficult to hear and understand because it was mumbly, it was deep … it was quite unique' (lines 69–70). This does not, however, constrain his identification(s). Drawing upon the loaded idea of uniqueness — though without explaining why or providing any information about the frequency of mumbling or deep voices (which are not unique voice features) — Detective J was willing to categorically identify Davey as the speaker.[135] Reliance on equivocal voice features and assertions about uniqueness are misleading.[136]

There are also the issues of: (1) whether the various voices attributed to Davey on the intercepted recordings are the same person (lines 29–30); and (2) the very limited (though highly suggestive) exposure to Davey's actual voice said to have

133 Section 78 of the *Evidence Act* (Vic) (n 36) is relied upon in *Kheir* (n 9) because the police officer cannot satisfy s 79, or the common law requirements in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, 743–4 [85] (Heydon JA) ('*Makita (Australia)*').

134 The jury might have been told that Detective J was not an expert, but he was an employee of the state — a police officer — who was allowed to testify. Like the trial judge, he is not in a position to assist the jury with knowledge and likely to be misunderstood as better than average. See Kathy Pezdek and Daniel Reisberg, 'Psychological Myths about Evidence in the Legal System: How Should Researchers Respond?' (2022) 11(2) *Journal of Applied Research in Memory and Cognition* 143, 144–5.

135 There is an assumption that all voices are unique, which cannot be tested but may be true (in a trivial way). Even if all speech were unique, it does not follow that all fragments of speech from telephone intercepts are discernibly different, or that an untrained and inexpert individual can reliably distinguish between them in order to identify the speaker. The real question is whether Detective J is capable of distinguishing between and identifying a specific voice on intercepted phone calls. Differences in voices make this possible but reveal nothing about Detective J's ability.

136 The fact that voice features are difficult to explain should not encourage prosecutors and judges to rely on s 78 of the UEL. Not only are these opinions 'identifications' by those who did not directly perceive the matter or event, but recourse to s 78 rewards ignorance and renders the speculative and biased opinions of investigating police officers largely unaccountable.

confirmed Detective J's identification (lines 74–6).[137] Throughout the investigation, Detective J was exposed to the metadata, telephone numbers, locations, content of the calls (including names), and had access to the transcripts with names attributed to speakers when listening to the voices.[138] He knew the identity of the suspect when purporting to recognise the speaker on the tapes as Davey during Davey's police interview. Detective J claimed that linking the voices on the recordings and identifying those voices as Davey was based on voice comparison and recognition. This was not — despite its representation at trial and in the directions — a voice comparison (or recognition) exercise at all. Rather, Detective J was central to the investigation and was exposed to all of the circumstantial evidence which implicated Davey as the speaker. The impact of this circumstantial evidence is demonstrated by the fact that Detective J was confident about the identity of the speaker before he attended Davey's interview.[139]

The directions refer to the possibility that voices may sound similar, and that Detective J might have mistaken mere similarities for identity (lines 60, 62, 84). The problem with relying on similarities — real or apparent — was discussed by Barack Obama's Presidential Council of Advisers on Science and Technology ('PCAST') in relation to forensic scientists engaged in feature comparisons, such as voice identification:

> The frequency with which a particular pattern or set of features will be observed in different samples, which is an essential element in drawing conclusions, is not a matter of 'judgment.' It is an empirical matter for which only empirical evidence is relevant. Moreover, a forensic examiner's 'experience' from extensive casework is not informative — because the 'right answers' are not typically known in casework and thus examiners cannot accurately know how often they erroneously declare matches and cannot readily hone their accuracy by learning from their mistakes in the course of casework.[140]

This was the advice offered to experienced forensic scientists undertaking feature comparisons — DNA profiles, fingerprints, ballistics, shoeprints and so on. Detective J struggled to find words to describe the voice(s) said to be similar

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137 *Davey* (n 7) [57]. Detective J's evidence was 'I couldn't be certain it was Matthew Davey until I spoke to him in person'.

138 Ibid. A few limitations with Detective J's opinion evidence (for example, access to names, transcript and metadata) may have been hinted at, but the problems and the level of threat posed, discussed in Part V(B), were not explained.

139 Cf the translator in *Tran v The Queen* [2016] VSCA 79, [34] who made this explicit. See Gary Edmond, 'Investigators, Cognitive Bias and Double-Dipping: Misunderstanding Opinion Evidence in Trials and Appeals' (2023) 97(8) *Australian Law Journal* 543.

140 PCAST Report (n 70) 19, 55. The emphasis is on the construction of a rigorous database and the need to test methods and abilities in conditions where the correct answer is known. Investigations provide neither.

— such as deep, and mumbly.[141] He would not have known whether the telephone or recording contributed to these voice characteristics or how common or interrelated such voice features might be in the community.[142] He was likely dependent on his limited casework experience and what he knew about the case against Davey.[143]

Detective J did precisely what experts are cautioned against. A handful of putative similarities were used to categorically identify Davey as the speaker. Detective J is unfamiliar with scientific research and advice. He is not conversant with appropriate methods for voice comparison, the chance of other voices sounding similar, his ability to distinguish similar voices, or the likelihood that he has or might have made an error.[144] He remained confident, indeed certain, about his identification throughout.[145] This is what happens when non-expert investigators are allowed to proffer opinions at trial. Such non-expert investigators are incapable of helping the jury to evaluate their opinion or method.[146] Compounding the problem, jurors are also very likely to over-estimate their abilities with voices and likely to attribute identity based on expectations (informed by Detective J and exposure to the other evidence) in combination with perceived similarities.[147]

We note that on appeal, Davey (in person) raised the fact that 'there was no testing' of the voice identification process and highlighted the revised English *Criminal Practice Directions* which require 'a sufficiently reliable scientific basis' for such evidence to be admitted in England and Wales.[148] Davey was right to raise these

141 *Davey* (n 7) [57].

142 For example, having a deep voice is often correlated with gender.

143 See generally David White et al, 'Passport Officers' Errors in Face Matching' (2014) 9(8) *PLOS One* 1. See also PCAST Report (n 70) 6.

144 Detective J has likely never been tested on his ability in conditions where the actual speaker was known. Empirical evidence suggests that at best, police are no better than ordinary persons in comparison and identification tasks. See: Annelies Vredeveldt and Peter J van Koppen, 'The Thin Blue Line-Up: Comparing Eyewitness Performance by Police and Civilians' (2016) 5(3) *Journal of Applied Research in Memory and Cognition* 252; Anna Lvovsky, 'The Judicial Presumption of Police Expertise' (2017) 130(8) *Harvard Law Review* 1995.

145 Cross-examination is unlikely to shake subjective claims, particularly if sincerely held. It is also unlikely to elicit vulnerabilities because they are not known to most investigators, and are likely to be resisted.

146 See: *HG v The Queen* (1999) 197 CLR 414, 429 [44] (Gleeson CJ); *Makita (Australia)* (n 133).

147 David Dunning, Chip Heath and Jerry M Suls, 'Flawed Self-Assessment: Implications for Health, Education, and the Workplace' (2004) 5(3) *Psychological Science in the Public Interest* 69.

148 Davey (n 7) [73], citing Court of Appeal of England and Wales, *Criminal Practice Directions 2015* [2015] EWCA Crim 1567, 29 September 2015, [19A.4], citing *R v Dlugosz* [2013] EWCA Crim 2 [11]. See also Paul Roberts and Michael Stockdale (eds), *Forensic Science Evidence and Expert Witness Testimony: Reliability through Reform?* (Edward Elgar, 2018).

points, for the validity and reliability of the method is obviously integrally related to the value of derivative (here, Detective J's) opinion. It is the validity and reliability of a method, along with the proficiency of the analyst applying it (and the way subjective interpretation is protected from cognitive bias), that determines the capability of the evidence.[149] Apparently unconcerned by developments in England and Wales (as well as Canada and the United States), Estcourt JA explains that '[n]o such requirement exists in Australia'.[150] The TASCCA appears comfortable with the protections afforded by cross-examination and the fairness inducing qualities it attributes to the directions as given.[151]

B *Great Expectations: Cognitive Bias and Contextual Effects*

> A system of criminal law cannot be attuned to the needs of the people whom it exists to serve unless its administration, proceedings and judgments are comprehensible by both the accused and the general public *and have the appearance, as well as the substance, of being impartial and just*.[152]

There is an expectation, of a fundamental sort, that jurors will not be biased.[153] The 'administration of criminal justice', we are frequently reminded, should have 'the appearance of being, unbiased and detached'.[154] Legal concerns with bias have overwhelmingly focused on the interests and motivations of defendants and witnesses, and the risks to public confidence from judges appearing to lack impartiality.[155]

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149 See *IMM* (n 42).

150 *Davey* (n 7) [73].

151 This article does not consider cross-examination or rebuttal expertise. We have considered those issues in other articles: Gary Edmond and Mehera San Roque, 'The Cool Crucible: Forensic Science and the Frailty of the Criminal Trial' (2012) 24(1) *Current Issues in Criminal Practice* 51; Gary Edmond et al, 'Forensic Science Evidence and the Limits of Cross-Examination' (2019) 42(3) *Melbourne University Law Review* 858; Gary Edmond, 'Forensic Science and the Myth of Adversarial Testing' (2020) 32(2) *Current Issues in Criminal Justice* 146. However, unless cross-examination is capable of introducing and meaningfully conveying the problems with voice identification it is unlikely to be effective. For the reasons we explain below, cross-examination and directions are incapable of placing a jury in a position where they can reliably or fairly compare voices or assess the biased and speculative opinions of investigators.

152 *Kingswell v The Queen* (1985) 159 CLR 264, 301 (Deane J) (emphasis added). See *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 66 Fam LR 369.

153 The underlying assumptions — not applied consistently — appear grounded in Lockean metaphysics; that knowledge derived from the senses is independent of bias and judgement. See generally John Locke, *An Essay Concerning Human Understanding* (Oxford University Press, 1689).

154 *Brown v The Queen* (1986) 160 CLR 171, 202 (Deane J).

155 Gary Edmond and Kristy A Martire, 'Just Cognition: Scientific Research on Bias and Some Implications for Legal Procedure and Decision-Making' (2019) 82(4) *Modern Law Review* 633, 633. See also Australian Law Reform Commission, *Without Fear or*

Trial and appellate courts have generally assumed that careful directions will alert jurors to the dangers of partiality so that in most cases they will not misuse evidence or succumb to prejudice and other forms of irrationality.[156] Remarkably, given that the evaluation of evidence is both a routine and core feature of trials (and pleas) and many appeals, our courts have devoted limited attention to the question of whether careful directions actually work. Do directions protect jurors from the biases created by evidence or procedures? In terms of the wide range of cognitive biases that are known to contaminate perception and cognition — sometimes irreparably — there is little evidence in reported jurisprudence of courts recognising dangers or responding in ways that are informed by decades of scientific research or the considered advice of attentive scientists.

Cognitive biases and contextual effects are ubiquitous in human decision-making. When we speak of cognitive biases, we are referring to the systematic ways in which the environment or a person's perspectives (for example, expectations or world view) influences how they perceive and reason.[157] They are a class of effects that automatically influence — sometimes distorting or misleading — judgment. Despite our best efforts they are never fully under conscious control.[158] In this regard, they resemble other reflexive actions, such as sneezing and most movements of our eyelids. Cognitive biases and contextual effects are mental shortcuts or decision-making preferences that help us to process the very large amounts of information produced through our senses to form judgments and make decisions quickly and easily, even automatically.[159] They are generally useful, although in some circumstances — such as where perception or evaluation are unusual or difficult — their effects can become undesirable. They may generate irrational responses to evidence and other stimuli.

Favour: Judicial Impartiality and the Law on Bias (Final Report No 138, December 2021) 21–102.

156 In *Zoneff* (n 14) 261 [67], in an unusually frank discussion of the effectiveness of directions, Kirby J indicated that '[t]he law presumes that triers of fact are able to disregard the prejudicial aspects of testimony and adjust appropriately the weight to be attached to such evidence on the basis of its "probative value"'. Juries gauge and determine the weight of evidence. In Australia, following *IMM* (n 42), probative value is determined by the trial judge taking the capacity of the evidence 'at its highest': at 313 [44], 314 [47] (French CJ, Kiefel, Bell and Keane JJ). Probative value, then, is the maximum value or capacity that can rationally be assigned to some evidence.

157 For an introduction to these and other issues, see generally: Daniel Kahneman, *Thinking, Fast and Slow* (Penguin, 2012); Gerd Gigerenzer, *Simply Rational: Decision Making in the Real World* (Oxford University Press, 2015); Michael J Saks and Barbara A Spellman, *The Psychological Foundations of Evidence Law* (New York University Press, 2016); Dan Simon, *In Doubt: The Psychology of the Criminal Justice Process* (Harvard University Press, 2012); Tom R Tyler, *Advanced Introduction to Law and Psychology* (Edward Elgar, 2022).

158 See generally Jessica Nordell, *The End of Bias: A Beginning* (MacMillan, 2021).

159 Kahneman (n 157); Emma Cunliffe, 'Judging, Fast and Slow: Using Decision-Making Theory to Explore Judicial Fact Determination' (2014) 18(2) *International Journal of Evidence and Proof* 139, 144.

Biased interpretations, responses and attitudes are often unintentional. Individuals striving to act with impartiality and integrity are vulnerable to biases. One conspicuous bias concerns expectancy effects. These arise when our expectations influence perception and interpretation.[160] They may occur in an interpersonal context. If we are told that someone we are going to interact with is angry or mean-spirited, we tend to interpret behaviour, though especially ambiguous behaviours, in ways that are consistent with our expectations.[161] Expectations have been repeatedly demonstrated to inform the way we understand and interpret evidence (or information). Related to expectancy effects is confirmation bias.[162] This is a preference for information that supports rather than contradicts our existing beliefs.[163] Beyond colouring judgment based on our expectations, however, confirmation effects can influence the way we search for information in our environment, how we weigh what we find, and our ability to generate and appropriately evaluate alternative explanations.[164] Confirmation bias has been demonstrated in a variety of contexts, including maintaining beliefs in illusory correlations (for example, that certain weather patterns cause ailments to act up), and belief persistence in the face of strong contradictory evidence.[165] Tunnel vision appears to be a combination of expectation and confirmation biases.[166]

Humans can be biased quickly and often outside their conscious awareness. Researchers refer to the lack of awareness of being biased as a bias blind spot.[167] We

160 D Michael Risinger et al, 'The *Daubert/Kumho* Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion' (2002) 90(1) *California Law Review* 1, 6.

161 E Tory Higgins, William S Rholes and Carl R Jones, 'Category Accessibility and Impression Formation' (1977) 13(2) *Journal of Experimental Social Psychology* 141; Stéphane Doyen et al, 'On the Other Side of the Mirror: Priming in Cognitive and Social Psychology' (2014) 32 (Supplement) *Social Cognition* 12, 16–17. See also Gary Edmond et al, 'Contextual Bias and Cross-Contamination in the Forensic Sciences: The Corrosive Implications for Investigations, Plea Bargains, Trials and Appeals' (2015) 14(1) *Law, Probability and Risk* 1, 4 ('Contextual Bias and Cross-Contamination in the Forensic Sciences').

162 See generally Raymond S Nickerson, 'Confirmation Bias: A Ubiquitous Phenomenon in Many Guises' (1998) 2(2) *Review of General Psychology* 175.

163 Ibid 175.

164 For example, pre-existing attitudes are a robust predictor of how people will search for information on the internet: Dáša Vedejová and Vladimíra Čavojová, 'Confirmation Bias in Information Search, Interpretation, and Memory Recall: Evidence from Reasoning about Four Controversial Topics' (2022) 28(1) *Thinking and Reasoning* 1, 14. See also Joshua Klayman, 'Varieties of Confirmation Bias' (1995) 32(1) *Psychology of Learning and Motivation* 385.

165 Nickerson (n 162) 183.

166 See Keith A Findley and Michael S Scott, 'Multiple Dimensions of Tunnel Vision in Criminal Cases' [2006] (2) *Wisconsin Law Review* 291, 292.

167 Emily Pronin, Daniel Y Lin and Lee Ross, 'The Bias Blind Spot: Perceptions of Bias in Self versus Others' (2002) 28(3) *Personality and Social Psychology Bulletin* 369, 370.

routinely underestimate our vulnerability and the extent to which our thinking is actually biased. This extends to being able to generate sincere, though mistaken and misleading, explanations for (biased) preferences and interpretations.[168] We also tend to believe that other people (including professional peers) are more vulnerable to bias and more likely to be biased.[169] The bias blind spot produces overconfidence, a finding that has been demonstrated across a variety of professions, from architecture to medicine.[170]

Context effects occur when environmental factors influence the way information is perceived and processed.[171] They are most pronounced with unusual or difficult tasks, such as where the information being considered is ambiguous, unclear or vague.[172] In these circumstances decision-makers automatically draw upon other information accessible in the context, or the context itself, to make sense of evidence and attribute meaning. Contextual information is often very useful and can improve decision-making. However, it can also distort and mislead. Contextual effects are particularly concerning where irrelevant, misleading, or unreliable information is accessible to decision-makers, because decision-makers will often unwittingly draw on that information and be affected by it. Exposure to contextual information can lead to overvaluing — or actually, double counting — evidence, especially where the trier of fact is required to consider information that was also available to investigators and experts.[173]

In recent decades, mainstream scientists have advised forensic scientists to manage their exposure to domain irrelevant information.[174] This is information (and context)

168 Ibid 374–6.

169 Ibid 376–7.

170 Dunning, Heath and Suls (n 147) 72–3. In one study of forensic scientists, 71% reported that cognitive bias was a concern for forensic science, but only 26% reported that their own judgments were affected by cognitive bias: Jeff Kukucka et al, 'Cognitive Bias and Blindness: A Global Survey of Forensic Science Examiners' (2017) 6(4) *Journal of Applied Research in Memory and Cognition* 452, 454. Many of these respondents had some background knowledge of cognitive bias, through training, yet remained overconfident about their personal ability to control effects that are largely uncontrollable.

171 MJ Saks et al, 'Context Effects in Forensic Science: A Review and Application of the Science of Science to Crime Laboratory Practice in the United States' (2003) 43(2) *Science and Justice* 77, 78.

172 Ibid.

173 Ibid 84.

174 National Commission on Forensic Science, *Ensuring that Forensic Analysis is Based upon Task-Relevant Information* (Report, 2015) 1. Another option is to gradually expose an analyst to contextual information, starting with only the information required to do the specific comparative task. This procedure has been endorsed by many scientists concerned with bias in forensic science: see Adele Quigley-McBride et al, 'A Practical Tool for Information Management in Forensic Decisions: Using Linear Sequential Unmasking-Expanded (LSU-E) in Casework' (2022) 4(1) *Forensic Science International: Synergy* 1.

that is not required to perform a specified task. Those involved in comparing fingerprints, cartridges, shoe and tyre marks, DNA profiles, blood spatter, faces and so on, should, for example, only be provided with the information required to perform the comparison. When undertaking comparisons or reviewing comparisons, the context should not suggest a (preferred or expected) result. Numerous studies have found that forensic scientists are vulnerable to domain irrelevant information.[175] For example, when applying risk assessment algorithms to those convicted of crimes in order to predict their future dangerousness, the conclusions of forensic psychologists are dependent on the party retaining them.[176] Forensic pathologists evaluating human remains are much more likely to interpret the same skull damage as pre-mortem if they are told they are examining skulls from a conflict site, and post-mortem if they are told the remains came from an old cemetery.[177] Providing extraneous information to fingerprint examiners (for example, that the suspect confessed, emotional details of the case, or that other examiners concluded the prints did not match) has been shown to reverse decisions as to whether prints match.[178]

Medical researchers, as just one conspicuous example, employ double blind randomised clinical trials to avoid the corrosive effects of expectation, suggestion and confirmation.[179] Highly trained and experienced biomedical consultants, including those who are conversant with the dangers, are incapable of resisting these invidious influences. Blinding from biasing information is the only effective way to manage the dangers.[180]

Scientific research demonstrates how easily human perception and cognition can be inadvertently biased.[181] Cognitive biases affect not only the general population, but also actors in the legal system. Naturally, this includes witnesses, police officers (and other investigators) and jurors, but it also extends to lawyers and judges as well

175 Glinda S Cooper and Vanessa Meterko, 'Cognitive Bias Research in Forensic Science: A Systematic Review' (2019) 297(1) *Forensic Science International* 35, 37–43.

176 Daniel C Murrie et al, 'Are Forensic Experts Biased by the Side That Retained Them?' (2013) 24(10) *Psychological Science* 1889, 1893.

177 Sherry Nakhaeizadeh, Ian Hanson and Nathalie Dozzi, 'The Power of Contextual Effects in Forensic Anthropology: A Study of Biasability in the Visual Interpretations of Trauma Analysis on Skeletal Remains' (2014) 59(5) *Journal of Forensic Sciences* 1177.

178 Cooper and Meterko (n 175) 43; Itiel E Dror, David Charlton and Ailsa E Péron, 'Contextual Information Renders Experts Vulnerable to Making Erroneous Identifications' (2006) 156(1) *Forensic Science International* 74.

179 J Bruce Moseley et al, 'A Controlled Trial of Arthroscopic Surgery for Osteoarthritis of the Knee' (2002) 347(2) *New England Journal of Medicine* 81, 81–2.

180 Well-designed evidence line-ups offer a means to circumvent contextual influences.

181 See, eg, Marcus R Munafò et al, 'A Manifesto for Reproducible Science' (2017) 1(1) *Nature Human Behaviour* 1, 1. Cognitive biases are a major reason for false positives in the scientific literature (and are a reason why reforms to scientific process focus on making science more transparent such that biases are easier to identify and control).

as forensic scientists applying validated methods.[182] In drawing upon the scientific research, we do not mean to imply that humans are incapable of approaching evidence and decision-making critically. Rather, research confirms that the context in which evidence is presented, how evidence is perceived and interpreted, along with our preconceptions (of the evidence or task), can all change the way evidence is understood and weighed.[183] Most prosecutions proceed as though the evaluation of evidence is mechanical, and cognitive biases are peripheral or can be managed through cross-examination, judicial directions, and conscious effort. Such attitudes are inconsistent with decades of scientific research, which demonstrates that even professionals acting with integrity frequently and unwittingly make errors caused by biases.

The directions in *Davey* do not provide insight into, let alone assistance with, context effects and cognitive bias.

C *Context, Contamination and Overvaluing the Circumstantial Evidence*

Starting from the position that risks from cognitive biases are pervasive, the unstructured, impressionistic and suggestive character of Detective J's interpretations, performed as part of an investigation, render them especially susceptible. PCAST reviewed the literature on cognitive bias in forensic sciences and warned about judgments akin to Detective J's: '[s]ubjective methods require particularly careful scrutiny because their heavy reliance on human judgment means they are especially vulnerable to human error, inconsistency across examiners, and cognitive bias'.[184] Cognitive bias looms large in investigative environments. When the source material is unclear (or difficult or ambiguous) and there is no particular methodology for analysing materials, such as the voice recordings, those endeavouring to interpret them will — regardless of any conscious awareness — tend to rely on unintentional

182 Andrew J Wistrich, Jeffrey J Rachlinski and Chris Guthrie, 'Heart versus Head: Do Judges Follow the Law or Follow Their Feelings' (2014) 93(4) *Texas Law Review* 855. See also: Chris Guthrie, Jeffrey J Rachlinski and Andrew J Wistrich, 'Inside the Judicial Mind' (2001) 86(4) *Cornell Law Review* 777; Birte Englich, Thomas Mussweiler and Fritz Strack, 'Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making' (2006) 32(2) *Personality and Social Psychology Bulletin* 188. In the experiments, judges made higher damages awards when they rolled a higher number on a die than when they rolled a lower number (ie, they are susceptible to the 'anchoring effect'): 192–5. See also François Rabelais, *Gargantua and Pantagruel, Complete: Five Books of the Lives, Heroic Deeds and Savings of Gargantua and His Son Pantagruel*, tr Sir Thomas Urquhart (Gutenberg, 2004) bk 3, ch 39.

183 Edmond et al, 'Contextual Bias and Cross-Contamination in the Forensic Sciences' (n 161); Amos Tversky and Daniel Kahneman, 'The Framing of Decisions and the Psychology of Choice' (1981) 211(4481) *Science* 453; Nickerson (n 162).

184 PCAST Report (n 70) 5.

shortcuts to make sense of it.[185] Detective J's voice identification embodied these problems.[186]

Detective J did not use a reliable method for his voice comparison (and recognition). Apart from the inferences available from the research surveyed in Part V(A), even after cross-examination and directions, his actual ability is uncertain. At no point was Detective J's ability to identify or recognise Davey's voice (or any other voices) tested. We therefore have no reliable insight into Detective J's ability to make accurate voice identifications. Moreover, there were no safeguards in place to protect Detective J's listening and recognition from domain irrelevant information, or the suggestive context of the interview.

Detective J testified that as part of the investigation into the burglary and theft of guns (where many forms of information and other evidence were available to the investigating police officers), he listened to a large number of intercepted calls. The total is stated to be as high as 1200 calls, though the number alleged to involve the person or persons said to be Davey is considerably lower.[187] There were, according to Detective J's evidence, '30 to 50 calls where Matthew, Matty or Matthew Davey were used' during the call (lines 13–14), and an unspecified number of other calls where identity was suggested by the address, locations, subscriber details, other metadata or the subject matter (lines 15–16, 56–7). Detective J testified that he used the calls where the speaker was identified by one of the names shared by the defendant to attribute all the calls featuring a similar sounding speaker to the same source — implicitly, Davey (lines 35, 38).[188] He then (is said to have) confirmed the identity of the speaker as Davey when he 'recognised' (lines 29, 72) the voice during Davey's police interview (lines 74–5). The formation of Detective J's opinions was actually more complicated than this 'just so story'.[189]

185 Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185(4157) *Science* 1124, 1130.

186 Interestingly, listeners will 'hear' voices and speech in white noise — where there is no speech — when presented with suggestive contextual primes: Michael A Nees and Charlotte Phillips, 'Auditory Pareidolia: Effects of Contextual Priming on Perceptions of Purportedly Paranormal and Ambiguous Auditory Stimuli' (2015) 29(1) *Applied Cognitive Psychology* 129, 130; Paul Lunn and Andy Hunt, 'Phantom Signals: Erroneous Perception Observed During the Audification of Radio Astronomy Data' (Conference Paper, International Conference on Auditory Displays, 6–10 July 2013) 250. For a legal example, see *R v Bain* [2010] 1 NZLR 1, 7 [5] (Elias CJ for Elias CJ and Blanchard J), discussed in Helen Fraser, Bruce Stevenson and Tony Marks, 'Interpretation of a Crisis Call: Persistence of a Primed Perception of a Disputed Utterance' (2011) 18(2) *International Journal of Speech, Language and the Law* 261.

187 *Davey* (n 7) [5].

188 We are not told if all of these calls were made using the same phone (number), and whether that played a factor in their selection and the 'identification'.

189 Derived from Rudyard Kipling's *Just So Stories* (1902), these tend to be narratives featuring frequently untestable and not particularly helpful explanations. See generally Rudyard Kipling, *Just So Stories* (Gutenberg, 2008).

When he sat in the interview room with Davey (and when he listened to the intercepted recordings during the investigation), Detective J was conversant with all of the materials assembled during Operation Oracle.[190] There was a strong circumstantial case against Davey. Davey had, after all, been named on the recordings and arrested. Detective J expected to recognise Davey as the speaker identified on many of the tapes as 'Matthew', 'Matty' or 'Matthew Davey'. Indeed, this seems to have been one of the primary motivations for Detective J attending the interview.[191] The attribution of the recorded voice to Davey is not, in any simple or primary sense, based on Detective J's listening or the development of genuine familiarity leading to recognition. Rather, Detective J's recognition was based on an inextricable combination of non-voice evidence, background information, suggestion, expectation, supposition (or inferences from the circumstantial case), along with his impression of voice similarities at the interview. The manner in which calls were linked, and Davey identified during the investigation and the police interview, render Detective J's purported voice identification evidence practically worthless.[192] Detective J and the other police officers believed the 'speaker' on the intercepted calls was Davey before any comparison or recognition took place.[193]

The comparison from the police interview — presented as some kind of recognition or confirmation of Davey's identification — has little value. This was not an exercise in identification, but a reaffirmation of what Detective J and his colleagues already believed based on the circumstantial evidence they had assembled. Detective J's opinion evidence was based on all of the information — the circumstantial case as well as other background material — to which he had been exposed.[194] This was not

190 As part of the investigation, Detective J knew the identity of the suspects (for example, from DNA evidence, recovered weapons, associates, and the statements of potential witnesses). He also knew the identities of those being monitored by lawful telephone intercepts, and was provided with metadata, transcripts and location information associated with the very voices he was purporting to compare, associate and identify. The circumstances of the case meant that Detective J was expecting to hear Davey. He knew that Davey was implicated in the offence on the basis of a range of different types of evidence. He knew, even before listening, that Davey was one of the suspects and he knew from the calls that someone called 'Matthew', 'Matty' or 'Matthew Davey', was speaking on a significant number of calls. There were other calls where Davey's names were not used, but Detective J had access to the telephone numbers, metadata, transcripts as well as the content of those calls before he began to listen and recognise.

191 See generally Ziva Kunda, 'The Case for Motivated Reasoning' (1990) 108(3) *Psychological Bulletin* 480.

192 If Detective J's opinions on identity were probative (and so relevant), the probative value at its highest was objectively low.

193 Speaker is in inverted commas because it is uncertain as to whether the same person is speaking across these recordings.

194 The so-called confirmation through the police interview adds little, if anything, to Detective J's globalised impressions. The trial judge warned the jury 'it would seem that there's a risk that somehow he's ultimately globalised, if you like, his opinion': *Davey* (n 7) [57].

a straightforward case of listening, leading to recognition and identification (lines 21, 74). Detective J's opinions about identity could not be retrieved, or extricated, from what he already knew and the context in which he came to listen. The possibility that Detective J might not have been influenced by the investigation or the other evidence, that he was sincere in his identification(s), or that he might have tried to rise above potential risks, does not matter. Humans are incapable of reliably thinking their way around such powerful contexts and expectations.[195] The conditions in which the listening took place practically guaranteed that Davey would be identified as the speaker already named as 'Matthew', 'Matty' or 'Matthew Davey'.[196]

The prosecutor, trial judge and TASCCA presented Detective J as a police officer who identified Davey on the basis of repeated listening, leading to familiarity with the unique features of his voice.[197] These misunderstandings (and misrepresentations) have serious implications for the admissibility of Detective J's opinions. Relevant exceptions to the exclusionary opinion rule require that opinions must be 'substantially based on [specialised] knowledge' or 'based on what the person saw, heard or otherwise perceived about a matter or event'.[198] Section 79 of the *Evidence Act 2001* (Tas), regarding specialised knowledge, can be quickly dispensed with. Relying on Detective J's experience with the voice recordings is not a solution, because he does not have experience with Davey's voice, unless we assume that it is Davey speaking — and that is what Detective J's opinion is being used to prove. Additionally, s 79 does not provide an admissibility pathway for opinions based on experience. Rather, the opinion must be substantially based on specialised knowledge. Importantly, Detective J has no knowledge of: methods for voice comparison; the difficulty of voice comparison; methods for blinding; the value of documentation; terms for classifying and describing voice features; the frequency of voice features; and statistical models for expressing the strength of opinions. Detective J is not an expert in voice comparison or even Davey's voice, and he is incapable of placing the jury in a position to evaluate his lack of expertise and biased impressions.[199] Section 79 does not provide an admissibility pathway for opinions that are based on biased experience.[200]

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195 Kukucka et al (n 170) 452, 456.

196 *Davey* (n 7) [57].

197 Cf *R v Harris [No 3]* [1990] VR 310, 322: Justice Ormiston described the listener as having 'engaged in a combination of identification and logic in a way which now cannot be satisfactorily unravelled'.

198 *Evidence Act* (Tas) (n 37) ss 76(1), 78(a), 79(1). These sections all form part of the UEL.

199 *Davie v Magistrates of Edinburgh* [1953] SC 34, 39–40 (and *Makita (Australia)* (n 133)) requires the witness to be able to place the fact-finder in a position where they are able to assess the opinion.

200 There is also the complication that the only experience Detective J has with what is certainly Davey's voice is during the police interview. On ad hoc expert opinion evidence, see Gary Edmond and Mehera San Roque, 'Quasi-Justice: Ad Hoc Expertise and Identification Evidence' (2009) 33(1) *Criminal Law Journal* 8.

As for s 78, there are two problems. The first is the High Court's indication that s 78 is restricted to direct witnesses — this is relevant when considering that Detective J was an indirect witness here (ie, he listened to the recordings, and was not a witness to the relevant events themselves).[201] Intermediate courts of appeal, however, have overlooked this expectation and allowed investigators to opine. The second problem is the basis of Detective J's opinion evidence (also an issue for s 79). Section 78 requires the opinion to be 'based on what the person saw, heard or otherwise perceived about a matter or event' (and s 79 requires the opinion to be substantially based on 'specialised knowledge').[202] Unfortunately, Detective J's opinions about identity are not in any simple sense based upon listening to and comparing the voices.[203] Rather, as we have seen, his opinions about identity are based on his participation in the investigation and knowledge of the suspects, relationships between suspects, the phones being intercepted, the content of messages, including the names of participants, the labelling of speakers on the transcripts, the other evidence in the case (for example, DNA) and so on. To contend that the identification is based on the voice recognition at the police interview is to misconceive the foundation of the opinion evidence and Detective J's vulnerability to what he already knew. It also undermines the second requirement of s 78, that reception of the opinion must be 'necessary to obtain an adequate account or understanding of the person's perception'.[204] Once we recognise that the voice identification was based on Detective J's participation in the investigation, and his exposure to and synthesis of the circumstantial case, we can appreciate that ss 78 and 79(1) do not provide admissibility pathways.[205]

Simultaneously, understanding that Detective J's evidence is inadmissible as opinion evidence exposes fundamental, indeed constitutional, threats to fact-finding. If Detective J's opinion about the speaker is actually based on (or even nontrivially informed by) his exposure to the circumstantial case, then he was trespassing on

201 See: *Lithgow City Council v Jackson* (2011) 244 CLR 352, 370–1 [45]–[46] (French CJ, Heydon and Bell JJ) ('*Lithgow City Council*'); *Smith* (n 128) 669–70 [59]–[60] (Kirby J). See also Gary Edmond, 'Regulating Forensic Science and Medicine Evidence at Trial: It's Time for a Wall, a Gate and Some Gatekeeping' (2020) 94(6) *Australian Law Journal* 427.

202 *Evidence Act* (Tas) (n 36) ss 78, 79. The apparent rejection of the common law basis rule, in *Dasreef Pty Limited v Hawchar* (2011) 243 CLR 588, 604 [37] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), does not remove the obligations imposed by the text of ss 78 and 79.

203 On the application of rules following decisions about the meaning of facts, see, eg, Karl N Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and Law School* (Oxford University Press, 2008) 65.

204 *Evidence Act* (Tas) (n 36) s 78(b).

205 We cannot retrospectively claim that it was reducible to the sounds he heard. We have no credible basis for drawing such inferences, especially where they are incompatible with mainstream scientific research and advice.

the prerogative of the jury.[206] The jury was presented with much (though perhaps not quite all) of the information available to Detective J and the police officers.[207] Indeed, this circumstantial prosecution required the jury to consider all of the evidence in order to determine whether Davey was involved. Already, you might have spotted the problem. Because of his exposure to the circumstantial case from his participation in the investigation, Detective J's opinion evidence was both anticipating and reproducing what the jury was expected to do. Detective J improperly trespassed into the realm of jury fact-finding. His opinions, based on a synthesis of the circumstantial case, was redundant. It is the constitutional responsibility of jurors, not investigators, to evaluate and combine the evidence at trial.[208]

The admission of Detective J's opinion evidence thus made it very likely that the jurors would use some of the evidence, likely unwittingly, more than once.[209] Taking a step back, if Detective J's opinions about identity were informed by more than the listening — as it most certainly appears to have been (and the contrary position cannot be credibly established) — and if the jury are allowed to hear and use his opinions as well as the other circumstantial evidence, then there is a serious (and unmanageable) risk that the other evidence will be overvalued (that is, used more than once). This occurs because the context and non-voice evidence contributed to the formation of Detective J's opinions about the speaker being Davey, whether he knew it or not. If the jury relied on Detective J's opinions as well as the evidence which informed (really, contaminated) his opinions, then that evidence is being relied upon, or counted, more than once.[210] Domain irrelevant information was not only available to the jurors, but it was also presented as independent support for Davey's identity and guilt. However, these strands of circumstantial evidence were not independent. They were cross-contaminated and could not be decontaminated. This contamination, as we shall see, has further serious repercussions for the jurors' comparison of the voices and, because Detective J's evidence was incorrectly characterised as independent, there were no directions about the danger of re-using or overvaluing the evidence.[211]

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206 It is the responsibility of the jury to evaluate the evidence. Further, this raises a threshold admissibility question in terms of relevance: see *Smith* (n 128) 655–6 [11]–[12] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

207 Police were conversant with the criminal records of those they were investigating. The exposure to inadmissible evidence only compounds the problems, created by the inability to manage the influence of domain-irrelevant information.

208 There may be occasions when some species of expert (eg, forensic pathologists) might rely on several pieces of evidence in forming an opinion. These witnesses usually possess genuine expertise and are capable of adverting to and explaining their reliance. Such reliance should also be limited to what is technically required.

209 A piece (or strand) of evidence might be used for more than one purpose in legal proceedings — eg, for tendency and credibility purposes. Where, however, a piece of evidence is used for the same basic purpose over and over — here, by an investigator and jurors to determine the identity of a speaker — the evidence is being misused.

210 See Edmond, 'Opinion, Bias and Double-Dipping' (n 139).

211 Such directions would not work; but the dangers do not appear to have been recognised.

These are some of the reasons why investigators should not be invited or allowed to proffer their opinions in criminal proceedings.[212] They are not genuine experts. They are not in a position to provide reliable opinions about identity because their opinions are always irreparably contaminated by exposure to the evidence (and other information). They are not in a position to provide independent or unbiased opinions on identity. Further, Detective J's opinions were not and could not be 'shored up' (line 63) by the other evidence.[213] The same evidence cannot both inform an interpretation and confirm it — that is circular reasoning.[214] Here, the corrosive interactions of context, suggestion, expectation and confirmation cannot be meaningfully addressed or disaggregated. They are irretrievably intertwined in Detective J's irreparably contaminated opinions. It is not possible to extricate Detective J's opinions from his participation in the investigation and his exposure to the circumstantial evidence (and more).

The prosecution case, the judicial directions and appellate decisions, all present (or endorse) Detective J's opinions as identification by voice recognition or comparison. The appeal, after all, is largely concerned with the admission of Detective J's opinion evidence and the adequacy of related directions. In the legally authorised version(s) of provenance, none of the participants appear to be influenced by context or domain irrelevant information, or even particularly confident about the identity of the speaker, until Detective J 'spoke to [Davey] in person'.[215] Indeed, there are repeated references to the identification being based on, and resolved by, the in person meeting (lines 17–21, 32–4, 74–6). The version presented by the prosecutor, repeated in the directions, and accepted (as available) on appeal, is a sanitised reconstruction (or pro-prosecution rationalisation) of events that operates to inoculate against the serious threats posed by context and cognitive biases.[216] This version of events is available, and sustained, because lawyers and judges did not engage with scientific research on voice comparison and do not understand cognitive biases and their insidious effects. Ignorance enables them to accept an undocumented police version of events, even though it would seem, on the basis of studies of voice

212 Here we are speaking about detectives, police and translators, rather than those who are trained, certified and demonstrably proficient experts, with the potential to manage their exposure to domain irrelevant information.

213 *Davey* (n 7) [57].

214 See Eric-Jan Wagenmakers et al, 'An Agenda for Purely Confirmatory Research' (2012) 7(6) *Perspectives on Psychological Science* 632. Formal statistical hypothesis testing is invalidated by this very mistake: 'This also means that the interpretation of common statistical tests in terms of [false positives and false negatives] is valid only if the data were used only once and if the statistical test was not chosen on the basis of suggestive patterns in the data. If you carry out a hypothesis test on the very data that inspired that test in the first place then the statistics are invalid (or "wonky", as Ben Goldacre put it)': at 633.

215 *Davey* (n 7) [57].

216 The prosecutor, police and judge recognise there are issues here, but they do not confront them, and their various representations — whether unintentionally or deceptively — downplay serious risks.

comparison and cognitive bias, to be untenable.[217] It bears noting, that if judges are making these oversights (and mistakes) — not recognising the dangers posed by context and cognitive biases and their implications, such as double-dipping — then we can only assume that jurors are responding in similar ways.

We can contrast the insights and evidence-based observations developed in this article, with specific directions given to the jury:

> that Detective [J] … had the summaries of metadata from TIS, Telephone Intercept Services, he's expecting the call to be the voice of Matthew Davey, the risk where in terms of reliability is the expectation has influenced his identification of the speaker. The risk — well, the risk is that there are voices that are similar, but they're not identical in all their characteristics and yet with an expectation of the speaker being a certain person, the opinion is filled in with that expectation if you like, and so the end opinion is, it is Matthew Davey rather than it sounds like Matthew Davey so, if you like, the person's assessment of the voice is shored up by the information they have from TIS, another fact that you've got to bear in mind.

Although referring to expectations, these directions are not informed by scientific knowledge and do not convey the magnitude of risks. Here we can observe how risks, notorious among attentive scientists, are tentatively raised though ultimately left to the jury. The issue in the extract concerns the strength of Detective J's opinion evidence — positive identification rather than similarity (ie, sounds like). The trial judge's advice is not in consonance with the actual dangers because we regularly mistake voices, and suggestion or expectations can change our perception of whether unfamiliar voices are experienced as similar.[218] Reference to the possibility of Detective J's opinion being 'shored up'[219] by the very evidence that contaminated it, as an issue for the jury to 'bear in mind',[220] reinforces our argument that judges do not appreciate the magnitude of risk created by this type of evidence. Contamination is trivialised — something for the jury to bear in mind — when they come to evaluate Detective J's opinions in conjunction with the very evidence that contaminated them.[221]

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217 Again, Detective J might believe it and his testimony may be sincere, but that is part of the problem.

218 Consider the classic card recognition experiment described in Jerome S Bruner and Leo Postman, 'On the Perception of Incongruity: A Paradigm' (1949) 18(2) *Journal of Personality* 206, 209–22. See also Thomas S Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 2nd ed, 1970) vol 2, 62–5.

219 *Davey* (n 7) [57].

220 Ibid.

221 Similarly, the QLRC expressed concern that some directions may lead jurors to 'over-compensate' for bias in arriving at a verdict: QLRC, *A Review of Jury Directions* (n 2) vol 1, 22 [2.21].

VI Evaluating Detective J's Opinion Evidence, the Jury Comparison and Unfair Prejudice

Courts seem to assume that describing what an investigator (or 'expert') did or the procedure(s) used, along with observations on issues to consider or 'bear in mind' (derived from collective judicial experience), provides sufficient assistance to enable a decision-maker to evaluate derivative opinions.[222] This is surely mistaken, especially in relation to feature comparison evidence, such as identification from sound recordings (or the identity of persons of interest in images). Although well-intentioned, the directions in *Davey* were likely to imbue jurors with false confidence — in the possibility of rational fact-finding around the identity of the speaker following the admission of Detective J's contaminated synthetic impressions.[223] This is remarkable, because directions and warnings are the main tools available to trial judges to regulate the evaluation of admissible evidence.[224]

In order to evaluate Detective J's opinions, we need to know quite a bit more than what was available to the jurors. This is a justification for excluding Detective J's speculative opinions, because directions and warnings cannot overcome the absence of information, or place jurors in a position to rationally evaluate them.[225] We need information about, for example: the validity of the methods used; the accuracy of voice comparison (including his own ability); familiarity and whether Detective J had actually become a familiar (discussed above); the quality and quantity of recordings; the frequency of voice attributes among suspect populations; the context(s) in which the comparisons were made; the information available to Detective J when he undertook his listening and identification; and the magnitude of dangers created by cognitive bias.

This kind of information is produced through formal testing and engagement with mainstream scientists and their research.[226] It was not provided by the parties or the Court and so was not available to any of the decision-makers.[227] Directions (and lay testimony) cannot make up for these omissions. The directions did not enable

222 The knowledge and experience of the judiciary might be considered mixed. Section 165A of the *Evidence Act* (n 2), for example, documents and proscribes some of what was once presented by judges as collective insight.

223 Trial and appellate courts will tend to assume the directions are sufficient, understood, and followed. Such assumptions, to the extent that they are misguided, appear to threaten the constitutional legitimacy of trials.

224 *Davey* (n 7) [58], [74].

225 See: Gary Edmond, 'Forensic Science Evidence and the Conditions for Rational (Jury) Evaluation' (2015) 39(1) *Melbourne University Law Review* 77, 79–92; Martire and Edmond, 'Rethinking Expert Opinion Evidence' (n 113).

226 See, eg: NAS, *Strengthening Forensic Science* (n 70) 87, 109–10; PCAST Report (n 70) 4–6.

227 This requires formal testing by scientists. It cannot be generated by the parties or elicited through adversarial procedures.

the jury to understand the various deficiencies with Detective J's opinions or to rationally evaluate them.

A very significant additional limitation with the directions, and a profound problem for the fairness of the proceedings, was making the voice recordings available to the jury. The jurors were presented with the contaminated impressions of a police officer actively engaged in Operation Oracle, along with some of the contaminating evidence presented as independent support. They were, in addition, invited to compare the intercepted voice(s) said to be Davey, and sometimes featuring the names 'Matthew', 'Matty' and 'Matthew Davey', with Matthew Davey's police interview.[228] Jurors undertook their comparisons having been primed with Detective J's contaminated opinions along with the circumstantial evidence implicating Davey as the speaker (which also contaminated his interpretations).

Ostensibly, the recordings were provided to the jurors for two purposes. First, to assess Detective J's credibility and the reliability of his voice identification. However, it is unclear how listening to these recordings enabled the jury to evaluate Detective J's opinions.[229] While in some circumstances poor quality recordings might lead the jury to question a witness's ability to make a (reliable) comparison, provision of the recordings does not facilitate meaningful evaluation of Detective J's testimony. Instead, as Davey submitted on appeal, the results of formal (ie, validation) testing provide the appropriate evaluative framework.[230] How — in the absence of insight into the difficulty of the task and Detective J's ability (or even the ability of other, ordinary persons), and other problems — jurors could make a sensible evaluation of Detective J's opinions is anyone's guess. Assessment of Detective J's opinions was necessarily speculative, and inextricably linked to their own comparisons. How, and more importantly why, were the jurors expected to evaluate the opinions of a police officer that were based on, and perhaps determined by, much of the same evidence they heard in the case against Davey?

Second, the recordings were played to enable the jurors to make their own voice comparisons. However, this was not a comparison of similarities in the voices. Rather, it was a holistic evaluation of all the evidence masquerading (and being presented by the judges) as voice comparison and identification. The jurors were invited to compare the voices in the shadow of the circumstantial case against Davey (and Eaton).[231] When they embarked on this difficult comparison, in the context of an

228 *Davey* (n 7) [57].

229 Cf *R v Hawat [No 5]* [2019] NSWSC 1727, [30].

230 See, eg: Forensic Science Regulator (UK), *Validation* (Guidance, 22 September 2020); Forensic Science Regulator (UK), *Cognitive Bias Effects Relevant to Forensic Science Examinations* (Guidance, 22 July 2020); Forensic Science Regulator (UK), *Appendix: Speech and Audio Forensic Services* (Codes of Practice and Conduct, September 2020).

231 *Davey* (n 7) [57]. Unwittingly, the Court embarked on an exercise that was very likely to lead the jurors to overvalue the evidence and agree with Detective J even if he was wrong.

accusatorial trial, the evidence was pointing to Davey being the speaker. Here we can observe how evidence which irreparably contaminated Detective J's opinions was (again) available to contaminate the juror comparisons. To the extent that Detective J's opinion evidence was contaminated, or that jurors relied upon it or other evidence to inform their listening, this evidence was being used more than once. In other words, evidence which informed Detective J's interpretation was very likely to have informed (ie, contaminated) the juror comparisons. The suggestive context of the accusatorial trial was simply ignored. Compounding these problems, the contaminating non-voice evidence was said to be also available as independent evidence implicating Davey as the speaker. In these ways the non-voice evidence might have been unwittingly used on as many as three separate occasions. The voice comparison was likely to result in jurors concluding that it was Davey speaking — even if it was not — and simultaneously, and inextricably, that Detective J was a credible and reliable witness.

Judicial directions are incapable of preventing or repairing contaminated perception and evaluation. They are incapable of preventing or repairing cognitive bias. This applies to impressionistic directions, such as those provided in *Davey*, but would also apply to scientifically informed assistance. Directions are incapable of enabling the jury to avoid unconscious influences on their perception and cognition and the double and triple counting of evidence which could not be prevented following the admission of Detective J's synthetic opinions.[232] Jurors are very likely to be persuaded by the sincere, confident, and resilient opinions proffered by police officers.[233] They are extremely vulnerable to the context (a trial with Davey sitting in the dock) and other suggestive evidence — such as the matching DNA profile and the opinion evidence of Detective J — unconsciously and irreparably contaminating their perception, interpretation and evaluation of the voices.[234] Jurors

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232 See also: *Nguyen* 2002 (n 9) 90 [138] (Anderson J); *Neville v The Queen* (2004) 145 A Crim R 108, 125–6 [66]–[72] (Miller J). In *Bulejcik* (n 31) Toohey and Gaudron JJ stated at 398–9:

> Where the jury is itself asked to make a comparison of voices in a situation such as this one, very careful directions are called for … it is unsafe to leave that matter to the jury without very careful directions as to those considerations which would make a comparison difficult and without a strong warning as to the dangers involved in making a comparison.

Chief Justice Brennan also insisted on the need for 'a satisfactory warning': at 383.

233 See generally: Jerry W Kim and Brayden G King, 'Seeing Stars: Matthew Effects and Status Bias in Major League Baseball Umpiring' (2014) 60(11) *Management Science* 2619; Kanu Okike, 'Single-Blind vs Double-Blind Peer Review in the Setting of Author Prestige' (2016) 316(12) *Journal of the American Medical Association* 1315, 1316; Andrew Tomkins, Min Zhang and William D Heavlin, 'Reviewer Bias in Single-Versus Double-Blind Peer Review' (2017) 114(48) *Proceedings of the National Academy of Sciences of the United States of America* 12708; Simine Vazire, 'Our Obsession with Eminence Warps Research' (2017) 547(7661) *Nature* 7.

234 A simple example might be considering the DNA evidence as implicating Davey, even though the same evidence was part of the matrix of contextual information that unwittingly informed Detective J's opinion evidence, and also unwittingly informed

should not be tasked with voice (or other) comparisons in the context of accusatorial proceedings.[235]

Interestingly, the trial and appellate judges in *Davey* — like many of the trial and appellate judges who have considered the opinion evidence of investigators in recent years[236] — could not discern much unfairness attending the admission and reliance on Detective J's opinions or in allowing the jurors to engage in voice comparisons. Having deemed Detective J's contaminated and impressionistic opinion evidence admissible, according to our remarkably lax admissibility frameworks, the trial judge and TASCCA were satisfied that there was 'no unfair prejudice' to Davey because of the work attributed to the directions.[237] Consider the formulaic assessment offered by the TASCCA: 'Once the required warnings are given, no question of unfair prejudice within the meaning of s 137 of the *Evidence Act* is likely to be discernible'.[238] With the benefit of knowledge, this assessment seems coldly indifferent.

After *R v Tang*,[239] *Honeysett v The Queen*[240] and *IMM v The Queen*,[241] scope for exclusion on the ground of cognitive bias or the reliability (or accuracy) of opinions, like those of Detective J, seem to be largely relegated to unfair prejudice when balancing the probative value of biased and speculative opinions against the danger of unfair prejudice to the defendant.[242] Ignorant of relevant scientific knowledge,

any jury comparison. In this case, the DNA evidence is being triple counted because even though it could be independent of the comparisons, exposing those engaged in comparisons means it is no longer independent. Unwittingly, the evidence might be counted three times: (i) the DNA evidence as an implicitly independent strand of circumstantial evidence; (ii) the DNA evidence influencing Detective J's interpretation; and (iii) the DNA evidence influencing the jurors' comparisons. Such exposure is not only detrimental to the comparisons, but it threatens the rational evaluation of the entire case.

235 Edmond, 'Against Jury Comparisons' (n 94). The fact of admission and the implied value of Detective J's listening and the voice comparison exercise appear to be far stronger signals of their potential, or assumed value, than the limited insight offered through the orthodox directions.

236 See above n 9.

237 *Davey* (n 7) [74].

238 Ibid [58]. See also ibid [74]. This is a peculiar form of words.

239 (2006) 65 NSWLR 681.

240 (2014) 253 CLR 122.

241 *IMM* (n 42).

242 According to *Xie v The Queen* (2021) 386 ALR 371, 457 [301]: '*IMM* left open the possibility that an assessment of the "reliability" of evidence may be permissible as part of an inquiry into the "danger of unfair prejudice"'. This produces the absurdity that the capability of evidence (which inexorably requires consideration of reliability 'at its highest') is to be balanced against actual reliability. For a review of the prejudice associated with expert evidence, see Jason M Chin, Hayley J Cullen and Beth Clarke, 'The Prejudices of Expert Evidence' (2023) 48(2) *Monash University Law Review* 59.

the TASCCA assumed that Detective J's opinions were quite probative (because an uninformed jury might treat them as such) and balanced that impression (and possibility) against an equally naïve response to the dangers.[243] The lawyers and judges appear to have been largely oblivious to dangers outlined in this article. According to the TASCCA there was no actual need to engage in a balancing exercise, for once the warnings were given 'there was no unfair prejudice from the admission of the evidence'.[244]

Here, we can observe adjectival law — and specifically a safeguard intended to protect defendants — operating asymmetrically, in favour of the Crown. Against decades of scientific research, criminal trials and appeals proceed on the basis that risks to the defendant from speculative opinions and cognitive bias can and will be managed by directions.

VII Was Detective J's Opinion Evidence Necessary?

Police, prosecutors and judges seem to assume that voice identification is important, and perhaps necessary, in many cases. But is it? In principle, courts should aim to admit all relevant evidence that can be rationally evaluated by the trier of fact. There are, however, limits in relation to what ought to be admitted where there are significant costs, serious threats to fairness, or manifest risks of error and irrationality. Voice comparison and identification evidence is not only costly to produce (it consumes a great deal of police time), and expensive to hear and contest (consuming time preparing for and presenting it in court), but it is also extremely difficult to manage (through directions and warnings), and very likely to mislead lawyers, trial judges, jurors, and appellate courts.

The question that prosecutors and judges have not adequately grappled with is whether voice identification evidence and jury comparisons are actually required. We contend that in many cases, perhaps most cases, there is no need for voice identification evidence. The number of cases where jury comparisons are helpful is likely to be vanishingly small. Consider the case against Davey. Apart from witnesses placing Davey's co-accused (and friends, Eaton and Cure) in the vicinity of the crime, there was a match with Davey's DNA profile on a recovered screwdriver, guns and ammunition.[245] A stolen gun was recovered close to Davey's house

243 *Davey* (n 7) [103]. See also *Davey* (n 7) [99]. Cf *Bulejcik* (n 31) 382 (Brennan CJ):

> the ordinary rules of evidence confer on a judge a discretion to exclude evidence that is unduly prejudicial, albeit the evidence is otherwise admissible. The exercise of that discretion is designed to avoid a significant risk that the evidence will be misused by the jury in a way that cannot be guarded against by an appropriate warning.

244 *Davey* (n 7) [58], [74]. See Jason M Chin, Gary Edmond and Andrew Roberts, 'Simply Unconvincing: The High Court on Probative Value and Reliability in the *Uniform Evidence Law*' (2022) 50(1) *Federal Law Review* 104, 122–3.

245 *Davey* (n 7) [58], [74]. Of course, transfer was a possibility, but that was to be considered in the context of the case as a whole.

with a fingerprint identified to one of his relatives.[246] There were recorded conversations between the burglars and a leader. Phones and phone numbers used by the burglars to communicate during the weekend of the burglary were in the vicinity of the crime scene. They were used at other times by a person calling himself or responding to the names 'Matthew', 'Matty' or 'Matthew Davey'.[247] This evidence could be used as circumstantial evidence implicating Davey in a joint criminal enterprise.[248] There was an abundance of evidence with which to prosecute and convict without recourse to the partial opinions of those who participated in the investigation. Perceived insufficiency, or the desire to prop up a case, should not be addressed by allowing investigators to proffer speculative opinions, however well-intentioned, sincere or plausible.

If there is a need to identify a speaker — whether Davey or some other suspect — then all is not lost. There are a range of valid and reliable approaches to voice comparison available.[249] Rather than call on the impressions of police (or translators) embedded in the investigation, prosecutors should obtain the services of genuine experts. These are individuals with: (1) validated methods; (2) a clear idea of their abilities with different types of voice recordings; (3) a deep understanding of speech, voice comparisons and their limitations; and (4) procedures to manage the corrosive effects of context and cognitive bias. Experts are able to provide reliable opinions on identity or the significance of similarities informed by statistics and/or the risk of error. Opinions obtained from experts using validated methods are opinions based on specialised knowledge. They facilitate the goals of accuracy and fairness by providing relevant evidence in a form that enables rational assessment of their probative value and weight. By managing exposure to domain irrelevant information, genuine experts can provide independent evidence. This helps to prevent double counting evidence and enables courts to avoid asking jurors to compare voices in the very suggestive conditions attending all prosecutions.[250]

246 Ibid [15]–[17].

247 Ibid [57].

248 The jury might hear incriminating calls intercepted from the phone linked to Davey, but there was no need to engage them in a biased and speculative comparison exercise: ibid [29].

249 See: Geoffrey Stewart Morrison and William C Thompson, 'Assessing the Admissibility of a New Generation of Forensic Voice Comparison Testimony' (2017) 18(2) *Columbia Science and Technology Law Review* 326; Geoffrey Stewart Morrison et al, 'Consensus on Validation of Forensic Voice Comparison' (2021) 61(3) *Science and Justice* 299.

250 Proscribing jury comparisons and excluding the impressions of biased investigators actually simplifies the provision of warnings and will tend to make trials fairer and decision-making less likely to be biased and irrational.

VIII Detective J's Recognition of Eaton

We accept that, in principle, Detective J might express an opinion about Eaton's voice based on his longstanding acquaintance — his apparently genuine (ie, pre-investigative) familiarity.[251] This was qualitatively different to his purported recognition of Davey's voice at the police interview. Our evidence law should provide a clear mechanism to admit the opinions of those who are genuine (ie, non-investigative) familiars. This is because genuine familiarity can rationally assist fact-finding.

There were, however, problems with Detective J's recognition of Eaton and the directions provided.[252] The opinions of familiars are vulnerable to contamination by the conditions in which they are obtained, such that admission and a warning might not repair the threat to probative value or redress the magnitude of unfair prejudice to the defendant. As with eyewitness identifications, the identity of the suspect should not be implied or suggested by the request or the procedure structuring the identification or recognition.[253] In *Davey*, it seems likely that Eaton's involvement was known to the investigators before Detective J purported to identify him on the intercepted recordings. These were, after all, intercepts obtained on the suspicion required to secure legal permission in the form of a warrant. If the recognition was produced in suggestive circumstances — such as where Detective J was listening, already aware that Eaton was a prime suspect or warrants had been obtained to intercept his phone — then it should have been excluded. If it was recognition evidence, then Detective J was primed, expecting to hear Eaton. Similarly, the putative confirmation obtained by speaking to Eaton (at the police interview) should have been excluded because it contributed nothing to the claimed recognition but was likely to mislead.[254] The prosecution's narrative suggested a level of caution and confirmation that was not compatible with the suggestive conditions in which the listening and identification appear to have occurred.

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251 Precisely where such opinions sit within the UEL is unclear. We cannot, as Basten JA seems to contend in *Nguyen* 2017 (n 77), just admit the evidence because it was admissible at common law. Section 76 appears to proscribe the admission of such opinions: at 411–12 [20]–[21]. Section 78 is not obviously suited to displaced perceivers and should, consistent with High Court authority, be limited to direct witnesses: *Lithgow City Council* (n 201) 370–1 [45]–[46] (French CJ, Heydon and Bell JJ).

252 *Davey* (n 7) [99].

253 Best practices for eyewitness parades (ie, line-ups) require that the suspect not stand out among the foils and that an individual not involved in the investigation, and not aware of the suspect, conduct the parade: Gary L Wells et al, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence' (2020) 44(1) *Law and Human Behavior* 3, 8. These prescriptions are reflected in the *Crimes Act 1914* (Cth) s 3ZM(6).

254 *Davey* (n 7) [98].

The directions did not draw known risks to the attention of the jury or place jurors in a position to make sense of Detective J's recognition and attendant problems.[255]

IX Conclusion: Lacking Direction

> What … is vital to the criminal justice system is the capacity of jurors, when properly directed by trial judges, to decide cases in accordance with the law, that is, by reference only to admissible evidence led in court and relevant submissions, uninfluenced by extraneous considerations. That capacity is critical to ensuring that criminal proceedings are fair to an accused.[256]

> If directions are ineffective, then there is little or no point giving them. They add to the length of a trial without any real benefit. Giving directions that may backfire (ie result in jurors reasoning in the opposite way than is intended) is even more problematic, as such directions can be detrimental to the party which the direction is meant to benefit.[257]

We have identified and endeavoured to explain some of the problems with the evidence characterised as voice identification or recognition in *Davey*. In reviewing the conventional judicial directions attending the admission of a police officer's opinion evidence, we have observed how the evidence was mischaracterised in ways that helped to rationalise admission. Serious dangers were overlooked, treated superficially, or addressed in ways that were not merely misguided but misleading and unfair. The fact that the police officer's opinions were a synthesis of the entire circumstantial case was overlooked, even though it makes the opinion irrelevant and, more fundamentally, redundant — trespassing on the constitutional prerogatives of the jury. Detective J's opinions and the jury comparison were both irreparably contaminated such that they had limited, if any, value but great potential for unfair prejudice and irrationality.

Directions provided with the authority and experience of the trial court and endorsed by the TASCCA (and by extension, appellate courts in other Australian jurisdictions) did not and could not have assisted decision-making. They alluded to a few of the risks (or possibilities) for the jury to consider but did not provide practical assistance. Overlooking scientific knowledge and advice, they treated voice identification as mundane — based on the experience of the judges and the common sense of jurors — and effectively trivialised cognitive contamination. The directions in *Davey* (and many other cases) present the reader with complacent assumptions, ignorance and popular misnomers masquerading as common sense, legal experience and even wisdom. They facilitate the admission of the opinions of

255 Ibid [99]. Nothing a judge can say is likely to persuade the jury of the reality or the seriousness of the risk of error or the dangers posed by suggestion and expectation when a police officer purports to recognise an acquaintance.

256 *Dupas* (n 14) 248–9 [29].

257 CLR, *Jury Directions: A New Approach* (n 11) 24.

police officers, privileging the case advanced by the prosecutor, while insinuating that any problems could be (or should have been) effectively addressed at trial by competent defence counsel. According to the TASCCA, 'in light of the directions given to the jury … there was no unfair prejudice'.[258] Proceeding as though words are magical — this was, after all, Operation Oracle — directions were said to have removed all unfair prejudice attending the admission of Detective J's opinions.[259]

Convictions obtained through reliance on the impressions of investigators or biased jurors are incompatible with fairness and justice. Safe and socially legitimate convictions are not obtained through cognitive traps. Courts should not pretend that directions eliminate scientifically notorious dangers. Where directions are unlikely to work or unlikely to place the trier of fact in a position to rationally evaluate evidence, judges must exclude the evidence. If they do not, then some trials and some of our trial processes would seem to be primarily for show.

258 *Davey* (n 7) [74].

259 Note that Estcourt JA in *Davey* (n 7) at [58] referred to 'discernible' unfair prejudice, but risks and dangers that are not known to judges, from their (remarkably) limited and non-systematic experiences at the bench and bar, will not be discernible. See Justice Marcia Neave, 'Jury Directions in Criminal Trials: Legal Fiction or the Power of Magical Thinking?' (2012) (Speech, Supreme and Federal Court Judges' Conference, 23 January 2012) 6. See also John L Austin, *How to Do Things with Words: The William James Lectures Delivered at Harvard University in 1955* (Oxford University Press, 1962).

Bill Swannie*

A CRITICAL APPRAISAL OF THE 'NO CONTACT' RULE

Abstract

The 'no contact' rule is a professional obligation which prohibits a lawyer from directly communicating with the client of an opposing lawyer, apart from certain exceptions. Breach of the rule can result in disciplinary action by a relevant regulator, with sanctions including cancellation of the lawyer's practising certificate. This article argues that the current formulation of the rule in the *Australian Solicitors' Conduct Rules* lacks clarity in several key respects, resulting in uncertainty regarding its scope and operation. Further, the rationales commonly provided for the rule provide little guidance regarding its appropriate scope. This article provides practical proposals to clarify the rule, which would benefit solicitors, clients and the general public.

I Introduction

The *Legal Profession Uniform Law* ('*Uniform Law*')[1] and the *Australian Solicitors' Conduct Rules* ('*ASCRs*')[2] were intended to provide greater clarity and certainty regarding the regulation of Australian solicitors. Although the

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1 The *Uniform Law* can be found in sch 1 of the *Legal Profession Uniform Law Application Act 2014* (Vic) ('*Uniform Law Application Act* (Vic)') or *Legal Profession Uniform Law 2014* (NSW), which applies in New South Wales, Victoria and Western Australia: *Legal Profession Uniform Law Application Act 2014* (NSW); *Uniform Law Application Act* (Vic) (n 1); *Legal Profession Uniform Law Application Act 2022* (WA).

2 See Law Council of Australia, *Australian Solicitors Conduct Rules* (at 24 August 2015). These were drafted by the Law Council of Australia under the *Uniform Law*, and have been adopted (with minor differences) in all jurisdictions except the Northern Territory: see Law Society Northern Territory, *Rules of Professional Conduct and Practice* (at May 2005) ('*Rules of Professional Conduct* (NT)'). Unless otherwise indicated, a reference to the *ASCRs* in this article is referring to the current version in *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) ('*ASCRs*'). This version is also applied in Victoria and Western Australia, and similar versions are in force in the Australian Capital Territory, Queensland, South Australia and Tasmania. See: *Legal Profession (Solicitors) Conduct Rules 2015* (ACT)

Uniform Law has only been adopted in Victoria, New South Wales and Western Australia, the *ASCRs* impose professional obligations on solicitors throughout Australia. Given a breach of professional duties can result in disciplinary action being taken by a relevant regulator, and potentially serious sanctions for the solicitor, clarity is necessary regarding their scope and operation. However, the imprecise and confusing drafting of the 'no contact' rule in r 33 of the *ASCRs* creates significant issues concerning the rule's scope. In essence, the rule proscribes a lawyer, except in very limited circumstances, from communicating directly with the client of another lawyer in respect of a transaction or proceeding in which the lawyers in question were engaged.[3]

The rule fails to make several important clarifications, such as whether unintentional contact may be sanctioned, or whether contact during the transfer of a file is prohibited. Part II of this article outlines the serious consequences which may flow from breaching the rule, and Part III outlines some significant uncertainties regarding the scope of r 33.

Various rationales have been given for the rule, including: (1) it prevents inadvertent disclosures to the contacting solicitor; and (2) it prevents another solicitor from undermining the relationship of trust and confidence between a solicitor and their client. These rationales, and their underlying assumptions, are critically examined in Part IV of this article. Part V argues that the exercise of a court's contempt powers may address some of the concerns underlying the no contact rule.

Part VI examines five areas of uncertainty concerning r 33, and outlines how these issues could be clarified. Finally, Part VII examines broader arguments concerning the scope and rationale for the no contact rule. In summary, clarifying the scope of the rule would assist solicitors to comply with it, and would also benefit clients and the general public.

II The *ASCRs* and Solicitor Discipline

The adoption of the *ASCRs* in New South Wales and Victoria in 2015[4] represented a significant development in the regulation of Australian solicitors. As noted by

('*Solicitors Conduct Rules* (ACT)'); Queensland Law Society, *Australian Solicitors Conduct Rules* (at 1 June 2012) ('*Solicitors Conduct Rules* (Qld)'); Law Society of South Australia, *South Australian Legal Practitioners Conduct Rules* (at 21 December 2012) ('*Legal Practitioners Conduct Rules* (SA)'); *Legal Profession (Solicitors' Conduct) Rules 2012* (Tas) ('*Solicitors' Conduct Rules* (Tas)').

3 See Gino Dal Pont, *Lawyer Discipline* (LexisNexis, 2020) 361–2 [14.59]. As will be explained in Part II, the rule exists at common law and now finds expression in *ASCRs* (n 2) r 33 and in every Australian jurisdiction. The rule also applies to barristers, in a modified form. See, eg, Bar Association of Queensland, *Barristers' Conduct Rules* (at 23 February 2018) r 51. This article focuses on the rule's operation in relation to solicitors.

4 See above nn 1–2.

Gino Dal Pont, the *ASCRs* 'form the foundation for solicitors' professional rules' throughout Australia.[5]

Ultimately, the regulation of lawyers is within the jurisdiction of the superior court (usually the Supreme Court) of each state and territory. However, each state and territory has established an independent statutory body responsible for regulating solicitors practising in the jurisdiction, including disciplinary proceedings for breach of professional standards.[6] Disciplinary proceedings against a solicitor are generally conducted before a statutory tribunal.

Four key features of disciplinary proceedings will now be outlined. First, a breach of professional standards, including the no contact rule, is capable of constituting 'professional misconduct'[7] or 'unsatisfactory professional conduct'[8] and therefore provides the basis for disciplinary action by a relevant regulator against a solicitor.[9] The no contact rule applies to solicitors in every Australian state and territory,[10] however, this article will focus on the formulation of this rule within r 33 of the *ASCRs*.

Second, the purpose for which Australian solicitors are disciplined is to protect the public, and not to punish errant solicitors. This principle is regularly affirmed in

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5 Gino Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 7th ed, 2020) ix. See also Chris Edmonds, 'Misconduct of Australian Lawyers under Legislation Based on the National Model: Aligning the Common Law Tests with the New Statutory Regime' (2013) 39(3) *Monash University Law Review* 776.

6 See generally Dal Pont, *Lawyer Discipline* (n 3) ch 3.

7 At common law, 'professional misconduct' means conduct 'which would reasonably be regarded as disgraceful or dishonourable by [a solicitor's] professional brethren of good repute and competency': *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750, 761 (Lord Esher MR). Legislation now expands this definition to include conduct that 'involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence': see, eg: *Uniform Law* (n 1) s 297; *Legal Practitioners Act 1981* (SA) s 69(a) ('SA *Legal Practitioners Act*'). The common law concept remains extant: cf *Council of the New South Wales Bar Association v EFA* (2021) 106 NSWLR 383, 397 [63] (Bathurst CJ, Leeming JA and Simpson AJA).

8 'Unsatisfactory professional conduct' includes conduct 'that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent' legal practitioner: see, eg: *Uniform Law* (n 1) s 296; SA *Legal Practitioners Act* (n 7) s 68.

9 *ASCRs* (n 2) r 2.3.

10 Ibid r 33, which applies in New South Wales, Victoria and Western Australia. For other jurisdictions, see: *Solicitors Conduct Rules* (ACT) (n 2) r 33; *Rules of Professional Conduct* (NT) (n 2) rr 17.38, 23; *Solicitors Conduct Rules* (Qld) (n 2) r 33; *Legal Practitioners' Conduct Rules* (SA) (n 2) r 33; *Solicitors' Conduct Rules* (Tas) (n 2) r 38.

tribunal decisions[11] and by commentators.[12] Similarly, it is commonly argued that the no contact rule seeks to protect clients, rather than, for example, serving the interests of solicitors.[13] However, punishment of a solicitor and protection of the public are not mutually exclusive. Sanctioning a solicitor who breaches professional standards may protect the public, for example by deterring future breaches, either by the same solicitor or by others.[14]

Third, the sanction applied by a tribunal to a particular breach depends on two factors.[15] The first factor is whether the breach is characterised as 'professional misconduct' (essentially, more serious misconduct) or 'unsatisfactory professional conduct' (less serious misconduct).[16] Although there is no difference in the sanctions available for the two types of misconduct, the former is likely to result in more severe sanctions.[17] The second factor is the surrounding circumstances that would determine the appropriate sanction. These circumstances include factors such as the number of breaches,[18] whether the solicitor cooperated with the investigation,[19] and any prior disciplinary history of the solicitor.[20]

Finally, disciplinary proceedings can result in a wide range of sanctions including an order to pay the costs of the application,[21] a fine,[22] a caution or reprimand,[23] imposition of conditions on the lawyer's practising certificate, suspension or cancellation of the solicitor's practising certificate[24] and removal of a practitioner's name

11 See, eg: *Legal Services Commissioner v Poole* [2019] QCAT 381, [86] ('*Poole*'), citing *Legal Services Commissioner v Munt* [2019] QCAT 160, [43]; *Legal Services Commissioner v Bradshaw* [2008] LPT 9, [47], affd *Legal Services Commissioner v Bradshaw* [2009] QCA 126, [15], [49], [52]; *Victorian Legal Services Commissioner v Efron* [2019] VCAT 1798, [29]–[30] ('*Efron*').

12 See, eg, Dal Pont, *Lawyer Discipline* (n 3) 10 [1.12].

13 See below Part IV.

14 *Tuferu v Legal Services Commissioner* [2013] VSC 645, [97], [100] (Zammit AsJ) ('*Tuferu II*').

15 Dal Pont, *Lawyer Discipline* (n 3) 45–6.

16 Ibid 27 [2.1], 45–6 [3.3].

17 Ibid ch 4.

18 See, eg, *Legal Practitioners Conduct Board v Wharff* [2012] SASCFC 116, [13] ('*Wharff*') in which the solicitor's breach was described as 'serious' as it involved 30 separate communications over 10 months.

19 Dal Pont, *Lawyer Discipline* (n 3) 79–83.

20 *Efron* (n 11) [44].

21 See, eg, *Council of the Law Society of New South Wales v Byrnes* [2016] NSWCATOD 64, [40] ('*Byrnes*').

22 *Orlov and Pursley* [1995] NSWLST 3 ('*Orlov and Pursley*').

23 *Poole* (n 11) [92], [94].

24 See, eg, *Legal Services Commissioner v Tuferu* [2013] VCAT 1438, [17] ('*Tuferu I*'). Leave to appeal was refused in *Tuferu II* (n 14).

from the Court roll.[25] In one proceeding, a Victorian tribunal cancelled a solicitor's practising certificate, where he could not reapply for at least 12 months for breach of the no contact rule.[26] Further, sanctions are at the discretion of the tribunal, and are therefore difficult to overturn on appeal.[27]

Notably, solicitors are rarely sanctioned for breach of the no contact rule alone. In most cases, breach of other professional duties are alleged, such as acting where there is a conflict of interest,[28] or making unfounded allegations of misconduct against a solicitor.[29] Further, some tribunals describe a breach of the rule as merely 'technical', and this is reflected in minimal sanctions such as a costs order.[30] In another decision, however, Judge Lacava described it as a 'basic rule' which is 'fundamental to practice as a legal practitioner in this state'.[31] In other words, there appear to be differing views as to the importance of the rule, which is reflected in the varying and sometimes minimal sanctions applied by disciplinary tribunals.

III The Uncertain Scope of Rule 33

This Part highlights the significant uncertainty surrounding the scope and operation of r 33. The uncertainty of r 33 is compounded by the widely differing views expressed by tribunals regarding its importance, which is sometimes reflected in minimal sanctions for its breach. Whilst it is accepted that disciplinary sanctions can and should depend on the surrounding circumstances, the potentially serious consequences for a solicitor who breaches the rule reinforces the need for clarity regarding the scope of the rule.

The no contact rule was originally developed by courts, and judicial statements of the rule are still relevant even though the rule is now expressed in solicitors' conduct rules in each jurisdiction.[32] In *Re Margetson*, Kekewhich J of the Chancery Division stated '[i]t is a professional rule that where parties to a dispute are represented by solicitors, neither of those solicitors should communicate with the principal of the other touching the matters in question'.[33]

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25 *Wharff* (n 18) [69].

26 *Tuferu I* (n 24) [17].

27 See: *Tuferu II* (n 14) [46]; *Guss v Law Institute of Victoria Ltd* [2006] VSCA 88, [28] (Maxwell P, Callaway JA agreeing at [52], Chernov JA agreeing at [53]).

28 *Poole* (n 11) [41].

29 Ibid [57].

30 *Byrnes* (n 21) [38]. See also Dal Pont, *Lawyer Discipline* (n 3) 362–3 [14.60]. Dal Pont comments that 'flouting the "no contact" rule is hardly venal'.

31 *Legal Services Commissioner v Mercader* [2011] VCAT 2062, [55].

32 'In considering whether a solicitor has engaged in unsatisfactory professional conduct or professional misconduct, the [*ASCRs*] apply in addition to the common law': *ASCRs* (n 2) r 2.2.

33 *Re Margetson* [1897] 2 Ch 314, 318 ('*Re Margetson*').

Similarly, in *Jones v Jones*,[34] the Court stated that '[a]ny communication which the solicitor of one party has with a party opposed to him in the cause is extremely unprofessional'.[35]

The rule now finds expression in the *ASCRs*,[36] which provides:

> **33 Communication with another solicitor's client**
>
> 33.1 In representing a client, a solicitor shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another practitioner unless —
>
> 33.1.1 the other practitioner has previously consented,
>
> 33.1.2 the solicitor believes on reasonable grounds that —
>
> (i) the circumstances are so urgent as to require the solicitor to do so, and
>
> (ii) the communication would not be unfair to the opponent's client,
>
> 33.1.3 the communication is solely to enquire whether the other party or parties to a matter are represented and, if so, by whom, or
>
> 33.1.4 there is notice of the solicitor's intention to communicate with the other party or parties, but the other practitioner has failed, after a reasonable time, to reply and there is a reasonable basis for proceeding with the communication.

Rule 33 prohibits a solicitor from directly communicating with the client of another solicitor, apart from the listed exceptions. Although the rule only has potential disciplinary consequences for the solicitor, it also effectively prohibits a client from contacting an opposing solicitor directly, unless that client's solicitor consents. For this reason, the rule has been described as conferring a 'veto' power on a solicitor.[37]

Five significant ambiguities surrounding rule 33 will now be highlighted. First, it is unclear whether the rule applies to litigious matters or merely to non-litigious

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34 [1847] 5 Notes of Cases in the Ecclesiastical and Maritime Courts 134 ('*Jones v Jones*').

35 Ibid 140.

36 *ASCRs* (n 2) r 33. This applies in New South Wales, Victoria and Western Australia. Other jurisdictions in Australia also have a no contact rule, expressed in slightly different terms: see above n 10.

37 John Leubsdorf, 'Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests' (1979) 127(3) *University of Pennsylvania Law Review* 683, 683. Part VII of this article examines this argument and its implications.

(or transactional) matters.[38] The rule is contained in a part of the *ASCRs* dealing with 'relations with other persons', rather than the part dealing with 'advocacy and litigation'. This ambiguity in the language and placement of r 33 creates the 'potential for confusion'.[39] On the one hand, the language of r 33 could apply to both litigious and non-litigious matters. On the other hand, sub-r 33.1.2(ii) refers to the 'opponent's client', indicating that the rule applies in a litigious context. Most disciplinary proceedings for breach of r 33 and its predecessors involve litigious matters.[40]

Second, the rule has exceptions that are acknowledged in practice but not specifically referred to in r 33. For example, it is generally accepted that the rule does not apply when a solicitor contacts a client to arrange the transfer of the client file to that solicitor.[41] In these circumstances, contact with the client is necessary to effect the transfer, and it accords with the client's wishes.[42] Additionally, the rule does not prevent a solicitor from communicating with an opposing solicitor's client, for example in a social setting, on matters unrelated to the legal representation.[43] Further, the rule does not prevent a solicitor from providing a second opinion to a client who is represented by another solicitor, provided that the solicitor is not acting in the same matter.[44] It seems, then, that the rule mainly applies when there is a potential conflict of interest between the solicitor and the contacted client.

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38 Law Council of Australia, *Review of the Australian Solicitor's Conduct Rules* (Consultation Discussion Paper, 1 February 2018) 113 ('*Review of Conduct Rules*').

39 Ibid. As will be outlined in Part VI, previous formulations of the rule explicitly distinguished between its application in the litigious as opposed to a non-litigious context. See also *ASCRs* (n 2) r 22, which deals with 'communication with opponents' in the context of litigation.

40 See, eg: *Tuferu I* (n 24); *Orlov and Pursley* (n 22); *Poole* (n 11). But see *Legal Services Commissioner v Paric* [2015] VCAT 703 ('*Paric*') where a solicitor breached the rule in the context of the purchase of property. See also Neil Wertlieb and Nancy Avedissian, 'The No Contact Rule Actually DOES Apply to Transactional Lawyers' [2015] (4) *Business Law News of the California Lawyers Association* 31.

41 Dal Pont, *Lawyers' Professional Responsibility* (n 5) 758.

42 This situation may be covered by the exception in r 33.1.1 — that is, it happens with the solicitor's consent: *Review of Conduct Rules* (n 38) 140. Contact relating to transfer of a client file was a specific exemption in some formulations of the rule: see below Part VI.

43 Dal Pont, *Lawyers' Professional Responsibility* (n 5) 758. Rule 33 was amended in April 2022: see *Legal Profession Uniform Law Australian Solicitors' Conduct Amendment Rules 2022* (NSW). Previously the rule prohibited a solicitor from 'deal[ing] directly' with another solicitor's client. Now, the rule prohibits a solicitor from 'communicat[ing] about the subject of the representation'. The amendment somewhat clarifies this aspect of the rule.

44 Dal Pont, *Lawyers' Professional Responsibility* (n 5) 758. See also Virginia Shirvington, 'Critical Colleagues, Second Opinions and Solicitor Swapping' (2001) 39(6) *Law Society Journal* 45, 45. Some previous formulations of the rule specified that it applied only 'in relation to the case for which the opponent is instructed': see, eg, Law Institute of Victoria, *Professional Conduct and Practice Rules 2005* (30 June 2005) r 18.4 ('*Victoria 2005 Conduct Rules*').

Third, when the client is an organisation or company, it is uncertain whether the rule prohibits an opposing solicitor from communicating with any employee of the organisation, or merely directors and senior executives. If the rule prohibits contact with all employees, this could prevent a solicitor from legitimate evidence gathering.[45]

Fourth, on some occasions, solicitors have been found to have breached the rule by communicating with an opposing solicitor's client through an intermediary, rather than communicating with them directly.[46] However, it is unclear to what extent *indirect* contact will breach the rule. This relates directly to the rule's underlying purpose, which is discussed in Part IV below.

Finally, it was unclear whether (and to what extent) a breach of the rule depends on a solicitor being *aware* that a client is represented. Previously, r 33 appeared to apply regardless of the knowledge or awareness of the solicitor.[47] However, recently the rule was amended to apply only where 'the lawyer knows [the person is] represented'.[48]

In summary, there are significant uncertainties surrounding the scope of the no contact rule.[49] Further, decision-makers have expressed widely varying views regarding the significance of the rule. This uncertainty is problematic when considering the potential for serious consequences of breaching the rule — including the cancellation of the solicitor's practising certificate.[50]

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45 See Queensland Law Society, *Applying the 'No Contact Rule' When the Other Party is an Organisation* (Guidance Statement No 29, 13 October 2011) <https://www.qls.com.au/Guidance-Statements/No-29-Applying-the-no-contact-rule%E2%80%99-when-the-other> ('Guidance Statement No 29').

46 See, eg, *Orlov and Pursley* (n 22), in which a solicitor communicated with an opposing solicitor's client through his wife, who was also a solicitor. Both the solicitor and his wife were found guilty of professional misconduct and received substantial fines. Similarly, in *Byrnes* (n 21), a solicitor communicated with an opposing solicitor's client through his office manager. The Tribunal found that this was unprofessional conduct. However, no sanction other than costs was ordered, as the Tribunal regarded the breach as merely 'technical': at [29].

47 In disciplinary proceedings, tribunals tend to emphasise, at the sanction stage, whether the breach involved conscious wrongdoing. For example, tribunals comment on whether solicitors consciously 'flout[ed] … authority': *Paric* (n 40) [24] or whether they were warned about their conduct and continued it despite the warnings: *Wharff* (n 18) [62].

48 Similarly, earlier formulations of the rule explicitly required knowledge that the client was represented. See *Victoria 2005 Conduct Rules* (n 44) r 18.4.

49 Geoffrey C Hazard Jr and Dana Remus Irwin argue that the rule is 'overbroad and ambiguous in important respects': Geoffrey C Hazard Jr and Dana Remus Irwin, 'Towards a Revised 4.2 No-Contact Rule' (2009) 60(4) *Hastings Law Journal* 797, 798.

50 See above nn 23–6 and accompanying text.

IV Uncertainty Regarding the Rationale for the Rule

This Part argues that the no contact rule has various rationales and that these rationales provide little guidance in resolving uncertainties concerning the scope of the rule. Commonly, it is argued that the rule prevents a solicitor from undermining the relationship of trust between a solicitor and their client. However, an alternative rationale is that the rule prevents collusion between a client and an opposing solicitor, which could disadvantage the client's solicitor.

A *The Common Rationales for the Rule*

As noted previously, the no contact rule was originally developed by courts, and it has a long history.[51] The rule exists in the United States[52] and formerly in the United Kingdom.[53] Although the rule is 'longstanding',[54] its precise purpose or rationale is less clear. It is often stated that the rule seeks to prevent a solicitor from circumventing the protection provided by legal representation.[55] In other words, it protects the client's interests by preventing contact with the opposing solicitor. The risks of allowing direct communication between a client and an opposing solicitor are elaborated as follows. First, the solicitor may obtain admissions from the client which are against the client's interests.[56] Second, the solicitor may access privileged communications between the client and their solicitor.[57] Third, the solicitor may undermine the client's trust in their solicitor, for example, by questioning their competence or judgment.[58] Finally, the solicitor may persuade the client to act against their interests, such as by withdrawing or settling proceedings on unfavourable terms.

The first two concerns outlined above (obtaining admissions and accessing privileged information) relate to evidence which may be obtained from a client and used against them.[59] Rather than prohibiting contact, these concerns could possibly be addressed through other means, such as by a court being given the power to

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51 See, eg, *Jones v Jones* (n 34).

52 See Leubsdorf (n 37).

53 The Solicitors Regulation Authority, *SRA Code of Conduct for Solicitors, RELs and RFLs* (Code of Conduct, 2018) prohibits solicitors in England and Wales from 'abus[ing their] position by taking unfair advantage of a client or others': r 1.2. The Code does not otherwise prohibit a solicitor from contacting a represented client.

54 *Review of Conduct Rules* (n 38) 139.

55 Dal Pont, *Lawyers' Professional Responsibility* (n 5) 753; *Poole* (n 11) [82].

56 Dal Pont, *Lawyers' Professional Responsibility* (n 5) 753.

57 Ibid.

58 Ibid.

59 Another rationale for the rule is to prevent a solicitor from potentially being a witness in proceedings whilst also representing a client. This raises practical and ethical issues: see *ASCRs* (n 2) r 27, which prohibits a solicitor from representing a client in proceedings in which the solicitor will be required to give evidence.

order the exclusion of evidence which was obtained unfairly from another solicitor's client.[60] As with disciplinary action, such means may deter potential misconduct by preventing this type of unfairly obtained evidence from being used.[61] Therefore, arguments based on this evidence provide an unconvincing rationale for the rule. Similarly, settlement agreements that were obtained by deception or other unfair means may be set aside.[62]

The substantive rationale or concern underpinning the no contact rule is that 'solicitors [must] have the full confidence of their clients and are enabled to communicate the one with the other upon that footing'.[63] In other words, the rule seeks to prevent a solicitor from 'undermining of the other party's trust and confidence in his or her own legal practitioner',[64] by making direct contact with a client.

The rule is commonly regarded as necessary to prevent a 'dexterous' solicitor from taking advantage of a 'helpless and undefended'[65] client of an opposing solicitor, and to 'ensure that a client, no matter how sophisticated, is entitled to the protection afforded by legal representation'.[66] For example, in *Tuferu I*, a Victorian solicitor breached the rule by arranging a meeting with the opposing solicitor's client and having him sign a document indicating that he did not wish to proceed with an intervention order application.[67] The breach was found to involve serious aggravating circumstances: (1) the opposing solicitor's client was a child who did not understand the document he signed; (2) the intervention order application was against the child's father, where the solicitor acted for the child's father, and the solicitor knew that the child was separately represented; and (3) the solicitor was aware that there was a related matter before the Children's Court of Victoria involving the child.[68]

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60 Hazard Jr and Irwin note that the 'no contact rule was historically a procedural, or evidentiary rule, rather than a rule of professional conduct entailing disciplinary consequences for its breach: Hazard Jr and Irwin (n 49) 799.

61 However, exclusion of unfairly obtained evidence is not possible once a proceeding has concluded. In *Jones v Jones* (n 34) the lawyer for the husband communicated directly with the wife. The judge stated that this 'made [him] look with fear and trembling at the whole evidence', as the lawyer's conduct may have enabled him to gather evidence against the wife: at 140.

62 See, eg, *Re Margetson* (n 33) 319.

63 Ibid 318–9.

64 *Wharff* (n 18) [12]. The concern is that direct contact between a client and an opposing solicitor may 'completely undermine the confidence of [the client] in [their lawyer]': *Orlov and Pursley* (n 22) 47. See also *Nauru Phosphate Royalties Trust v Business Australia Capital Mortgage Pty Limited (in liq)* [2008] NSWSC 833, [33] ('*Nauru Phosphate*').

65 *Jones v Jones* (n 34) 140. See also: George M Cohen 'Beyond the No-Contact Rule: Ex Parte Contact by Lawyers with Nonclients' (2013) 87(5–6) *Tulane Law Review* 1197, 1239; Hazard Jr and Irwin (n 49) 801.

66 *Review of Conduct Rules* (n 37) 140.

67 *Tuferu I* (n 23) [7]–[11].

68 Ibid [14].

The rule's protective purpose explains its strict and almost absolute nature. The rule prohibits *all* communications (outside of the exceptions provided by the rule) by a solicitor with an opposing solicitor's client, regardless of whether they are harmful in the circumstances,[69] because such communication is assumed to be against that client's interests. Further, the protective purpose may explain why the rule cannot be waived by the client, but only by the client's lawyer.[70] The rule's strict operation assumes that clients are vulnerable and incapable of recognising the risks of direct contact with an opposing solicitor, and that 'lawyers will bamboozle parties [who are] unprotected by their own counsel'.[71]

B *Critique of the Common Rationales*

The common rationales for the no contact rule, and their underlying assumptions, have been countered in multiple ways. Not all clients are helpless, unsophisticated or unable to determine whether direct communication with an opposing solicitor is in their interests.[72] The no contact rule may be regarded as paternalistic in that it allows the solicitor, rather than the client, to determine whether direct communication is permitted.[73]

Further, a client may wish to communicate with an opposing solicitor in certain circumstances, for example if they believe that their solicitor is neglecting their matter or misrepresenting their likelihood of success in order to increase legal fees. The client may suspect that their solicitor is delaying settlement or not conveying settlement offers.[74] Alternatively, a client may wish to investigate settlement options with the opposing side, in order to conclude proceedings quickly and cheaply. For a client, these objectives are legitimate and even paramount, and they may override ideals concerning loyalty to a particular lawyer. Many clients are involved in a legal dispute not of their choosing and may simply wish to resolve their matter quickly and inexpensively.

Disciplinary tribunals emphasise the importance of maintaining a client's trust and confidence in their solicitor, and are particularly censorious when a solicitor criticises a client's solicitor *to the client*. For example, in *Legal Services Commissioner v Paric* ('*Paric*'),[75] a solicitor faced disciplinary action for criticising the opposing solici-

69 Cohen (n 65) 1200. But see *Tuferu I* (n 24) which demonstrates that tribunals typically examine the circumstances of the breach, to determine whether it is serious or not. Therefore, not all communications will be regarded as breaching the rule (or as warranting a sanction).

70 Cohen (n 65) 1201.

71 Leubsdorf (n 37) 686.

72 Ibid 687.

73 Ibid 710.

74 Ibid 690, cited in Hazard Jr and Irwin (n 49) 803–4.

75 *Paric* (n 40).

tor's character and fitness to practice.[76] This conduct was found to breach the no contact rule and a separate regulation prohibiting the use of 'discourteous, offensive and provocative' language.[77] The Tribunal characterised this conduct as professional misconduct and the solicitor was ordered to pay a fine and the costs of the proceeding. Significantly, the Tribunal in this proceeding regarded the solicitor's conduct as particularly serious when the solicitor copied the opposing solicitor's clients into emails.[78]

Notably, disciplinary tribunals have on occassion declined to enquire into or determine whether criticism or allegations made by one solicitor against another are true or justified. Rather, merely *making* the criticism or allegation is regarded as sufficient to breach the no contact rule. For example, in *Paric*,[79] the Tribunal regarded the truth or falsity of the allegations as a 'personal dispute' between the solicitors, which was inappropriate for the Tribunal to decide.

Rule 32.1 of the *ASCRs* prohibits a solicitor from making

> an allegation against another Australian legal practitioner of unsatisfactory professional conduct or professional misconduct unless the allegation is made bona fide and the solicitor believes on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it.[80]

This rule prohibits a solicitor from making *unfounded* allegations of misconduct against another solicitor. However, the no contact rule has been interpreted as prohibiting *all* criticism of other solicitors to their client or third parties (although not to professional bodies), regardless of whether or not the criticism is valid. This is concerning, when considering that principles of free speech indicate that statements which are substantially true should not be subject to liability or restriction.[81] The no contact rule, however, as interpreted and applied by courts and tribunals, raises significant issues concerning communications which are possibly truthful and significant for the contacted client.[82]

C *An Alternative Rationale for the Rule*

An alternative rationale for the no contact rule is that it reduces the risk of collusion between the client and an opposing solicitor which may deprive the client's solicitor

76 Ibid [19]–[22].

77 Ibid [29]–[30]; *Victoria 2005 Conduct Rules* (n 44) r 21. The rules now require a solicitor to be 'honest and courteous in all dealings in the course of legal practice': *ASCRs* (n 2) r 4.1.2.

78 *Paric* (n 40) [34], [43].

79 Ibid [31].

80 *ASCRs* (n 2) r 32.1.

81 Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 7–12.

82 Leubsdorf (n 37) 688.

of legal fees.[83] For example, in *Re Margetson*,[84] a solicitor contacted former clients with whom he was in dispute, and persuaded them to settle the dispute and terminate the retainer of the client's new solicitor. The new solicitor then sued the former solicitor for his costs. The Court ordered the former solicitor to pay the new solicitor's costs up to the time of settlement, and the costs of the proceeding.[85] This decision, which provides a classic statement of the no contact rule,[86] did not involve disciplinary action against a solicitor. Rather, the proceeding was brought by a solicitor for the recovery of his legal costs from another solicitor.

Re Margetson demonstrates that *one* purpose served by the no contact rule is to protect solicitors from being deprived of legal fees.[87] The rule can therefore operate to protect a solicitor's interests, rather than only protecting the client's interests.[88] In this proceeding, the Court stated that the no contact rule is 'highly consonant with good sense and convenience, because otherwise solicitors cannot really do their duty'.[89] In this statement, the Court aligns the interest of solicitors with common sense. However, the interests of clients may not always align with those of their solicitors. Rather, the interests of a solicitor and their client may diverge on the issue of communication with an opposing solicitor.

Scholars such as Christine Parker emphasise that the rules of legal practice, including the no contact rule, were developed by lawyers and are enforced by lawyers who work for legal regulators such as the Legal Services Commission, and by tribunal members who include lawyers.[90] Historically, the Australian legal profession was largely self-regulated.[91] Although these rules are often said to be in the public

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83 Cohen (n 65) 1201–2.

84 *Re Margetson* (n 33).

85 Ibid 321.

86 Dal Pont, *Lawyers' Professional Responsibility* (n 5) 753.

87 As outlined above, the rule has many purposes.

88 Leubsdorf (n 37) 688–93. It is notable that the Court in *Re Margetson* (n 33) did not consider whether the settlement agreed to by the clients was beneficial to them, or reasonable.

89 *Re Margetson* (n 33) 318.

90 Christine Parker, 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness' (2002) 25(3) *University of New South Wales Law Journal* 676, 682, 686. Legal profession disciplinary tribunals generally include lay persons. However, a lawyer (who is often a judge) is usually chair and therefore exercises considerable influence over the tribunal's deliberations and decision.

91 Dal Pont, *Lawyer Discipline* (n 3) chs 1, 6. This is no longer the case. For example, in Victoria, the Legal Services Commissioner is a statutory office independent of the profession. See: *Uniform Law Application Act* (Vic) (n 1) ss 48–9; 'About the Board and Commissioner', *Victorian Legal Services Board and Commissioner* (Web Page, 27 January 2023) <https://www.lsbc.vic.gov.au/about-us/board-and-commissioner/about-board-and-commissioner>.

interest or for the benefit of the public,[92] they also operate to benefit members of the legal profession.

The principle that the no contact rule can be waived by the solicitor but not by the client supports the argument that the rule seeks to protect a solicitor's interests, rather than the client's interests.[93] If the rule truly sought to protect the client's interests, it could be waived by the client, similarly to other protections such as the prohibitions placed on a solicitor acting where there is a conflict of interest.[94]

V Contempt of Court May Provide an Alternative to Disciplinary Action

This Part argues that the law of contempt of court may provide a suitable alternative to disciplinary action against a solicitor for breach of the no contact rule. Part V(A) outlines that Australian courts are currently using contempt powers to overcome the limitations of the no contact rule. Part V(B) outlines circumstances in which contempt powers may not be available or appropriate.

A *Contempt of Court*

At common law, courts have powers under the law of contempt to regulate their proceedings and to prevent interference with a proceeding.[95] Interference with a proceeding may take many different forms, such as disobedience of a court order, or using improper pressure on another party to withdraw from or settle proceedings.[96] Contempt powers enable courts to make orders to protect and ensure the integrity of judicial proceedings.

Superior courts have the inherent power to make orders relating to conduct which may interfere with the course of justice in a proceeding.[97] This is distinct from the rules of legal practice and the disciplinary powers of tribunals outlined previously in this article. Contempt proceedings seek to maintain the authority of the court,[98] whereas disciplinary action generally seeks to protect the public. However, the exercise of contempt powers may address the same concerns as disciplinary sanctions for breach of the no contact rule. Moreover, they may do so more directly and effectively than disciplinary sanctions, by providing a more timely and practical response to the potential harms of direct contact between a solicitor and an opposing solicitor's client.

92 See, eg, Dal Pont, *Lawyer Discipline* (n 3) 4–5 [1.3].

93 Leubsdorf (n 37) 688–93.

94 Hazard Jr and Irwin (n 49) 825. See *ASCRs* (n 2) rr 10–12.

95 Sharon Rodrick et al, *Australian Media Law* (Lawbook, 6th ed, 2021) ch 6, 416.

96 Ibid 417–18.

97 *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1, 7.

98 Ibid.

As mentioned previously, a significant concern underpinning the rule is the possible impact that direct contact with a client may have on current proceedings between parties. In *Day v Woolworths Ltd* ('*Day v Woolworths*'),[99] a self-represented party was restrained from contacting or communicating with an insurance company involved in the proceedings, other than through the company's lawyers. The Court acknowledged that the self-represented party 'attempt[ed] to obtain an advantage in the litigation by undermining the relationship among [the insurer] and [its] solicitors'.[100] The self-represented party was not a lawyer, and therefore was not bound by the rules of professional practice. However, they were completing legal training and were experienced in litigation.[101] The Court's order, made under its contempt power, operated to apply the no contact rule to a non-lawyer.

The Court's decision in *Day v Woolworths* demonstrates a practical approach to the concerns underpinning the no contact rule. The self-represented party was not subject to the disciplinary powers of any regulator. However, the Court exercised its contempt powers to make suitable orders. Further, the Court's orders addressed the possible impact of the conduct *at the time* and into the future. This type of response may be more practically effective than taking disciplinary action, which may not commence for months or years after the relevant conduct. Although the legal profession is regulated in order to protect the public, the nature of disciplinary proceedings may make achieving this goal difficult in many cases. First, disciplinary action usually takes place months or even years after the relevant conduct. Second, disciplinary action is generally directed towards the impugned solicitor, and tribunals can generally only make orders relating to the respondent. A client may make a complaint regarding a solicitor's conduct to a regulator, but tribunals have limited powers regarding compensation or other remedies for the client.[102]

In *Nauru Phosphate*,[103] the New South Wales Supreme Court exercised its contempt powers in circumstances where the no contact rule might otherwise have been breached. This decision is controversial in that it involved *indirect* communication between solicitors for one party to proceedings, and the opposing party.[104]

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99 [2018] 3 Qd R 593 ('*Day v Woolworths*').

100 Ibid 597–8 [9]. The self-represented party alleged professional misconduct by the insurer's solicitors: at 598 [11]. Just as in the decisions referred to in Part II(B) of this article, the Court did not determine whether the allegations were true.

101 Ibid 597–8 [7]–[9], 599 [18].

102 Parker (n 90) 691. The Victorian Legal Services Board and Queensland Legal Services Commission have the power to order payment of compensation to a client for direct financial loss. See, eg, 'Compensation for Financial Loss', *Victorian Legal Services Board and Commissioner* (Web Page, 20 July 2021) <https://lsbc.vic.gov.au/consumers/how-we-can-help/compensation/compensation-financial-loss>.

103 *Nauru Phosphate* (n 64).

104 Decisions such as *Orlov and Pursley* (n 22) and *Byrnes* (n 21) demonstrate that a solicitor may breach the no contact rule by instructing someone else to make the prohibited contact. *Nauru Phosphate* (n 64) extended this principle to circumstances where there is no direct communication with the other party at all, but where the solicitor *intends* the communication to reach and influence the opposing client: at [31].

However, the Court regarded the solicitor's conduct as 'scandalous',[105] 'underhanded and wrong'.[106] The communication criticised the conduct of the client's solicitors, which was likely to cause the client to mistrust the solicitor's advice and motives,[107] and to induce suspicion and lack of confidence in the client's solicitor.[108] The Court regarded the communication as likely to interfere with the proceeding by persuading the client to settle without having obtained 'proper [legal] advice'.[109] This undermined the client's free choice of whether to continue with the proceedings or to settle.[110] The Court did not determine whether this conduct constituted professional misconduct, as this was not the issue. However, it restrained the solicitor from communicating 'directly or indirectly' with the other party except through their solicitors.[111]

In *Allison v Tuna Tasmania Pty Ltd*,[112] the Supreme Court of Tasmania considered the decision in *Nauru Phosphate* in the context of an application to restrain a barrister from continuing to act in the proceeding. The barrister had breached the no contact rule by attending a meeting with the opposing solicitor's client, without the client's solicitor being present, at which settlement of the proceeding was discussed.[113] Initially, the Court restrained the barrister from continuing to act in the proceeding.[114] However, on appeal, the Supreme Court of Tasmania modified the order by merely restraining the barrister from acting as the sole or senior counsel in the proceeding.[115] The Supreme Court of Tasmania, on appeal, emphasised that the barrister immediately provided details of the meeting to the client's solicitor and did not deny the meeting or try to conceal it, and also acknowledged that it was wrong.[116] The Court regarded the original order as going beyond what was reasonably necessary to protect the integrity of the judicial process and the due administration of justice in the proceeding.[117] Rather, due weight needed to be given to the litigant having their barrister of choice, and the cost and inconvenience of changing counsel midway through a complex proceeding.[118]

105 *Nauru Phosphate* (n 64) [30].

106 Ibid [35].

107 Ibid [27].

108 Ibid [33], [35].

109 Ibid [35]. It is unclear why the Court assumed that the client could not obtain advice from their solicitors before responding to the communication.

110 Ibid [33].

111 Ibid [39]. The solicitors were also ordered to pay the costs of the proceedings on an indemnity basis: at [42].

112 [2011] TASSC 52.

113 Ibid [7].

114 Ibid [39].

115 *Allison v Tuna Tasmania Pty Ltd* (2012) 21 Tas R 293, 305–6 [37].

116 Ibid 305 [36].

117 Ibid.

118 Ibid 300 [21], 303–4 [30], 304–5 [32], 305 [34].

These decisions demonstrate that Australian courts currently use their contempt powers to restrain conduct which may interfere with the administration of justice. Exercising these powers may overcome some of the limitations of the no contact rule, such as the rule applying only to solicitors and not to self-represented parties, and possibly not applying to indirect communications with a client. Further, the curial use of contempt powers may be more practical and effective than disciplinary action against a solicitor for breach of the no contact rule. This is because exercise of contempt powers can address conduct directly and immediately. This is unlike disciplinary action, which is inevitably delayed and cannot address the harms of unprofessional contact with a client directly.[119]

B *Contempt May Not Be Available or Appropriate in All Circumstances*

Although courts can, in certain circumstances, exercise their contempt powers when there has been direct contact between a solicitor and an opposing solicitor's client, this will not be available in all cases. In particular, it will only be available when there is a proceeding already on foot. It will not be available in purely transactional matters which do not involve court proceedings. This represents a major limit on the power of courts to redress any harm of direct contact. Similarly, the exercise of contempt powers may not be effective if a proceeding has concluded. Although a court may sanction a solicitor who has breached the no contact rule, it may be difficult for a court to determine the extent, if any, to which particular conduct has interfered with the administration of justice in a proceeding. Interference with the administration of justice is essential for the exercise of contempt powers, but it is less relevant in disciplinary proceedings.

There may be broader objections to the use of contempt powers in the context of breaches of professional standards. First, courts' powers to punish for contempt are derived from the common law, and therefore, they are not defined or limited like legislative powers.[120] Therefore, contempt powers may be administered by courts in a less predictable way than disciplinary sanctions, which are partially defined by legislation.[121] However, a court's exercise of contempt powers is subject to review on appeal.

Second, only superior courts have the inherent power to punish for contempt. Lower courts and tribunals have no contempt powers, unless granted by legislation.[122] Therefore, only superior courts can exercise this power without specific legislative authority.

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119 It is assumed that contact with a client comes to the attention of the client's own solicitor in a timely manner, which may not always be the case.

120 Rodrick et al (n 95) 416–7.

121 See, eg, *Uniform Law Application Act* (Vic) (n 1) s 150A.

122 Legislation usually grants lower courts and tribunals limited powers regarding contempt. See Rodrick et al (n 95) 421–4.

Third, court proceedings are commonly more expensive than tribunal proceedings. It may be more expensive for the parties and not an efficient use of the court's time for breaches of professional standards to be determined in a court rather than in a tribunal. It is acknowledged, however, that most disciplinary matters commence before a tribunal and are brought by a regulatory body.[123] Conversely, an action for contempt will be pursued in court precisely because it is not a disciplinary proceeding. Therefore, the costs issues are different in disciplinary proceedings as compared to contempt proceedings.

Further, exercising contempt powers may not have the same deterrent effect as disciplinary action. The purpose of disciplinary action against a solicitor is to determine whether rules of professional practice have been breached, and if so, the appropriate sanction which must be applied. Disciplinary proceedings focus almost exclusively on the practitioner and their conduct. Further, courts and tribunals consider all the surrounding circumstances in determining an appropriate sanction.[124] Disciplinary proceedings may have a greater educational effect than contempt proceedings, in terms of the practitioner involved, the legal profession, and the broader community. Decisions of disciplinary tribunals can be particularly educative if they are reported in the mainstream media or in professional legal journals.[125]

On the other hand, contempt powers are inevitably exercised in the context of another proceeding, and are peripheral to that proceeding. These powers may be less known or understood in the broader community. They are controversial, in that a judge who alleges contempt may also hear and determine the charge and penalty.[126] The focus of contempt proceedings is the impact of certain conduct on the administration of justice in a proceeding.[127] Disciplinary action, on the other hand, focuses on whether the solicitor's conduct meets certain professional standards.[128]

Additionally, disciplinary proceedings have the public interest advantage of naming the offending solicitor, and commonly their name is then listed on a publicly accessible website maintained by the regulator, serving as a warning to unsuspecting future clients.[129] On the other hand, this warning function is not a feature of court reports for contempt proceedings because, at present, adverse court findings are sometimes not automatically linked to the names of lawyers on the

123 Dal Pont, *Lawyers' Professional Responsibility* (n 5) 815–16.

124 In *Tuferu II* (n 14) the Victorian Supreme Court emphasised that once there has been a finding of professional misconduct, the sanction is discretionary: at [46].

125 For example, the Law Institute of Victoria publishes a column on legal ethics in its monthly journal, the *Law Institute Journal*.

126 Rodrick et al (n 95) 430–432.

127 Ibid 416–7, 421.

128 See, eg, *ASCRs* (n 2) r 2.3.

129 See, eg, 'Disciplinary Register', *Legal Profession Conduct Commissioner* (Web Page) <https://lpcc.sa.gov.au/disciplinary-register?page=1>.

regulator's site. Contempt proceedings generally adopt a consequentialist approach, where the primary consideration is the effect of certain conduct on a proceeding.

Disciplinary action, however, focuses on relatively fixed standards of conduct. This is reflected, for example, in the strict approach taken to the no contact rule in some decisions. In *Tuferu I*, the Tribunal rejected the solicitor's argument that he was acting as a 'mediator' between the two parties.[130] Although the solicitor felt obliged to resolve disputes in his local community, his primary duty as a lawyer was to uphold the proper administration of justice.[131] Similarly, in *Orlov and Pursley*,[132] the solicitor argued that he contacted the opposing solicitor's client and arranged settlement of the proceeding in order to assist his friend, the opposing solicitor's client. However, the Tribunal rejected this explanation, stating that the settlement was on terms favourable to the solicitor's client.[133]

Yet, disciplinary proceedings are not entirely lacking a consequentialist aspect, as courts and tribunals consider all of the surrounding circumstances when determining a sanction. Where the breach is considered trivial, the sanction may be minimal, such as a reprimand. However, where the breach is serious or repeated, the sanction may be a fine or even suspension of a solicitor's practising certificate. Therefore, both contempt of court and disciplinary proceedings consider the seriousness of the breach and its impact on proceedings.

In summary, contempt of court may be available as an alternative to disciplinary action where a solicitor has breached the no contact rule. Courts may use contempt powers to redress the harms of direct contact with a client relatively quickly and in a practical manner. However, contempt powers will not be available in all circumstances. Such powers are only available when there is a proceeding already on foot. Further, contempt powers are relatively undefined, and little-known by the general public. Therefore, contempt powers and disciplinary action both ought to be considered where a solicitor makes direct contact with an opposing solicitor's client.

VI Clarifying the No Contact rule

This Part provides practical recommendations on how r 33 could be clarified to resolve the uncertainties outlined in Part III. In summary, these uncertainties are: (a) whether the rule applies to litigious and non-litigious matters; (b) whether it applies to file transfer, providing a second opinion and communications on other matters; (c) the application of the rule when the client is a company or organisation; (d) the extent to which the rule prohibits communication through an intermediary; and (e) whether a breach of the rule depends on a solicitor being aware that the client is represented. The following sections will address these issues in turn.

130 *Tuferu I* (n 24) [10].

131 Ibid [13].

132 *Orlov and Pursley* (n 22).

133 Ibid.

A *Litigious and Non-Litigious Matters*

As mentioned previously, r 33 is located in the part of the *ASCRs* dealing with 'relations with other persons', rather than the part dealing with 'advocacy and litigation'. This is potentially confusing, as it suggests that the rule does not apply in a litigious setting. This appears unintentional, as the rule has traditionally been understood as applying in both a litigious and non-litigious setting.

Further, the 'advocacy and litigation' part of the *ASCRs* contains r 22.4 (titled 'communication with opponents'), which provides that '[a] solicitor must not confer or deal with any party represented by or to the knowledge of the solicitor indemnified by an insurer, unless the party and the insurer have signified willingness to that course'. This rule appears to be a narrow form of the no contact rule, applying only in the insurance context. It is unclear how this specific rule relates to the broader provision in r 33.

Under the previous rules applying in Victoria ('*Victoria 2005 Conduct Rules*'),[134] there were two separate no contact rules — one applying to litigious matters,[135] and one applying to other matters.[136] Rule 25 was in the part titled 'relations with other practitioners'. It was substantially similar to the current r 33, except in the following respects.

First, r 25 applied 'in any matter other than in relation to a case in court'.[137] Therefore, the rule did not apply to litigious matters, which were governed by r 18 (discussed below). Second, the exception concerning delay by the other lawyer in replying only allowed communication 'for the sole purpose of informing the other party that the practitioner has been unable to obtain a reply from that party's practitioner and requests that party to contact the practitioner'.[138]

On the other hand, the equivalent exception in r 33 appears to allow communication with the client *on any topic*, provided the other lawyer has failed, after a reasonable time, to reply. However, the r 33 exception requires there to be a 'reasonable basis for proceeding with the communication'.[139]

Third, there was no exemption in the former r 25 for enquiring whether the other party is represented, as there is in rule 33. Finally, r 25 expressly provided for the transfer of a client's file from one solicitor to another.[140]

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134 *Victoria 2005 Conduct Rules* (n 44).

135 Ibid r 18.4.

136 Ibid r 25.

137 Ibid r 25.1.

138 Ibid r 25.1.1(b).

139 *ASCRs* (n 2) r 33.1.4. It is unclear what this requirement means, apart from a delay in the other solicitor responding.

140 *Victoria 2005 Conduct Rules* (n 44) r 25.2.

The *Victoria 2005 Conduct Rules* included a separate no contact rule which applied to litigious matters. It was in the 'advocacy and litigation' part of the rules and titled 'Communications with Opponent'. Rule 18.4 is substantially similar to r 33, however, there was no exception for contact following a delay in responding by the other lawyer (as in r 33.1.4). Also, r 18.4 prohibited communication 'in relation to the case for which the opponent is instructed', whereas r 33 appeared to prohibit communication on any topic, until its amendment in April 2022.[141]

As mentioned above, the no contact rule has traditionally been understood as applying in both litigious and non-litigious matters. Rule 33 should be clarified to reflect this reality. In its 2018 review of the *ASCRs*, the Law Council of Australia ('LCA') noted the 'potential for confusion' in placing r 33 in the part dealing with 'relations with other persons'.[142] The LCA recommended either 'replicating rule 33 … in the Part dealing with Advocacy and Litigation, or … including commentary to … rule 22 that draws solicitors' attention, when in an advocacy setting, to the requirements of rule 33'.[143]

The first option (replicating the rule) is potentially confusing, particularly if — as in the *Victoria 2005 Conduct Rules* — there are differences between the versions of the rule in litigious as opposed to non-litigious matters. Rather, the commentary to both rr 33 and 22 should clarify that the former applies in both litigious and non-litigious matters. This would support the protective and educative purpose of the rules.

B *File Transfer, Second Opinions and Other Communications*

The second area of uncertainty regarding r 33 is whether it applies to file transfer, providing a second opinion, and communications on other matters. These matters will be addressed in turn.

Regarding file transfer, some earlier versions of the rule have expressly excluded the transfer of a client's file from one solicitor to another from the operation of the rule.[144] However, this exemption is not included in r 33. In its 2018 review, the LCA argued that an express exemption is unnecessary, as transfer of a client file is covered by r 33.1.1 (which concerns prior consent of the other practitioner).[145] However, this reasoning may be questioned, as it is not necessarily the case that a solicitor whose retainer is terminated would consent to contact with the former client. Although, it is likely that this situation is outside the scope of the rule, as the solicitor–client relationship no longer exists when a solicitor's retainer is terminated.

Likewise, where a solicitor provides a second opinion to a person represented by another solicitor, this will be in many cases outside the scope of r 33. This is because

141 See below Part VI(C).

142 *Review of Conduct Rules* (n 38) 113.

143 Ibid.

144 See, eg, *Victoria 2005 Conduct Rules* (n 44) r 25.2.

145 *Review of Conduct Rules* (n 38) 140.

communicating with the client of another solicitor is not prohibited per se by the rule. Rather, communication is prohibited only if the solicitors are either opponents in litigation or acting for different parties in a transaction.[146] There are ethical obligations on a solicitor who provides a second opinion to another solicitor's client, such as not disparaging the client's solicitor, but this is separate from r 33.[147]

Related to the above, r 33 does not prohibit a solicitor from communicating with a person represented by another solicitor — including an opposing solicitor's client — on matters unrelated to the proceeding or transaction. Before April 2022, r 33 appeared to prohibit communication on any topic and in any circumstances. However, since the amendments, the rule prohibits only communications 'about the subject of the representation'.[148] As mentioned above, previous formulations of the rule were much clearer on this point. For example, r 18.4 of the *Victoria 2005 Conduct Rules* applied only 'in relation to the case for which the opponent is instructed'. The amendment of r 33 clarifies that communication is prohibited only in relation to the matter or proceeding in which another solicitor is instructed. This enables, for example, a solicitor to have social contact with an opposing solicitor's client, provided that the solicitor does not use the occasion to discuss the matter or to obtain information from that client.

C *When the Client is a Company or Organisation*

Difficult issues arise under r 33 when the client is a company or organisation rather than an individual. This is because a solicitor may have legitimate reasons to communicate with an organisation or its personnel, such as the employees of a company. Legally, a company acts only through its officers and representatives, including, in some circumstances, its employees.

Generally, a company's directors and senior executives are the authorised representatives, and therefore are the client for the purposes of r 33.[149] Such officers have power to instruct in the conduct of proceedings and to bind the company to a settlement, whereas ordinary employees generally do not. Restricting client status to directors and senior executives is consistent with there being no property in a witness, and a litigant's right to a fair trial.[150] For example, the *Professional Conduct and Practice Rules 1995* (NSW) expressly prohibited contact 'where the opposing party … is a corporation, [with] any person authorised to make admissions on behalf of the corporation, or to direct the conduct of the proceedings' except

146 See Shirvington (n 44) 45.

147 Ibid.

148 See: *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) r 33, as at 27 May 2015; *ASCRs* (n 2) r 33.

149 See, eg, Law Institute of Victoria, *Communicating with Another Solicitor's Client* (Guidelines, 12 October 2022) 2. See also Guidance Statement No 29 (n 45).

150 Leubsdorf (n 37) 695.

in certain circumstances.[151] On the other hand, Virginia Shirvington argues that the rule prohibits contact with *any* of the corporation's officers or employees.[152] However, no reasons are provided for this extremely expansive interpretation of the rule.

This issue is particularly important in legal disputes between a company and an employee or employees. It may prohibit a solicitor acting for an employer from contacting an employee, for example, to obtain evidence from that employee or to ask for them to act as a witness where the employee has their own representation in the legal dispute. Therefore, the rule generally does not prevent an opposing lawyer from contacting an employee of their client, provided that the employee is not separately represented. As outlined above, the rule does not prohibit a solicitor from communicating with a company or its representatives on matters unrelated to the transaction or proceeding.

D *Communicating Through an Intermediary*

As mentioned previously, solicitors have been found to breach r 33 by contacting the opposing solicitor's client through an intermediary, rather than directly. This has occurred in three notable Australian decisions.[153] All three decisions have unique circumstances, and it is uncertain whether indirect contact will be regarded as breaching the rule in other circumstances.

On the one hand, a finding that the rule can be breached by *indirect* contact seems counterintuitive, as the essence of r 33 is prohibiting direct contact. On the other hand, the scope of the rule logically depends on its purpose or rationale. As outlined in Part IV above, the main rationale identified is preventing a solicitor from undermining the client's confidence in their lawyer. From this perspective, it matters little whether the contact is direct or indirect, and therefore indirect contact may also be sanctioned. However, this creates great uncertainty regarding the scope of the rule, and the potential for inadvertent breaches. This is particularly so given that a client (as opposed to their solicitor) is generally free to contact an opposing party, and a solicitor may instruct their client regarding this without breaching the no contact rule.[154]

In *Orlov and Pursley*, a solicitor communicated with an opposing solicitor's client through his wife, who was also a solicitor. Both solicitors were found guilty of

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151 Law Society of New South Wales, *Professional Conduct and Practice Rules 1995* (at 11 December 1995) r 18.2. Rule 18 was titled 'Duty Not To Influence Witnesses' and was in the part of the Rules dealing with 'Practitioner's Duties to the Court'. The rule was distinct from the broader no contact rule, which was contained in r 31.

152 Virginia Shirvington, 'Civility and Thoughtfulness Needed in Communications' (2005) 43(7) *Law Society Journal* 44, 44.

153 See: *Nauru Phosphate* (n 64); *Orlov and Pursley* (n 22); *Byrnes* (n 21).

154 Dal Pont, *Lawyers Professional Responsibility* (n 5) 754–5 [21.250].

professional misconduct and received substantial fines.[155] The Tribunal regarded this conduct as particularly serious, as it resulted in the contacted client settling legal proceedings on terms that favoured the opposing solicitor's client. Further, the Tribunal found that the contact 'completely undermined the confidence of [the client] in [their lawyer]'.[156]

Similarly, in *Byrnes*,[157] a solicitor contacted an opposing solicitor's client through his office manager. The Tribunal found that this was unprofessional conduct. However, no sanction other than costs was ordered, as the Tribunal regarded the breach as merely 'technical'.[158] The finding that the rule was breached in these circumstances was justified, as the office manager was an employee and legally obliged to carry out the employer's directions. The decision confirms that a solicitor cannot direct another person (such as an employee) to do an act which the solicitor is prohibited from doing, particularly where the solicitor obtains the benefit of the agent's act.

Although *Nauru Phosphate* concerned indirect contact, this decision involved the Court exercising its contempt powers, rather than directly invoking the no contact rule.[159] Therefore, this decision does not concern the scope of r 33. However, the outcome was similar to disciplinary proceedings, in that the Court restrained the solicitor from communicating 'directly or indirectly' with the other party except through their solicitors.[160]

In *Orlov and Pursley*,[161] and *Byrnes*,[162] solicitors breached the no contact rule by instructing someone else to contact the client. In *Nauru Phosphate*, however, the Court was less concerned with whether there was any communication with the other party at all, and rather focused on the solicitor's *intention* to communicate with and influence the opposing solicitor's client.[163] Similarly to *Orlov and Pursley*, the Court regarded such communication as likely to undermine the client's confidence in their solicitor.[164]

In summary, the decisions examined in this section do not mean that every contact between a solicitor and an opposing solicitor's client through a third party will

155 *Orlov and Pursley* (n 22).

156 Ibid.

157 *Byrnes* (n 21).

158 Ibid [29]. The circumstances involved a delay in the opposing solicitor responding to communications, and therefore may have come within the exception in r 33.1.4, had this rule been applicable.

159 *Nauru Phosphate* (n 64) [32]–[33], [36]–[37].

160 Ibid [39]. The solicitors were also ordered to pay the costs of the proceedings on an indemnity basis: at [42].

161 *Orlov and Pursley* (n 22).

162 *Byrnes* (n 21).

163 *Nauri Phosphate* (n 64) [31], [35].

164 Ibid [35].

necessarily breach the rule. Rather, this will only be the case in limited circumstances. An employment (or agency) relationship between the solicitor and the intermediary is more likely to give rise to a breach. Similarly, there may be a breach where the intermediary is also a solicitor, and is therefore assumed to be aware of their professional obligations. Other circumstances in which communication is made through an intermediary are less clear.

E *Relevance of a Solicitor's Knowledge*

The final area of uncertainty concerns the relevance (if any) of a solicitor's knowledge that the contacted party is legally represented. Previously, r 33 appeared to impose strict liability meaning that accidental or inadvertent contact with a client could breach the rule. However, due to a recent amendment, the rule now requires that the solicitor 'knows' that the person is represented. The type of 'knowledge' that is required is an important issue, given the potentially serious consequences for breaching professional conduct rules.[165]

Previous formulations of the rule explicitly required knowledge that the client was represented. For example, the *Victoria 2005 Conduct Rules* prohibited (and potentially sanctioned) contact only if 'to the practitioner's knowledge', another practitioner was currently acting for the client.[166] As mentioned previously, r 25 applied in non-litigious matters only.[167] As the drafting of the *Victoria 2005 Conduct Rules* indicates, in litigious matters, knowledge that a person is represented may be presumed — assuming that a solicitor has entered an appearance. However, such knowledge cannot be so easily assumed in non-litigious matters.

The recent amendment of r 33, which now requires 'knowledge', provides some additional clarity. However, it remains unclear exactly what type of knowledge (or awareness) is required. For example, is it sufficient that the solicitor had reason to believe that a person was legally represented? Even when the relevant rules do not require knowledge, tribunals sometimes require such proof. Tribunals may regard this as necessary to mitigate the potential severity of an inadvertent breach. For example, in *Tuferu I*, the Tribunal emphasised that the respondent solicitor knew, or had reason to believe, that the client was represented by another solicitor.[168] Sanctions are at the discretion of a tribunal, and therefore, an inadvertent or accidental breach

165 As mentioned previously, breach of a rule of professional practice is separate from the imposition of a sanction. That is, a rule may be breached but no sanction, or minimal sanctions, may be imposed. At the sanction stage, disciplinary tribunals tend to emphasise whether the breach involved conscious wrongdoing, such as whether the solicitor consciously 'flout[ed] authority': *Paric* (n 40) or whether they were warned about their conduct and continued it despite the warnings: *Wharff* (n 18).

166 See *Victoria 2005 Conduct Rules* (n 44) r 25.

167 Ibid r 18 applies in litigious matters.

168 *Tuferu I* (n 24) [9]. This decision involved breach of *Victoria 2005 Conduct Rules* (n 44) r 18.4, which does not explicitly require knowledge that the client is represented.

is unlikely to result in more than a reprimand — particularly if the solicitor has a previously unblemished professional record.

VII Wider Reform of the No Contact Rule

Some scholars argue for wider reform of the no contact rule. This Part examines arguments advanced by American scholars in this regard. First, it examines issues concerning delay and neglect by the opposing solicitor. Second, it examines arguments that the opposing solicitor's client (rather than the solicitor) should be able to consent to direct contact.

Lawyers' ethics scholar John Leubsdorf argues that a solicitor should be permitted to communicate with an opposing solicitor's client in certain circumstances, provided that they simultaneously communicate with that client's solicitor.[169] This would address, for example, the risk of delay or neglect by a solicitor to pass on an offer of settlement to a client. This situation is to some extent addressed by r 33.1.4, which permits direct communication

> where there is notice of the solicitor's intention to communicate with the other party or parties, but the other practitioner has failed, after a reasonable time, to reply and there is a reasonable basis for proceeding with the communication.[170]

Leubsdorf goes beyond this exception, however, by requiring simultaneous communication with the client's solicitor. His proposal seeks to protect a client's interests, by protecting them from delay or neglect by their solicitor, particularly regarding settlement offers.[171] For example, by delaying or not passing on a settlement offer, a solicitor may prevent a client from considering and accepting an offer which may be in their interests. However, his proposal also seeks to protect a solicitor's interests by providing simultaneous notice of the communication. This could prevent collusion between the contacting solicitor and the client, to the detriment of the contacted client's solicitor.

However, Leubsdorf's proposal may not go far enough. Specifically, it does not limit the rule to the interests it seeks to promote, or prevent unjustified restrictions on a client's ability to communicate with an opposing solicitor. Rather, the rule may prevent a client from contacting an opposing solicitor even where the client has decided that this is appropriate and preferable to communicating through their own solicitor.

Geoffrey C Hazard Jr and Dana Remus Irwin argue that the no contact rule should not apply if the client waives the rule, say, by initiating contact with the opposing

169 Leubsdorf (n 37) 703.

170 *ASCRs* (n 2) r 33.1.4.

171 Leubsdorf (n 37) 690–3, 703.

solicitor.[172] They argue that clients can waive other protections, such as the rule prohibiting a solicitor from acting when there is a conflict of interest.[173] Significantly, Hazard Jr and Irwin describe these protections as 'right[s]' which a client has in relation to their solicitor.[174]

Hazard Jr and Irwin argue that this proposal promotes a client's personal autonomy, by respecting their choices, particularly regarding matters concerning their interests.[175] Hazard Jr and Irwin's proposal reshapes the no contact rule into one which explicitly serves a client's interests and their preferences. Rather than being paternalistic, their proposal seeks to fully respect a client's agency, personhood and autonomy.

However, this article does not support Hazard and Irwin's proposal, for the following reasons. First, allowing unrestricted contact between a client and an opposing solicitor is likely to undermine a client's relationship with their own lawyer. Allowing direct contact between a client and an opposing solicitor — even if this was sought by the client — means that the client's solicitor 'cannot really do their duty' of protecting the client's interests.[176] If a client seeks their solicitor's consent to make direct contact with an opposing solicitor, and this is refused, the client has the option of terminating the retainer.

Second, the relationship between a solicitor and client is both professional and fiduciary in nature — based on trust and confidence.[177] Particularly in litigious matters, allowing direct contact with an opposing solicitor is likely to undermine the solicitor's role in formulating and implementing a case concept, without interference by an opponent. Even in non-litigious matters, the role of a professional adviser is likely to be undermined if the client ignores expert advice (such as the potential risks of direct contact with an opposing solicitor). In the context of the solicitor–client relationship, promoting a client's 'autonomy' is significant, but perhaps not as important as Hazard Jr and Irwin argue.

Third, solicitors have overriding duties to the court and the administration of justice.[178] This means that solicitors are not obliged to, and in fact are prohibited from, following a client's instructions where they conflict with these overriding duties. For example, a solicitor must conduct proceedings in court in a prompt and organised manner, even if a client seeks to raise extraneous and irrelevant issues.[179]

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172 Hazard Jr and Irwin (n 49) 828.

173 Ibid 825.

174 Ibid.

175 Ibid 827–8.

176 *Re Margetson* (n 33) 318.

177 Parker (n 90) 686.

178 *ASCRs* (n 2) r 3.

179 Ibid r 21.3.

Hazard Jr and Irwin's approach unduly emphasises client's individual rights, rather than the public interest in the orderly and efficient administration of justice.

Finally, r 33 currently protects clients in respect of delays by their solicitor in responding to communication. There is an exception in the rule allowing direct communication in such circumstances. This may be important, for example, regarding settlement offers or other urgent matters. However, if a client believes that their solicitor is neglecting their interests, they may, and perhaps should, terminate the retainer.

VIII Conclusion

This article has argued that the no contact rule in the *ASCRs* requires clarification in several key respects. This article has highlighted five ways in which the operation of the rule lacks certainty. These are serious flaws, considering the potentially very serious consequences for a solicitor who breaches the rule. Further, the rationale for the rule is unclear. Commonly, it is argued that the rule protects clients from opposing solicitors. However, the rule also operates to protect the interests of solicitors, particularly regarding legal fees.

This article proposed practical reforms to r 33 to clarify its scope and operation. These clarifications are necessary to provide certainty to solicitors regarding their professional duties. They are also necessary to provide clarity to clients and other users of legal services. For example, many clients may be unaware that they may communicate with the opposing solicitor directly, if they obtain their solicitor's consent. A client may wish to do this, for example, to reduce legal expenses.

Although this article has argued for clarification of r 33, it does not support wider reforms, such as, by allowing clients to waive the rule. Although this proposal may promote a client's personal autonomy, it is also likely to undermine the trust and confidence on which the solicitor–client relationship is based and, to that extent, may impinge on the administration of justice.

Marilee Hou and Michaela Puntillo***

WHEN THE GAME IS NOT WORTH THE CANDLE: *PALMER V MCGOWAN [NO 5]* (2022) 404 ALR 621

'a man who chooses to enter the arena of politics
must expect to suffer hard words at times'[1]

I Introduction

The law on defamation balances 'the right to freedom of expression and the right to reputation'.[2] Recent defamation proceedings brought by billionaire and former politician Clive Palmer, against the Premier of Western Australia ('WA') Mark McGowan, demonstrated that 'a politician litigating about the barbs of a political adversary might be … a … futile exercise'.[3] Palmer, an 'indefatigable litigant',[4] commenced proceedings in the Federal Court of Australia alleging that McGowan defamed him by making certain comments during press conferences, including referring to Palmer as the 'enemy' of WA.[5] The proceedings were the subject of several interlocutory decisions,[6] and consumed considerable time and resources of the Court.[7] In a final judgment determining the proceedings, *Palmer v McGowan [No 5]* (2022) 404 ALR 621 ('*Palmer*'), Lee J found that Palmer and McGowan had each defamed the other.[8] However, the 'glaring disproportion between the damages awarded and the extent of legal expense'[9] demonstrated that '[t]he game ha[d] not been worth the candle'.[10]

This case note examines the proceedings in *Palmer* where Lee J's judgment should be treated as a warning to future litigants not to engage in costly defamation

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1 *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185, 210 (Windeyer J).

2 *Palmer v McGowan [No 5]* (2022) 404 ALR 621, 627 [3] (Lee J) ('*Palmer*').

3 Ibid 626 [1].

4 Ibid 650 [122].

5 Ibid 632–3 [37]–[38], 735–45 Annexure B.

6 *Palmer v McGowan* [2021] FCA 430; *Palmer v McGowan [No 2]* (2022) 398 ALR 524; *Palmer v McGowan [No 3]* [2022] FCA 140; *Palmer v McGowan [No 4]* [2022] FCA 292.

7 *Palmer* (n 2) 730 [523].

8 See below Part III.

9 *Palmer* (n 2) 731 [526].

10 Ibid 730 [522].

proceedings which are a drain on judicial resources if they do not suffer real reputational damage. This is particularly so in the case of politicians, who must expect a degree of public criticism. Part IV considers recent amendments to model defamation laws which may be the new gatekeeper against indefatigable litigants, like Palmer, who are not deterred by the costs of litigation and potential adverse costs orders. A focus is also had upon Lee J's remarks regarding the qualified privilege defence developed in *Lange v Australian Broadcasting Corporation* ('*Lange*')[11] and the need for courts to revisit the defence given its current lack of utility.

II Factual Landscape

The proceedings in *Palmer* arose 'out of a prolonged and heated dispute between two political antagonists dealing … with matters best described as political'.[12] The 'prolonged and heated dispute'[13] occurred in the context of: (1) WA's border closure during the COVID-19 pandemic; and (2) the enactment of the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) ('*Iron Ore Amendment Act*').[14]

A *Western Australia's Border Closure*

In response to the COVID-19 pandemic, the WA Government issued directions that closed the WA border to everyone except exempt travellers.[15] The border closure was widely known and described as WA's 'hard border'.[16] Palmer and his wife applied to enter WA, but their applications were refused.[17] Palmer subsequently commenced proceedings in the High Court of Australia in *Palmer v Western Australia* ('Border Challenge'),[18] challenging the validity of the border closure under the *Australian*

11 (1997) 189 CLR 520 ('*Lange*').

12 *Palmer* (n 2) 627 [4].

13 Ibid.

14 Ibid 627 [5].

15 Ibid 627 [7].

16 See, eg: ibid 627 [5]; Hamish Hastie, 'WA's Hard Border Spans the Whole Country as McGowan Protects COVID-Free Christmas', *The Sydney Morning Herald* (online, 17 December 2021) <https://www.smh.com.au/national/wa-s-hard-border-spans-the-whole-country-as-mcgowan-protects-covid-free-christmas-20211217-p59ij2.html>.

17 *Palmer* (n 2) 627 [8].

18 (2021) 272 CLR 505 ('Border Challenge'). See generally Lorraine Finlay, 'WA Border Challenge: Why States, Not Courts, Need To Make the Hard Calls During Health Emergencies', *The Conversation* (online, 29 July 2020) <https://theconversation.com/wa-border-challenge-why-states-not-courts-need-to-make-the-hard-calls-during-health-emergencies-143541>.

Constitution. The High Court unanimously dismissed the Border Challenge, finding that the border closure did not breach s 92 of the *Australian Constitution*.[19]

B *The Enactment of the* Iron Ore Amendment Act

Separately, the *Iron Ore Amendment Act* was enacted by the WA Government in response to a long history of disputes with Mineralogy Pty Ltd, a company owned and controlled by Palmer.[20] The disputes related to an agreement entered into in December 2001,[21] ratified by the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA),[22] and had already been the subject of two arbitrations.[23] With preparations for a third arbitration underway,[24] McGowan and the Attorney-General of WA, John Quigley, 'were discussing the prospect of legislation as a means of dealing with the problem'.[25] The draft Bill was passed and assented 'with the speed of summer lightning',[26] which had the 'extraordinary' effect of terminating the arbitration agreements, nullifying previous awards, terminating the third arbitration, and granting immunity to the WA Government.[27]

III The Defamation Proceedings

Against that background, in August 2020, Palmer commenced proceedings for defamation against McGowan, claiming that McGowan made six defamatory publications between 31 July 2020 and 14 August 2020.[28] Five of these publications were words said by McGowan at press conferences, which were then subsequently republished on various media platforms.[29] In summary, these included McGowan: referring to Palmer as the 'enemy' of WA and Australia;[30] stating that Palmer coming

19 Border Challenge (n 18) 534 [80]–[82] (Kiefel CJ and Keane J), 559–60 [166] (Gageler J), 576–7 [210] (Gordon J), 607–8 [293] (Edelman J). See also Samuel Whittaker and Leah Triantafyllos, 'Clive Palmer, Section 92, and COVID-19: Where "Absolutely Free" Is Absolutely Not' (2021) 42(2) *Adelaide Law Review* 623.

20 *Palmer* (n 2) 628 [9], 628–31 [13]–[32].

21 Ibid 628 [13].

22 Ibid 628 [14].

23 Ibid 629 [19]–[22].

24 Ibid 629–30 [23]–[26].

25 Ibid 630 [27].

26 Ibid 630 [29].

27 Ibid 631 [31]. Palmer unsuccessfully sought a declaration that the *Iron Ore Amendment Act* was invalid or inoperative: *Mineralogy Pty Ltd v Western Australia* (2021) 393 ALR 551, 572 [93] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), 593 [166] (Edelman J); *Palmer v Western Australia* (2021) 394 ALR 1, 5 [10] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), 10 [27] (Edelman J).

28 *Palmer* (n 2) 632 [37].

29 Ibid 632–3 [38].

30 Ibid 640–1 [73], 736 Annexure B.

to WA to 'promote a dangerous drug', hydroxychloroquine, is not a good thing for WA;[31] stating that Palmer was 'very selfish to pursue' the Border Challenge;[32] and claiming that he was at 'war' with Palmer.[33] The sixth publication was a post McGowan made to Facebook, which (amongst other things), claimed that Palmer 'decided to just make his profits by taking $12,000 from every man, woman and child in' WA.[34]

McGowan filed a cross-claim, claiming that Palmer made nine defamatory publications.[35] The publications related to statements Palmer made in press conferences and media interviews, as well as a document published by Palmer which was republished on various media platforms.[36] In summary, these included Palmer: calling on the WA Government 'not to lie to the Western Australian people about threats that don't exist';[37] claiming that the *Iron Ore Amendment Act* gave the WA Government 'an exemption of criminal liability';[38] stating 'what crime did you commit Mark, that you want to be immune from? That's the question';[39] and claiming that 'McGowan's very close to China'.[40]

A *The Imputations*

Palmer pleaded 17 defamatory imputations arising out of the 6 publications, 8 of which Lee J found to have been conveyed.[41] McGowan pleaded 9 defamatory imputations, 5 of which Lee J found to have been conveyed.[42] Justice Lee found that '[a]s is evident from their terms, each of the imputations conveyed was defamatory'.[43] By way of summary, Lee J found the following imputations to be conveyed:

- Palmer is a threat and danger to the people of WA;[44]
- Palmer promotes a drug, hydroxychloroquine, 'which all the evidence establishes is dangerous';[45]

31 Ibid 642 [82], 739 Annexure B.
32 Ibid 643 [84], 741 Annexure B.
33 Ibid 643 [87], 742 Annexure B.
34 Ibid 632–3 [38], 746 Annexure C.
35 Ibid 632 [37].
36 Ibid 633–4 [42].
37 Ibid 747 Annexure D.
38 Ibid 748 Annexure E.
39 Ibid 759 Annexure G.
40 Ibid 649 [117], 761 Annexure H.
41 Ibid 634–5 [47].
42 Ibid 636 [48].
43 Ibid 636 [49].
44 Ibid 634–5 [47].
45 Ibid.

- Palmer selfishly uses money made in WA to harm Western Australians;[46]
- Palmer is prepared to bankrupt WA 'because he is unhappy with standard conditions';[47] and
- Palmer is 'so dangerous a person that legislation was required to stop him making a claim for damages against' WA.[48]

With respect to the cross-claim, the following imputations were found to be conveyed:

- McGowan lied to the people of WA in saying he acted on advice of the Chief Health Officer in closing the borders;[49]
- McGowan lied in saying that the health of Western Australians 'would be threatened if the borders did not remain closed';[50]
- McGowan lied 'about his justification for imposing travel bans';[51]
- McGowan 'corruptly attempted to cover up' his involvement in criminal acts;[52] and
- McGowan acted corruptly in seeking to 'confer upon himself criminal immunity'.[53]

B *Defences*

Both McGowan and Palmer advanced defences to the claim and cross-claim, respectively. Their defences relied on qualified privilege, and Palmer also attempted to argue that the imputations conveyed were substantially true. Ultimately, none of the defences were successful.

1 *McGowan's Defences*

McGowan relied on three versions of qualified privilege as a defence.[54] These were: (1) under common law; (2) under s 30 of the *Defamation Act 2005* (NSW) ('*Act*'); and (3) a species of qualified privilege concerned with political speech developed in *Lange* ('*Lange* defence').[55] The defence of qualified privilege 'extends the right to publish defamatory statements for the "common convenience and welfare of society"', 'regardless of their truth or falsity', but the privilege is *qualified* depending

46 Ibid.

47 Ibid.

48 Ibid.

49 Ibid 636 [48].

50 Ibid

51 Ibid.

52 Ibid.

53 Ibid.

54 Ibid 657 [159].

55 Ibid.

on 'whether the occasion is used for an improper purpose to injure the person concerned'.[56] In such cases, the privilege is lost.[57]

(a) Common Law Qualified Privilege

McGowan's common law defence was dismissed by Lee J as 'hopeless', given the established general principle that matters, reaching a wide audience, is generally incapable of satisfying the 'reciprocity' element of the defence.[58] To succeed in relying on the existence of reciprocal interests, McGowan had to satisfy the Court that: (1) his legitimate interests had been furthered or protected by the disclosure of the defamatory material; and (2) the recipient's interest in receiving the information was 'of so tangible a nature that for the common convenience and welfare of society it [was] expedient to protect it'.[59] McGowan argued that there was a reciprocity of interest between himself and 'members of the public'.[60] Given the relevant comments by McGowan were made at press conferences to media personnel, Lee J noted McGowan's argument required accepting that the media personnel served as conduits of information between McGowan and the public generally.[61]

McGowan argued the public had an 'interest' in receiving the published information as residents and enrolled electors in WA.[62] Justice Lee dismissed this argument, given there was no evidence that the media physically present at the press conferences, or those of the public to whom the republications reached, had such characteristics.[63] This was particularly so given that with current technology, the media's reach is arguably limitless. The fact that a topic is *interesting* or members of the public may be *interested* in an answer, was also considered not to equate with the public having a 'corresponding or reciprocal "interest"' in the published information.[64] Further, Lee J considered that publishing attacks on Palmer (including calling him

56 Patrick George, 'Qualified Privilege: A Defence Too Qualified?' (2007) 30(1) *Australian Bar Review* 46, 46. See also Andrew T Kenyon, '*Lange* and *Reynolds* Qualified Privilege: Australian and English Defamation Law and Practice' (2004) 28(2) *Melbourne University Law Review* 406, 407, 410.

57 George (n 56) 46.

58 *Palmer* (n 2) 657 [160]. The test for the common law defence was recognised in *Lange* to have been devised to apply to a limited publication (ie to a single person): *Lange* (n 11) 572 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

59 *Palmer* (n 2) 657 [162], quoting *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 261 (McHugh J).

60 *Palmer* (n 2) 658 [169].

61 Ibid.

62 Ibid 659 [175].

63 Ibid.

64 Ibid 660 [177].

an 'enemy of the State'), did not amount to McGowan '"furthering or protecting" any relevant "interest" of his own'.[65]

In rejecting McGowan's arguments and therefore dismissing the defence, Lee J also acknowledged the 'Gilbertian result' that could arise by permitting statements made to the media at press conferences to be protected by the qualified privilege, but the same protection not to be afforded to news services who disseminate such information.[66]

(b) Statutory Qualified Privilege

To succeed in the statutory qualified privilege defence under s 30 of the *Act*, McGowan was required to prove: (1) 'the recipient ha[d] an interest or apparent interest in having information on some subject';[67] (2) 'the matter [wa]s published … in the course of giving to the recipient information on that subject';[68] and (3) the publication of the 'matter [wa]s reasonable in the circumstances'.[69] Palmer accepted the first two requirements were met, leaving Lee J to determine whether McGowan's conduct 'was "reasonable in the circumstances"'.[70] The concept of 'reasonableness' in this context was assessed with regard to a non-exhaustive list of considerations under s 30(3) of the *Act*, and commentary by Wigney J in *Chau v Fairfax Media Publications Pty Ltd*.[71]

His Honour ultimately dismissed McGowan's reliance on the defence, finding McGowan did not discharge the onus of proving his conduct in publishing the matters was 'reasonable in the circumstances'.[72] In doing so, Lee J stressed the importance of not taking a 'checklist' approach to the assessment of reasonableness, where regard must be had to '*all of the circumstances* leading up to and surrounding the publication'.[73]

Relevant findings include that some of the assertions made by McGowan in respect of being at 'war' with Palmer and regarding him as 'the enemy of the State' did not have 'a sufficient factual basis'.[74] While McGowan justified his comments by

65 Ibid 660 [176].

66 Ibid 660 [178].

67 *Defamation Act 2005* (NSW) s 30(1)(a), as at 26 September 2019 ('*Act*').

68 Ibid s 30(1)(b).

69 Ibid s 30(1)(c).

70 *Palmer* (n 2) 661 [182], quoting *Act* (n 67) s 30(1)(c).

71 *Palmer* (n 2) 661–2 [183]–[184], citing *Chau v Fairfax Media Publications Pty Ltd* [2019] FCA 185, [109]–[116]. See also *Fairfax Media Publications Pty Ltd v Chau* [2020] FCAFC 48, [188]–[193] (Besanko, Bromwich and Wheelahan JJ).

72 *Palmer* (n 2) 664 [194], 665 [199].

73 Ibid 664–5 [195], citing *Austin v Mirror Newspapers Ltd* [1986] AC 299, 313 (Lord Griffiths for the Court) (emphasis in original).

74 *Palmer* (n 2) 665 [196].

referring to Palmer's claims in previous arbitrations,[75] Lee J found McGowan had insufficient and 'less than complete knowledge of critical aspects of the arbitration' to justify his publication of the matters.[76] Despite McGowan arguing for the reasonableness of his conduct to be assessed in light of the '"rough and tumble" of politics' with him and Palmer both being 'political and public figures',[77] Lee J considered this did not outweigh the unreasonable harshness of the attacks on Palmer 'couched as statements of fact' for 'maximum political effect'.[78]

(c) Lange *Defence*

The final defence pursued by McGowan was the constitutionally protected *Lange* defence — 'seen as an extension' of the common law qualified privilege defence.[79] The qualified privilege defence developed by the High Court in *Lange* affords a protection to publishers for 'the dissemination of information about government and political matters to the widest possible audience' consistent with the notion of representative democracy.[80] This was in response to the narrow approach under the common law where publications reaching a wide audience do not attract the privilege. Under the *Lange* defence, a defamatory statement would be protected so 'long as the publisher honestly and without malice uses the occasion for the purpose for which it is given', as is the case for the common law version.[81] Given the *Lange* defence applies to a wider audience and can therefore cause greater damage, the High Court held — with reference to the reasonableness requirement under s 22 of the now repealed *Defamation Act 1974* (NSW)[82] — that the publisher must also prove they acted reasonably.[83]

Subsequent to *Lange*, intermediate appellate courts have equated the notion of reasonableness under the *Lange* defence with s 30 of the *Act*.[84] Justice Lee noted

75 See above Part II(B).

76 *Palmer* (n 2) 665 [196]. Justice Lee did, however, still appreciate it being normal for McGowan, as Premier, to rely upon information he is briefed with rather than reading sources in full.

77 Ibid 662 [186].

78 Ibid 665 [197].

79 Ibid 666 [200]–[203]. See also *Lange* (n 11) 571.

80 *Palmer* (n 2) 666 [201].

81 Ibid 666 [203], quoting *Lange* (n 11) 572.

82 Similar to the current provision in s 30(1)(c) of the *Act*, the *Defamation Act 1974* (NSW) imposed the same obligation for conduct 'in publishing that matter is reasonable in the circumstances': *Defamation Act 1974* (NSW) s 22(1)(c), as enacted.

83 *Lange* (n 11) 572–3.

84 *Palmer* (n 2) 667 [207]. See, eg: *Poniatowska v Channel Seven Sydney Pty Ltd* (2019) 136 SASR 1, 109–10 [573] (Blue J); *John Fairfax Publications Pty Ltd v O'Shane* [2005] Aust Torts Reports ¶81-789, 67,466 [83] (Giles JA), 67,480 [227], 67,487 [308] (Young CJ in Eq). See also *Jensen v Nationwide News Pty Ltd [No 13]* [2019] WASC 451, [346]–[349] (Quinlan CJ).

this interpretation 'has been the subject of ongoing criticism' and 'has led to an often microscopic analysis of pre-publication conduct' burdening litigants.[85] Ultimately, McGowan was not able to succeed in the *Lange* defence because Lee J was 'bound to follow the law as it currently stands'[86] and had already found McGowan's conduct not to have been reasonable.[87]

Accepting Palmer's point that much of McGowan's arguments on the *Lange* defence were 'academic',[88] Lee J nonetheless discussed and to some extent critiqued the 'principled scope of the reasonableness requirement'.[89] In doing so, Lee J addressed how the statutory requirements for proving reasonableness are onerous[90] — where the supposedly 'non-exhaustive statutory checklists' under s 30(3) of the *Act* are limiting and have prevented assessing reasonableness with 'a broad and bespoke evaluative assessment' of all the circumstances.[91] By taking this approach, Lee J acknowledged the *Lange* defence has been 'denuded … of any real utility'.[92] This is explored further in Part IV(B) below.

2 *Palmer's Defences to the Cross-Claim*

In defending McGowan's cross-claim, Palmer argued: (1) substantial truth; (2) contextual truth; and (3) reply to attack.[93] Palmer attempted to prove that the imputations that McGowan lied in his justifications for imposing the hard border were substantially true.[94] This required Palmer to 'establish actual dishonesty', in that McGowan '*knowingly* misled the people of Western Australia by communicating to them facts that he did not believe to be true'.[95] Acknowledging that McGowan 'certainly pitched his public comments in emphatic terms', Lee J considered that 'there is a degree of artificiality in reflecting on public statements of this type with a fine-tooth comb', and further found that the evidence could not establish

85 *Palmer* (n 2) 667 [207].

86 Ibid 667 [209]. See also ibid 668 [212].

87 Ibid 670 [224]. See also the discussion of Lee J's reasonableness findings in Part III(B)(1)(b) above.

88 *Palmer* (n 2) 670 [223].

89 Ibid 668 [210].

90 Ibid 669 [219].

91 Ibid 669 [216]. The non-exhaustive checklist approach originated in *Morgan v John Fairfax & Sons Ltd [No 2]* (1991) 23 NSWLR 374, when Hunt AJA interpreted the statutory meaning of 'reasonable in the circumstances': at 387–8, discussed in *Palmer* (n 2) 668–9 [215].

92 *Palmer* (n 2) 670 [221].

93 Ibid 684 [275].

94 Ibid 684 [276].

95 Ibid 687 [299] (emphasis in original).

that McGowan subjectively knew that any of his statements were false.[96] Palmer's defences of contextual truth and reply to attack also failed.[97]

C *Damages*

Given that no defences to either claim succeeded, Lee J was required to consider damages to be awarded.[98] Central to this consideration was the fact that 'political figures … have well-entrenched perceptions as to their character and reputation',[99] and 'many *ordinary*, *reasonable people* will not be influenced, positively or negatively, by statements concerning a politician about whom they have already formed a view'.[100]

After finding only 'minor damage to reputation'[101] and therefore that there was 'little to vindicate',[102] Lee J concluded that 'no substantial damages should be awarded' to Palmer.[103] However, his Honour did accept that *some* damages should be awarded, and that this should be more than 'a purely nominal sum'.[104] Justice Lee ultimately awarded Palmer $5,000 in damages, which his Honour considered to have a 'rational relationship' with the 'very minor' harm suffered.[105]

With respect to McGowan, Lee J accepted that his 'evidence as to an aspect of the subjective hurt he suffered was compelling'.[106] However, as the Premier of WA, '[r]obust criticism is, and should be, part and parcel of the job'.[107] Justice Lee awarded McGowan $20,000 in damages.[108]

1 *Aggravated Damages*

Justice Lee refused to award aggravated damages to either party.[109] His Honour considered that aggravated damages 'can only be awarded where the relevant conduct

96 Ibid 687–8 [300].

97 Ibid 703 [372], 706 [394].

98 Ibid 712 [424].

99 Ibid 713–14 [433].

100 Ibid (emphasis in original), citing *Hanson-Young v Leyonhjelm [No 4]* [2019] FCA 1981, [78] (White J).

101 *Palmer* (n 2) 727 [502].

102 Ibid 727 [499], 727 [502].

103 Ibid 727 [502].

104 Ibid 729 [509].

105 Ibid 729 [515].

106 Ibid 729–30 [516].

107 Ibid.

108 Ibid.

109 Ibid 725 [491].

meets the threshold of being unjustified, improper or lacking in *bona fides*'.[110] Palmer's argument that he was subject to 'a relentless, repetitive and wide-ranging series of attacks by Mr McGowan' was dismissed by Lee J as simply a dispute between 'two political opponents during a period when they were clashing'.[111] His Honour also found that the same considerations applied to McGowan's cross-claim.[112]

IV Comment

Following a lengthy trial and at the end of a lengthy judgment, Lee J concluded that '[t]he game has not been worth the candle'.[113] His Honour was less than pleased with the proceedings that 'consumed considerable resources of the Commonwealth and … diverted Court time from resolving controversies of real importance to persons who have a pressing need to litigate'.[114] His Honour's remark that those who 'have chosen to be part of the hurly-burly of political life'[115] 'must expect a degree of public criticism, fair or unfair'[116] is a warning to future litigants. His Honour said:

> at a time when public resources devoted to courts are under strain, and judicial resources are stretched, one might think that only a *significant* interference or attack causing *real* reputational damage and *significant* hurt to feelings should be subject of an action for defamation by a political figure.[117]

Justice Lee's dissatisfaction with the conduct of the litigation is further evidenced by his Honour's motivation to make no order as to costs, likening the relationship between Palmer and McGowan to 'the feud between the houses of Montagues and Capulets' with 'a "plague on both … houses"'.[118] However, his Honour noted that McGowan's cross-claim was largely defensive in nature, and that he was 'dragged into Court' by Palmer 'who first picked up the cudgels'.[119] More importantly, McGowan made a without prejudice offer to settle the proceedings, which ultimately led Lee J to make an order that Palmer bear McGowan's costs with respect to the

110 Ibid 725 [490].

111 Ibid 725–6 [492]. See also ibid 627 [4].

112 Ibid 726 [493].

113 Ibid 730 [522].

114 Ibid 730 [523].

115 Ibid 626 [2].

116 Ibid 730 [524].

117 Ibid 730–1 [525] (emphasis added).

118 *Palmer v McGowan [No 6]* (2022) 405 ALR 462, 465 [20] ('*Palmer [No 6]*').

119 Ibid 465 [17]–[18], 465 [20].

cross-claim.[120] This was later revealed to be $425,700,[121] being only a portion of the total cost to WA taxpayers.[122]

As Lee J observed, '[t]he cost of the litigation was disproportionate to any benefit it was likely to produce',[123] with barrister representing McGowan, Bret Walker SC's daily charge of $25,000 exceeding the total award of damages to either party.[124] Whilst the exact figure of total costs to both parties is not known, McGowan — after promising to do so[125] — later revealed WA's net costs to be $2,021,665, after having recovered $445,700 from Palmer.[126] Previous estimations had the total bill at around $2 million,[127] but it can now be speculated that the total bill could be close to $5 million if Palmer's legal costs matched McGowan's. Palmer's status as a billionaire is well known.[128] This is not the first time Palmer proceeded with costly

120 Ibid 465 [19], 465–6 [21]–[23], 467 [34].

121 Mark McGowan, 'Clive Palmer Pays Costs as Ordered by Federal Court Order' (Media Statement, Government of Western Australia, 22 December 2022).

122 See below n 126.

123 *Palmer [No 6]* (n 118) 467 [31].

124 See, eg, Michael Pelly, 'Meet the High Court's Busiest Barrister', *The Australian Financial Review* (online, 13 January 2022) <https://www.afr.com/companies/professional-services/meet-the-high-court-s-busiest-barrister-20211215-p59ht7>.

125 Peter Law, 'Mark McGowan Promises To Reveal Clive Palmer Defamation Legal Bill after Verdict', *The West Australian* (online, 2 August 2022) <https://thewest.com.au/news/wa/mark-mcgowan-promises-to-reveal-clive-palmer-defamation-legal-bill-after-verdict-c-7727156>.

126 McGowan (n 121). The $445,700 includes the $20,000 awarded to McGowan by way of damages, with the remaining $425,700 representing McGowan's costs with respect to the cross-claim: Keane Bourke, 'Mark McGowan Reveals Clive Palmer's Defamation Action Legal Bill Cost WA Taxpayers More than $2 Million', *ABC News* (online, 22 December 2022) <https://www.abc.net.au/news/2022-12-22/mark-mcgowan-reveals-cost-of-clive-palmer-defamation-action/101802142>. See also Hamish Hastie, 'Taxpayers Slugged $2 Million for Palmer v McGowan Defamation Case', *The Sydney Morning Herald* (online, 22 December 2022) <https://www.smh.com.au/national/taxpayers-slugged-2-2-million-for-palmer-v-mcgowan-defamation-case-20221222-p5c8cv.html>.

127 See, eg, Justin Quill, 'Palmer Case Delivers Lessons for Judges, Politicians', *The Australian Financial Review* (online, 11 August 2022) <https://www.afr.com/politics/palmer-case-delivers-lessons-for-judges-politicians-20220809-p5b8g3?utm_medium=social&utm_campaign=nc&utm_source=Twitter&fbclid=IwAR1nGsQR60Ob4pkTNo27d-J5x5ZH4IX1pzlrOGTGMpQ0Rq6AqkWfSYufYW0#Echobox=1660199225>.

128 See, eg: 'Clive Palmer', *Forbes* (Web Page, 18 March 2023) <https://www.forbes.com/profile/clive-palmer/?sh=1eb755574a97>; Rachel Pannett, 'Clive Palmer, Mining Billionaire Dubbed "Australia's Trump," Stirs Up Election', *The Washington Post* (online, 20 May 2022) <https://www.washingtonpost.com/world/2022/05/20/clive-palmer-australia-election-independents/>; Kay Dibben, 'Billionaire Clive Palmer in Court in a Bid To Have Criminal Charges against Him Discontinued', *The Courier Mail* (online, 1 June 2022) <https://www.couriermail.com.au/

litigation to advance his beliefs and interests.[129] The cost of this litigation, including potential adverse costs orders, was unlikely to have been a deterrent, or even a consideration for Palmer.[130] In our view, these proceedings were correctly characterised by Lee J as one where Palmer and McGowan 'have taken advantage of the opportunities created by publication of the impugned matters to respond forcefully in public and … to advance themselves politically'.[131] Justice Lee's judgment should serve as the strongest of warnings to politicians and other public figures that such matters should not consume judicial resources.

A *The New Requirement for Serious Harm*

Justice Lee's judgment in *Palmer* is timely given new developments in Australian defamation laws. Following a review into Australia's model defamation laws, on 31 March 2021, the Attorneys-General agreed to commence the *Model Defamation Amendment Provisions 2020* ('*Amendment Provisions*')[132] on 1 July 2021 in most Australian jurisdictions.[133] Amongst other things, the *Amendment Provisions* introduced a new element of 'serious harm' to establish defamation.[134] The intention was 'to encourage the early resolution of defamation proceedings'.[135] The serious harm requirement of the *Amendment Provisions* has, as at the date of writing, been implemented in the Australian Capital Territory,[136] New South Wales,[137] Queensland,[138] South Australia,[139] Tasmania[140] and Victoria.[141] Other jurisdictions are expected to follow suit.[142]

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truecrimeaustralia/police-courts-qld/billionaire-clive-palmer-in-court-in-a-bid-to-have-criminal-charges-against-him-discontinued/news-story/ca8602f7d38b6efda165607d67fb9ef5>.

129 See above Part II(A). In addition, McGowan revealed that since 2020, Palmer had 'brought 13 other separate legal actions against the State of WA, or Ministers or officers of the State': McGowan (n 121).

130 See above nn 128–9.

131 *Palmer* (n 2) 714 [434].

132 Parliamentary Counsel's Committee, *Model Defamation Amendment Provisions 2020* (Explanatory Note, 27 July 2020) ('*Amendment Provisions*').

133 New South Wales Government Department of Communities and Justice, 'Review of Model Defamation Provisions', *NSW Department of Justice* (Web Page, 12 December 2022) <https://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd_consultation/review-model-defamation-provisions.aspx>.

134 *Amendment Provisions* (n 132) 3–4, sch 1 [6].

135 Ibid 4.

136 *Civil Law (Wrongs) Act 2002* (ACT) s 122A.

137 *Act* (n 67) s 10A.

138 *Defamation Act 2005* (Qld) s 10A.

139 *Defamation Act 2005* (SA) s 10A.

140 *Defamation Act 2005* (Tas) s 10A.

141 *Defamation Act 2005* (Vic) s 10A.

142 'Review of Model Defamation Provisions' (n 133).

The introduction of the serious harm element was welcomed by the legal industry.[143] However, during consultation, many groups expressed concern that the new provision did not specify the *stage* at which the element is to be considered. For example, the Bar Association of Queensland advocated for this to be able to be determined on a summary basis 'to empower courts to filter out trivial defamation claims at an early stage'.[144]

Court application of the new provisions has since provided clarification. In the first case considering the new provisions, *Newman v Whittington*,[145] Sackar J confirmed that the issue of serious harm is to be determined *before* trial, unless special circumstances exist.[146] In the first case where defamation proceedings were dismissed for failing to meet the serious harm threshold, *Zimmerman v Perkiss*[147] confirmed that failure to establish serious harm on the pleadings will lead to the claim being dismissed at the preliminary stage, before trial.[148] One may speculate that had the serious harm threshold applied to *Palmer*, the proceedings may never have seen 'the fluorescent lights of a courtroom'.[149]

In addition to being a gatekeeper against politicians using defamation proceedings as a political weapon, the new requirement for serious harm is also likely to have an impact on rising concerns regarding free speech, where public figures threaten litigation on commentators. A demonstrable example is *Dutton v Bazzi*,[150] where Peter Dutton commenced proceedings against refugee advocate Shane Bazzi over a tweet which said 'Peter Dutton is a rape apologist'.[151] Dutton succeeded at first

143 Bar Association of Queensland, Submission to Defamation Working Party of the Council of Attorneys-General, *Review of Model Defamation Provisions* (25 February 2020) [1], [4]; Law Council of Australia, Submission to Defamation Working Party of the Council of Attorneys-General, *Review of Model Defamation Provisions* (31 January 2020) 5; Law Society of New South Wales, Submission to Defamation Working Party of the Council of Attorneys-General, *Review of Model Defamation Provisions* (24 January 2020) recommendation 14. See also Quill (n 127).

144 Bar Association of Queensland, Submission to Defamation Working Party of the Council of Attorneys-General, *Review of Model Defamation Provisions* (25 February 2020) [5]. See also Law Society of New South Wales, Submission to Defamation Working Party of the Council of Attorneys-General, *Review of Model Defamation Provisions* (24 January 2020) recommendation 14. See generally Law Council of Australia, Submission to Defamation Working Party of the Council of Attorneys-General, *Review of Model Defamation Provisions* (31 January 2020) 5–6.

145 [2022] NSWSC 249.

146 Ibid [35].

147 [2022] NSWDC 448.

148 Ibid [154], [163]–[164].

149 Quill (n 127).

150 [2021] FCA 1474 (White J) ('*Bazzi*'). See also: *Dutton v Bazzi [No 2]* [2021] FCA 1560 (White J); *Bazzi v Dutton* (2022) 289 FCR 1 (Rares, Rangiah and Wigney JJ) ('*Bazzi (Appeal)*').

151 *Bazzi* (n 150) [1], [3].

instance,[152] but the decision was overturned on appeal where a Full Court of the Federal Court found the tweet did not convey the defamatory imputation that Dutton excuses rape.[153] Bazzi's legal fees were raised through crowdfunding, but the case still raised the concern for political discourse in Australia if politicians continue to use the threat of litigation against commentators.[154] For many, the mere threat of litigation may be enough to deter them from engaging in political discourse. Such an effect has significant implications for democratic debate. The introduction of the serious harm threshold thus improves the balance between the right to freedom of expression and the right to reputation, where cases of a trivial nature are dismissed at an early stage — thereby minimising the threat of costly and lengthy litigation.

B *The Redundant* Lange *Defence*

Palmer addressed the applicability of defamation laws in the realm of politics, and their intersection with the implied freedom of political communication.[155] In particular, Lee J's assessment of the *Lange* defence raises important issues as to the operation of the defence currently providing no practical utility to media personnel and politicians who seek to rely on it.[156] This may even extend to the public generally given the growth in 'self-publication' and the proliferation of online discussion about political matters.[157]

The *Lange* defence reshapes the existing common law defamation defence as a protection for representative government drawing upon the constitutionally protected implied freedom.[158] In doing so, as articulated by Lee J, the High Court sought to 'strike a balance between freedom of discussion of government and politics and [the] reasonable protection of the persons who may be involved … in the activities

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152 Ibid [239].

153 *Bazzi (Appeal)* (n 150) 14 [48]–[50] (Rares and Rangiah JJ), 20 [79] (Wigney J). Cf *Barilaro v Google LLC* [2022] FCA 650 (Rares J), where it was found that former Deputy Premier of New South Wales, John Barilaro, was subject to 'a relentless, racist, vilificatory, abusive and defamatory campaign' for over a year: at [1].

154 See especially Shane Bazzi, 'Peter Dutton Suing Me for Defamation Almost Ruined Me — And It Could Happen to Anyone', *The Guardian* (online, 8 October 2022) <https://www.theguardian.com/australia-news/commentisfree/2022/oct/08/peter-dutton-suing-me-for-defamation-almost-ruined-me-and-it-could-happen-to-anyone>.

155 See generally: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70–3, 75–6 (Deane and Toohey JJ); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 202–3 (McHugh J).

156 See Justice Peter Applegarth, 'Distorting the Law of Defamation' (2011) 30(1) *University of Queensland Law Journal* 99, 108–10.

157 See: ibid 108–9; Patrick Hall, 'Freeing Speech: Protecting the Modern Media Defendant through the Defence of Qualified Privilege' (2019) 23(2) *Media and Arts Law Review* 201, 203.

158 See: Hall (n 157) 218; Russell L Weaver and David F Partlett, 'Defamation, the Media, and Free Speech: Australia's Experiment with Expanded Qualified Privilege' (2004) 36(2) *George Washington International Law Review* 377, 386.

of government or politics'.[159] It would therefore seem entirely inconsistent for a defence that sought to be an 'extended category of qualified privilege'[160] to have its utility judicially constrained with a 'stringent reasonableness requirement'.[161] There is no surprise that the *Lange* defence has therefore been critiqued as 'uncertain'[162] with limitations that 'continue to plague the defence'[163] rendering it 'practically useless'.[164]

In the face of such controversy, Lee J remarks the importance of taking a 'step back from the body of law that has developed and consider[ing] the underlying principle the High Court was articulating'.[165] From doing so, as it currently stands, the non-functioning nature of the *Lange* defence prevents it from furthering '[t]he common convenience and welfare of Australian society' through the protection of political communication to the public.[166] In circumstances where trial courts are bound by the existing law, and special leave to reopen *Lange* was refused in 2004,[167] one can only wait like a sitting duck for either Parliament or the courts to decide they are ready to remedy the defective law.

V Conclusion

The decision in *Palmer* demonstrates the interplay of defamation law with political discourse and the implied freedom of political communication. In doing so, Lee J provided a justified critique of the *Lange* defence, where its narrow interpretation amounts to it currently being a barely usable defence. It is therefore no doubt overdue for the High Court (or Parliament) to revisit the *Lange* defence and restore its utility.

For many politicians, defamation law is a political weapon. Palmer is no exception. Accordingly, it is no surprise that the primary concern with *Palmer* was the diversion of court time when 'judicial resources are stretched'.[168] The proceedings

159 *Palmer* (n 2) 670 [222].

160 *Lange* (n 11) 573.

161 *Palmer* (n 2) 670 [222].

162 Weaver and Partlett (n 158) 428.

163 Hall (n 157) 217. The limitations include: the ongoing controversy surrounding the implied freedom that is the foundation of the defence; uncertainty regarding what constitutes 'government and political matters' for the purposes of the defence; and strict interpretation of the 'reasonableness requirement': at 218–21.

164 Ibid 221.

165 *Palmer* (n 2) 670 [222].

166 *Lange* (n 11) 571.

167 *Palmer* (n 2) 667 [209]. Justice Lee was unsurprised that no intervention occurred in *Palmer* given the special leave refusal. See Transcript of Proceedings, *The Herald Weekly Times Ltd v Popovic* [2004] HCATrans 180 (28 May 2004) 570–95 (Gummow J).

168 *Palmer* (n 2) 730 [523], 730–1 [525].

were brought in uncommon circumstances where a wealthy, 'indefatigable' litigant, who 'carried himself with the unmistakable aura of a man assured as to the correctness of his own opinions',[169] persisted with litigation which arguably should never have been brought. In fact, only a matter of months after Palmer was 'dressed down' by Lee J as '"unpersuasive and superficial" and as someone who "refused to make obvious concessions"',[170] Palmer yet again commenced proceedings in the Federal Court against WA and the Commonwealth, this time arguing that parts of the *Iron Ore Amendment Act* are invalid under the *Australian Constitution*.[171]

Whilst Palmer remains undeterred, there is hope that between Lee J's judgment in *Palmer* and the new requirement for serious harm in defamation actions, litigants who do not suffer *real* reputational damage will be discouraged from seeking recourse through the courts. With claims like *Palmer* now able to be dismissed at the preliminary stage, there is a better balance between the right to free speech and the right to reputation, particularly in the context of political discourse and democratic debate. Only time will tell how these changes will play out in the political arena.

169 Ibid 650 [122].

170 Max Mason, 'Clive Palmer Takes Mark McGowan's WA to Court. Again', *The Australian Financial Review* (online, 26 October 2022) <https://www.afr.com/rear-window/clive-palmer-takes-mark-mcgowan-s-wa-to-court-again-20221025-p5bstp>, quoting *Palmer* (n 2) 713 [432], 651 [131].

171 Mason (n 170); *Palmer v Western Australia* (Federal Court of Australia, NSD905/2022, commenced 20 October 2022). The proceedings are currently assigned to Justice Lee's docket.

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TO BE OR NOT TO BE (WILLING) AT HER MAJESTY'S PLEASURE: *HORE V THE QUEEN* (2022) 273 CLR 153

'Between the idea
And the reality
Between the motion
And the act
Falls the Shadow'[1]

I Introduction

Indefinite detention laws have existed in Australia for centuries. Stemming from English common law tradition, prisoners in the 19th century could be indefinitely detained at His or Her Majesty's pleasure.[2] Such laws allow a monarch or a judge to consider the risk an offender poses to the community when determining their sentence, and consequently impose an unfixed limit and indeterminate sentence. With the increase of reports of sexual offending in Australia,[3] nothing infuriates communities more than the imminent release of a sex offender from prison, especially those who victimise children. The growth of public outcry as a result of societal and political interest in the punishment of sex offenders and protection from sexual offending[4] has led to post-sentence detention legislation being enacted in Australian states and territories allowing the detention of sex offenders

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1 TS Eliot, *Collected Poems 1909–1962* (Faber and Faber, 1963) 91–2, quoted in Mark Brown, 'Preventive Detention and the Control of Sex Crime: Receding Visions of Justice in Australian Case Law' (2011) 36(1) *Alternative Law Journal* 10, 10 ('Preventive Detention and the Control of Sex Crime').

2 Ben Power, '"For the Term of His Natural Life" Indefinite Sentences: A Review of Current Law and a Proposal for Reform' (2007) 18(1) *Criminal Law Forum* 59, 59.

3 Australian Institute of Health and Welfare, *Sexual Assault in Australia* (Report, August 2020) 3 <https://www.aihw.gov.au/getmedia/0375553f-0395-46cc-9574-d54c74fa601a/aihw-fdv-5.pdf.aspx?inline=true>.

4 Lorana Bartels, Jamie Walvisch and Kelly Richards, 'More, Longer, Tougher … or Is It Finally Time for a Different Approach to the Post-Sentence Management of Sex Offenders in Australia?' (2019) 43(1) *Criminal Law Journal* 41, 41.

in prison for an indefinite period.[5] Under such legislation, convicted sex offenders are not released if they are still deemed by a court to be a risk to the safety of the community, regardless of whether they have served their time. It follows then that the distinctive nature of indeterminate sentences allows for the imprisonment of an individual until certain conditions are satisfied.[6]

South Australia has a regime for the indefinite detention and release of sex offenders who are 'incapable of controlling, or unwilling to control' their sexual instincts in pt 3 div 5 of the *Sentencing Act 2017* (SA) ('*Sentencing Act*') — particularly within ss 57–9. In 2018, the Liberal Government swiftly introduced ss 58(1a), 59(1a) and 59(4a)[7] of the *Sentencting Act* to strengthen this regime.[8] These amendments were introduced in response to the Supreme Court of South Australia's ('Supreme Court') decision to release Colin Humphrys in *R v Humphrys* ('*Humphrys*'),[9] and in anticipation of an unsuccessful appeal in the South Australian Court of Appeal ('Court of Appeal'),[10] to prevent Humphrys from being released.[11]

5 *Crimes (High Risk Offenders) Act 2006* (NSW) s 5C; *Sentencing Act 1995* (NT) s 65; *Criminal Law Amendment Act 1945* (Qld) s 18; *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) pt 2; *Penalties and Sentences Act 1992* (Qld) s 163, sch 2; *Sentencing Act 2017* (SA) s 57(7) ('*Sentencing Act*'); *Dangerous Criminals and High Risk Offenders Act 2021* (Tas) s 4; *Sentencing Act 1991* (Vic) ss 18A–18B; *Serious Offenders Act 2018* (Vic) s 61; *Sentencing Act 1995* (WA) s 98. See generally: ibid 42–4; Patrick Keyzer and Bernadette McSherry, 'The Preventive Detention of Sex Offenders: Law and Practice' (2015) 38(2) *University of New South Wales Law Journal* 792; Tamara Tulich, 'Post-Sentence Preventive Detention and Extended Supervision of High Risk Offenders in New South Wales' (2015) 38(2) *University of New South Wales Law Journal* 823.

6 Daniel Piggott, 'During Her Majesty's Pleasure: *Pollentine v R*' (1998) 20(1) *University of Queensland Law Journal* 126, 126.

7 *Sentencing Act* (n 5) ss 58(1a), 59(1a), 59(4a), as inserted by *Sentencing (Release on Licence) Amendment Act 2018* (SA) pt 2 ('*Amendment Act*').

8 South Australia, *Parliamentary Debates*, House of Assembly, 29 May 2018, 581 (Vickie Chapman, Attorney-General) ('*Parliamentary Debates*, House of Assembly'). See also South Australia, *Parliamentary Debates*, Legislative Council, 19 June 2018, 496–9 (Rob Lucas, Treasurer) ('*Parliamentary Debates*, Legislative Council').

9 [2018] SASC 39 (Kelly J) ('*Humphrys*'). Humphrys was released on licence under s 24(1) of the *Criminal Law (Sentencing) Act 1988* (SA) ('*Repealed Act*') which was the predecessor to s 59(1) of the *Sentencing Act* (n 5).

10 This appeal was dismissed in *R v Humphrys* (2018) 131 SASR 344 (Kourakis CJ, Vanstone and Nicholson JJ) ('*Humphrys Appeal*'). The judgment was delivered on 25 June 2018 on the same day that the *Amendment Act* (n 7) was enacted.

11 *Parliamentary Debates*, House of Assembly (n 8) 581; *Sentencing Act* (n 5) s 59(10)(b), as inserted by *Amendment Act* (n 7) cl 4(3) where 'the appropriate board' may 'cancel the release of a person on licence' if satisfied that 'there is evidence suggesting that the person may now present an appreciable risk to the safety of the community'.

Even though the constitutional validity of indefinite detention has been upheld by the High Court of Australia,[12] its practical application and operation is an enduring enigma. In practice, determining indefinite detention sentences for sex offenders is difficult.[13] In *Hore v The Queen* (2022) 273 CLR 153 ('*Hore*'), the High Court clarified when persons will be deemed 'willing' pursuant to s 59(1a)(a) of the *Sentencing Act* in order to be released on licence. The High Court's interpretation of 'willing', giving it the converse meaning of 'unwilling' in s 57(1), as well as its finding that licence conditions can be considered when determining willingness, are consistent with the undoubtable intention of Parliament to strengthen the regime under which sex offenders are indefinitely detained or released for the protection of the community.[14] Nonetheless, *Hore* highlights the difficulty faced by courts in determining whether an individual is capable of controlling or willing to control their sexual instincts. This is not a concept defined in the legislation. The answer to this turns ostensibly to the wording of the statute and ultimately, the reasoning of the court.

II Background

A *Legislation*

In 2018, South Australia passed the *Sentencing Act*, replacing the former *Criminal Law (Sentencing) Act 1988* (SA) ('*Repealed Act*'). Sections 57–9 of the *Sentencing Act* are found in pt 3 div 5 which deals with offenders who have been determined to be incapable of controlling, or unwilling to control, their sexual instincts. Section 57 empowers the Supreme Court to order such persons, who have been convicted of certain sexual offences, be detained in custody until further order.[15] The Supreme Court may also authorise the release into the community of a person detained in custody.[16] Section 58 allows the Supreme Court to discharge a detention order made under s 57,[17] while s 59 permits the Supreme Court to release persons 'on licence', meaning certain conditions are attached to the person's release.[18]

12 See *Fardon v A-G (Qld)* (2004) 223 CLR 575 ('*Fardon*') where the High Court of Australia dismissed a constitutional challenge to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) which allowed the continuing detention of sex offenders if they are a serious danger to the community: at 593 [24] (Gleeson CJ), 602 [44] (McHugh J), 621 [117] (Gummow J), 648 [198] (Hayne J), 658 [234] (Callinan and Heydon JJ), Kirby J dissenting at 193 [647].

13 See Part IV(B) below.

14 *Parliamentary Debates*, House of Assembly (n 8) 581–5; *Parliamentary Debates*, Legislative Council (n 8) 496–9.

15 *Sentencing Act* (n 5) s 57(7). See also s 57(1).

16 Ibid ss 58(1), 59(1).

17 Ibid s 58(1).

18 Ibid s 59(1).

An order may be made under ss 58 or 59 if — and only if — the Supreme Court is satisfied that the person: (a) 'is both capable of controlling and willing to control the person's sexual instincts';[19] or (b) 'no longer presents an appreciable risk to the safety of the community … due to the person's advanced age or permanent infirmity'.[20] The Supreme Court has broad discretion to determine if these elements are satisfied, however, it is required to consider the reports of the Parole Board[21] and medical practitioners, as well as any relevant evidence that the applicant wishes to put to the Supreme Court.[22]

'[W]illing', for the purposes of ss 58(1a) and 59(1a), is not defined in the *Sentencing Act* and is the point of contention in *Hore*. However, s 57(1) provides that, for the purposes of s 57

> a person … will be regarded as *unwilling* to control sexual instincts if there is a significant risk that the person would, given an opportunity to commit a relevant offence, fail to exercise appropriate control of the person's sexual instincts.[23]

B *Facts*

Daryl Wichen[24] and Jacob Hore[25] were found by the Supreme Court (and subsequently by the Court of Appeal)[26] to be incapable of controlling their sexual instincts. Accordingly, their applications for release on licence were refused, with the effect that they were to be detained indefinitely, without a release date.

Wichen had a significant history of criminal offending commencing when he was 12 years old, including convictions for two attempted rapes and indecent assault.[27] He pleaded guilty on 5 February 2003 to one count of serious criminal trespass in a place of residence[28] and one count of assault with intent to rape,[29] and was sentenced to 10 years' imprisonment.[30] On 30 August 2011, Gray J declared that

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19 Ibid ss 58(1a)(a), 59(1a)(a).

20 Ibid ss 58(1a)(b), 59(1a)(b).

21 Ibid s 59(4)(c).

22 Ibid ss 59(2), 59(4)(a)–(b).

23 Ibid s 57(1) (definition of 'unwilling') (emphasis added).

24 *Wichen v The Queen* [2020] SASC 157 (Kourakis CJ) ('*Wichen*: Supreme Court').

25 *Hore v The Queen* (2020) 285 A Crim R 94 (Hughes J) ('*Hore*: Supreme Court').

26 *Wichen v The Queen* (2021) 138 SASR 134 (Kelly P, Lovell and Bleby JJA) ('*Wichen*: Court of Appeal'); *Hore v The Queen* (2021) 289 A Crim R 216 (Kelly P, Lovell and Bleby JJA) ('*Hore*: Court of Appeal').

27 *R v Wichen* (2005) 92 SASR 528, 532–3 [18]–[22].

28 *Hore v The Queen* (2022) 273 CLR 153, 161 [8] ('*Hore*').

29 Ibid.

30 Ibid.

'Wichen was incapable of controlling his sexual instincts' and made an order for his indefinite detention[31] under s 23 of the *Repealed Act*.[32]

Hore was a 'registrable offender'[33] as a consequence of his criminal history of sexual offences, including indecent assault and aggravated indecent assault against children.[34] Hore pleaded guilty to three counts of failing to comply with reporting conditions without reasonable excuse as a registrable offender and one count of possessing child pornography, and was sentenced to 16 months' imprisonment, with a 10 month non-parole period, on 24 February 2015.[35] On 9 February 2016, Nicholson J ordered under s 23(4) of the *Repealed Act* that Hore be detained until further order,[36] and declared that 'Hore was incapable of controlling his sexual instincts'.[37]

C *Applications for Release on Licence*

Hore and Wichen each applied for release on licence under s 24(1) of the *Repealed Act*. Due to the transitional provisions of the *Sentencing Act*, their applications were determined pursuant to s 59 of the *Sentencing Act*.[38] Chief Justice Kourakis and Hughes J denied Hore and Wichen's applications, respectively.[39]

Regarding Wichen, Kourakis CJ held that Wichen was not 'willing' for the purpose of s 59(1a). His Honour concluded that 'willing' has the opposite meaning of 'unwilling' — namely, that

> a person is *willing* to control their sexual instincts where there is not a significant risk that the person would, given an opportunity to commit a relevant offence, fail to exercise appropriate control of their sexual instincts.[40]

His Honour reached this construction of 'willing' by considering s 57 together with s 59 of the *Sentencing Act*, finding that they could only be read together as a 'coherent regime' for detention and release on license, if 'willing' is construed as the opposite of 'unwilling'.[41] This finding was based on his Honour's observations

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31 Ibid 161–2 [9]–[10].

32 Section 23 of the *Repealed Act* (n 9) was the predecessor to s 57 of the *Sentencing Act* (n 5).

33 Under the *Child Sex Offenders Registration Act 2006* (SA).

34 *Hore* (n 28) 162 [11].

35 Ibid.

36 Ibid 162 [12].

37 Ibid.

38 *Sentencing Act* (n 5) sch 1 cl 3(2)(c); *Hore* (n 28) 166 [30].

39 *Wichen*: Supreme Court (n 24) [126]; *Hore*: Supreme Court (n 25) 118 [124].

40 *Wichen*: Supreme Court (n 24) [112]–[113], quoting *R v Iwanczenko* [2019] SASC 140 [112] (Parker J) (emphasis added).

41 *Wichen*: Supreme Court (n 24) [110].

that although the definitions in s 57(1) applied to s 57 only, an order for detention is unlikely to be made under s 57 unless a person was determined to be 'incapable … or unwilling', and under s 59 persons can only be released on licence once it is established that they are capable and willing.[42] His Honour also determined that the Supreme Court could not consider any conditions to be imposed on the licence upon release in deciding whether to make an order under s 59.[43] This was held despite the fact that his Honour was 'confident' that if Wichen were to be released and appropriate conditions were imposed upon him, there would be no significant risk of him reoffending.[44] Instead, Kourakis CJ observed willingness must be demonstrated 'from within the artificial constraints of prison'[45] — a construction recognised by his Honour that would result in Wichen being 'trapped in a paradox' as it was impossible for Wichen to demonstrate such willingness outside of prison without first being released.[46]

Justice Hughes denied Hore's application for the same reasons as those of Kourakis CJ.[47] Her Honour similarly resolved that the imposition of conditions could only be considered after already determining that a person was willing to mitigate any remaining risk.[48] Her Honour recognised this would place a significant, and in some cases impossible, burden on the person.[49]

D *Court of Appeal Decisions*

Hore and Wichen appealed the respective decisions in the Court of Appeal. Both appeals were dismissed in separate judgments delivered on the same day.[50] The Court of Appeal noted the appellant's argument that the principle of legality presumed that 'willing', in s 59(1a)(a), should be given its ordinary meaning.[51] However, their Honours concluded that the presumption was displaced when considering the text, structure and purpose of pt 3 div 5 of the *Sentencing Act*.[52] For this reason, it was a 'necessary conclusion' that 'willing' has the opposite meaning of 'unwilling'.[53] Their Honours placed particular weight on the incoherence that would result if the

42 Ibid [107]–[108].

43 Ibid [124].

44 Ibid.

45 Ibid.

46 Ibid.

47 *Hore*: Supreme Court (n 25) 112–13 [91]–[93], 114–15 [99]–[101].

48 Ibid 114 [99].

49 Ibid.

50 *Wichen*: Court of Appeal (n 26) 145 [43]; *Hore*: Court of Appeal (n 26) 222 [27], with the reasons in *Wichen*: Court of Appeal being substantially adopted in *Hore*: Court of Appeal: at 217 [1], 221 [24], 222 [26].

51 *Wichen*: Court of Appeal (n 26) 140–1 [24].

52 Ibid 142 [28].

53 Ibid.

ordinary meaning of willing was used,[54] emphasising that it would be 'capricious' and 'nonsensical' for persons to be detained under one test in s 57 and released under a different test in ss 58 or 59.[55] The Court of Appeal agreed with Hughes J that the conditions of release on licence may only be considered after determining that the criteria in ss 59(1a)(a) or (b) are satisfied and the power to release on licence is enlivened.[56]

III High Court Decision

Hore and Wichen appealed the Court of Appeal's decisions to the High Court on two grounds:

(1) 'willing' in s 59(1a)(a) should be given its ordinary meaning, consequently Hore and Wichen were so willing;[57] and

(2) alternatively, the Supreme Court may consider the licence conditions to be imposed when determining whether persons are 'willing' for the purpose of s 59(1a)(a)[58] (which we will refer to as the step-down approach).

Hore and Wichen's cases were heard together, and in a joint judgment the High Court, comprising of Keane, Gordon, Edelman, Steward and Gleeson JJ unanimously allowed the appeals on the second ground,[59] setting aside the Court of Appeal's orders.[60] Their Honours remitted both applications to the Supreme Court to be properly determined according to the law.[61]

A *Meaning of 'Willing'*

Hore and Wichen argued that the term 'willing' should be given its ordinary meaning of 'a subjective state of mind … being open or prepared to make [a] choice'.[62] Hore and Wichen invoked the principle of legality and argued that the meaning of 'unwilling' should be confined to its use and operation in s 57 — namely, the practical content of the reports of medical practitioners in s 57(6), and thus, should not inform the definition of willing which goes beyond that limited purpose.[63]

54 Ibid 144 [37]–[38].

55 Ibid 143 [31].

56 Ibid 144–5 [41]–[42].

57 *Hore* (n 28) 161 [6].

58 Ibid.

59 Ibid 175–6 [67]–[68].

60 Ibid 175 [68].

61 Ibid.

62 Ibid 169–70 [45].

63 Ibid 170 [46].

On this ground, the High Court held that the inferior courts were correct to construe 'willing' as having the converse meaning of 'unwilling' for the purposes of s 59(1a)(a) — rejecting Hore and Wichen's submission that the principle of legality required 'willing' to be given its ordinary meaning.[64] The High Court considered the meaning of 'unwilling' and determined that it was 'not correct' to say that it was defined in s 57(1) — instead s 57(1) deems certain persons to which s 57 applies to be unwilling.[65] Importantly, their Honours noted that a 'person seeking discharge under s 58 or release on licence under s 59 is, and can only be, a person to whom s 57 applies'[66] — which is a person who is deemed to be unwilling. This seemingly indicates their meanings are related. The High Court then considered the medical reports that s 57(6), as well as ss 58(2) and 59(2) require the Supreme Court to obtain and act upon.[67] Their Honours observed the reports focussed on whether the person is: (1) incapable of controlling their sexual instincts; or (2) at significant risk of failing to control such instincts — the latter being the deemed meaning of 'unwilling'.[68] Accordingly, their Honours opined it would be pointless to obtain and act on the reports if they were not directed to helping the Supreme Court determine whether a person should be released under ss 58(1a) or 59(1a).[69] Critically, this requires a determination of a person's willingness. Their Honours considered that willingness falls on a 'spectrum',[70] and that '[i]t requires no leap of imagination to appreciate' that the requirement in s 59(1a)(a) means that there must be a determination that the person falls within the part of the spectrum where they would not pose a significant risk of harm to the community, should the person's self-control be tested.[71] Their Honours noted that 'significant risk' established the 'level of risk by reference to which the regime is engaged in s 57 or relaxed under s 58 or s 59'.[72] Consequently, their Honours held that the Court of Appeal was correct to reject the invocation of the principle of legality and construe 'willing' as the opposite to 'unwilling'.[73]

The High Court also rejected Hore and Wichen's submission that the meaning of 'willing' related to the subjective state of mind of the person.[74] Their Honours considered that willingness was not established exclusively by the subjective views of the person seeking release, and instead evaluation of their actual willingness

64 Ibid 171 [50]–[51].

65 Ibid 170 [47].

66 Ibid.

67 Ibid 170–1 [49]. See also *Sentencing Act* (n 5) ss 58(4)(a), 59(4)(a).

68 *Hore* (n 28) 170–1 [49].

69 Ibid 170 [48].

70 Ibid.

71 Ibid.

72 Ibid.

73 Ibid.

74 Ibid 171 [50].

was required.[75] It was held that the 'unmistakable intention of the [*Sentencing Act*]' was to determine whether the person is likely to have 'reliable commitment' to controlling their sexual instincts once released, rather than making determinations of willingness based on 'uncritical acceptance' of 'assertions by the person that may reflect subjective wishful thinking, if not feigned commitment'.[76] Therefore, the High Court concluded that the Court of Appeal correctly held that 'willing' in s 59(1a)(a) should be determined by reference to an evaluation of the definition of 'unwilling' in s 57(1), which is a person's actual willingness when presented with an opportunity to exercise control of their sexual instincts and when there is a significant risk of harm present.[77]

B *Relevance of Conditions of Release on Licence*

On the second ground of appeal, the High Court unanimously found that the Supreme Court can consider the likely effect of the conditions of release on licence when determining whether persons are 'willing' for the purposes of s 59(1a)(a).[78] Rejecting the approach of the lower courts, the High Court held that the appellants' contention on this step-down approach must be accepted for three reasons.

First, their Honours stated that the text of s 59(1) undoubtedly empowers the Supreme Court to make only *one* determination — whether a person should be released on licence.[79] Resultingly, willingness is not required to be established as 'an exercise separate from, and carried out without regard to' the likely impact of the conditions of the licence on 'the person's commitment to exercising appropriate self-control'.[80] Important to this finding was their Honours' view that, for the purposes of s 59(1a)(a), evaluating a person's capability and willingness is not exclusively concerned with their capability and willingness at the time the application for release is determined.[81] Instead, it is 'vitally concerned' with the ongoing capability and willingness of the person 'when any occasion for the exercise of self-control arises'.[82] That is, the evaluation of the person's capability and willingness to control their sexual instincts must proceed on the assumption or hypothetical occasion where the conditions of the licence are in place. The rationale of this step-down approach acknowledges the effect of the conditions on the person's willingness and is integral in determining whether there is an 'appreciable risk'.[83] Therefore, when determining whether a person will exercise appropriate control it must be assumed that the conditions of licence, required by ss 59(7) and (8), are in place. Otherwise,

75 Ibid.

76 Ibid.

77 Ibid 172 [51].

78 Ibid 175–6 [67].

79 Ibid 172 [55].

80 Ibid 172 [56].

81 Ibid 172–3 [57].

82 Ibid.

83 Ibid 173 [58]; *Sentencing Act* (n 5) ss 58(1a)(a)–(b).

willingness would be, absurdly, evaluated based on a 'state of affairs that could never arise under s 59' — being 'release on licence without conditions'.[84]

To bolster their reasoning, the High Court noted the specific wording of s 59 regarding 'release *on licence*'[85] refutes the suggestion that the effect of the conditions may be disregarded when assessing willingness.[86] Their Honours emphasised that although consideration of conditions was 'integral' to determining willingness, consideration did not require the Supreme Court to assume the conditions would be complied with or disregard the possibility they would be ineffective.[87] Their Honours reasoned that the arid exercise of construing s 59 as if it required a determination to be made for release on licence without considering the conditions imposed would 'substantially reduce the utility of s 59',[88] and thus, 'cannot be discerned in the legislation'.[89] That approach would result in the regime in s 58 being the 'only practical avenue' for release of a person detained pursuant to s 57.[90] Their Honours could not perceive how a person would fail to be released under s 58 but satisfy the test in s 59 without consideration of licence conditions.[91] Consequently, '[f]or all practical purposes' on the lower courts approach 's 59 would be rendered a dead letter'.[92]

Second, the High Court turned to consider the context of s 59(1a)(a), particularly, s 59(4) which outlines matters the Supreme Court must take into account when making a determination under s 59.[93] These matters include a report by the Parole Board which, among other things, notably includes 'a report as to the probable circumstances of the person if the person is released on licence'.[94] In the opinion of the High Court, this confirms the relevance of the conditions to making determinations pursuant to s 59(1a)(a).[95] Therefore, their Honours contended that nothing in s 59 suggests consideration of conditions, and in particular the reports referred to in s 59(4)(c), is limited to addressing any residual risk posed by the release of a person, rather than whether they should be released.[96]

84 *Hore* (n 28) 172–3 [57].

85 Ibid 173 [58] (emphasis in original).

86 Ibid.

87 Ibid.

88 Ibid 173 [59].

89 Ibid 172–3 [57].

90 Ibid 173 [59].

91 Ibid.

92 Ibid.

93 Ibid 173–4 [60].

94 Ibid, quoting *Sentencing A*ct (n 5) ss 59(4)(c)(i)–(ii).

95 *Hore* (n 28) 174 [61].

96 Ibid 174 [62].

Third, the step-down approach was 'not inconsistent' with the the purpose of s 59(1a)(a), as reflected in the second reading speech for the *Amendment Act*.[97] The purpose of s 59(1a)(a) is to ensure that the Supreme Court does not order the release of a person on licence where the safety of the community is absolutely reliant upon the 'efficacy of external controls such as monitoring, supervision and pro-social support', and where, even with such external constraints, the Supreme Court is unable to be satisfied of the person's willingness.[98] The High Court referred to *Humphrys*, where Humphrys — despite the fact he was likely to thwart his licence conditions by 'deceitful manipulation' and pose a risk to the safety of the community[99] — was released on licence with conditions, as the Supreme Court believed the community could be adequately protected through steps taken by government agencies to manage the risks.[100] The High Court acknowledged that the consideration of licence conditions in s 59(1a) was not introduced to prevent persons who are determined to possess 'a firm commitment to the exercise of appropriate self-control', which is bolstered by external controls, from being found to be 'willing'.[101] Nevertheless, the High Court, in considering *Humphrys*, emphasised that it does not always mean a person's exercise of self-control would be bolstered by external controls so as to 'warrant an affirmative finding of willingness' or that 'significant risk' would be absent.[102] However, the High Court recognised the rationale that s 59(1a) was not to preclude consideration of external constraints upon behaviour provided by licence conditions.[103]

IV Comment

The High Court's decision in *Hore* accentuates the proverbial elephant(s) in the room — namely: (1) making predicative judgments based on potentially unreliable psychiatric assessments; and (2) the practicality and effectiveness of indefinite detention of sex offenders.

A *Assessing Capability and Willingness*

Section 59(4)(a) of the *Sentencing Act* demonstrates the invaluable and active role medical practitioners have within the court system. After considering reports from two legally qualified medical practitioners, the judge may sentence that person to be detained at Her Majesty's pleasure.[104] Although neither report is determinative

97 Ibid 174 [63].

98 Ibid 174–5 [64].

99 Ibid 175 [65], citing *Humphrys Appeal* (n 10) 355–60 [29]–[44].

100 *Hore* (n 28) 175 [65], citing *Humphrys* (n 9) [57].

101 *Hore* (n 28) 175 [65]–[66].

102 Ibid.

103 Ibid.

104 Piggott (n 6) 126. This is now 'at His Majesty's Pleasure' following the death of Queen Elizabeth II on 8 September 2022.

of the court's decision, their influence is significant. This was seen when a psychiatrist recognised that Hore's willingness to control his instincts would depend on the environment, 'normal stresses and strains of everyday life'[105] and hence, conditions into which he was released[106] — the foundation that formed the step-down approach accepted in *Hore*. Despite the growth of assessment techniques to classify the risk of future harm for management and prediction purposes, this is no menial task.[107] This then leads to the question of whether medical practitioners are being placed in an untenable position by the legislature and how reliable the predictions of their reports are. It is difficult for medical practitioners to assess the 'appreciable risk'[108] to the safety of the community if an indefinite sentence is not imposed.[109] In *McGarry v The Queen*,[110] Kirby J acknowledged the 'limitations experienced by judicial officers, parole officers and everyone else in … estimating what people will do in the future'.[111] The only important types of evidence would be drawn from the prisoner's criminal history and prison records, essentially listing the offender's past behaviour before imprisonment.[112] In regard to principles of propensities and similar facts, if judging mere past conduct is deemed to be prejudicial, then it is even more so in assessing future behaviour.[113] This is because propensity is determined simply by analysing an offender's past actions and using that conduct to stereotypically label the offender.[114] While it may seem that the strongest indicator of future offending is past offending, heavy reliance upon evidence of past behaviour to predict future conduct effectively reverses the burden of proof and lacks logically probative conclusions.[115] Psychiatric assessments are speculative and lack the scientific validity to provide a definitive basis.[116] How great then must the risk be before the offender enters into the category of 'appreciable risk' and be indefinitely detainable? How does one decide who is incapable and unwilling to control their sexual instincts, in the sense that would justify indefinite detention?[117] The line drawn between upholding the safety of the community and ensuring that the offender be supported

105 *Hore*: Supreme Court (n 25) 106–7 [63].

106 Ibid.

107 Bernadette McSherry, 'The Preventive Detention of "Dangerous" People' [2012] (112) *Precedent* 4, 7 ('Preventive Detention of Dangerous People').

108 *Sentencing Act* (n 5) s 58(1a)(b).

109 McSherry, 'Preventive Detention of Dangerous People' (n 107) 7.

110 (2001) 207 CLR 121 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

111 Ibid 141–2 [61].

112 Michelle Edgely, 'Preventing Crime or Punishing Propensities? A Purposive Examination of the Preventative Detention of Sex Offenders in Queensland and Western Australia' (2007) 33(2) *University of Western Australia Law Review* 351, 373.

113 Ibid 383.

114 Ibid.

115 Ibid 373, 386.

116 Ibid 386.

117 See Michael Louis Corrado, 'Sex Offenders, Unlawful Combatants, and Preventive Detention' (2005) 84(1) *North Carolina Law Review* 77, 107.

so that their risk may continue to decrease becomes blurred.[118] This was identified by Jim Parke and Brett Mason:

> It must be hoped that in endeavouring to identify what that 'duty' is, the [reports] will accord due weight to doing justice and not simply endeavour to fulfil an ill perceived desire to 'protect' the system from criticisms.[119]

At least Gleeson CJ acknowledged this issue (albeit quickly dismissing it), observing that '[n]o doubt, predictions of future danger may be unreliable, but … they may also be right'.[120] However, are we then confident and at ease in indefinitely depriving an offender of their freedom based on predictive models that do not guarantee accuracy? Evidently, the *Sentencing Act* seems to think so.

B *The Practicality and Effectiveness of Section 57(7)*

This case note does not attempt to challenge the constitutional validity of s 57(7), but aims to highlight the practicality of its application. As the opening epigraph by TS Eliot illustrates, dreaming up what might be done is easy, but in contrast, getting it done can be hard.[121] The *shadow* lies in the difference between the concept and what is actually done or created. That is, the idea may be realised, and the motion may result in an act, but between one and the other, it is not clear what the result will be. Think of Eliot's quotation in the context of the practicality of s 57(7) — and the gap between its aims and executions.[122] For instance, Hazel Kemshall notes that '[p]rotection and prevention have become increasingly meshed, so the former can be delivered only through ever-increasing levels of the latter'.[123] This case note respectfully disagrees. Although locking up sex offenders and throwing away the key may be an instinctive reaction, its application is not always realistic. Ordering an offender to remain in prison indefinitely for the safety of the community would hardly change their perception that they are being punished.[124] As French philosopher, Michel Foucault says:

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118 Patrick Keyzer and Bernadette McSherry, 'The Preventive Detention of "Dangerous" Sex Offenders in Australia: Perspectives at the Coalface' (2013) 2(1) *International Journal of Criminology and Sociology* 296, 301.

119 Jim Parke and Brett Mason, 'The Queen of Hearts in Queensland: A Critique of Part 10 of the Penalties and Sentences Act 1992 (Qld)' (1995) 19(6) *Criminal Law Journal* 312, 325.

120 *Fardon* (n 12) 589–90 [12].

121 Brown, 'Preventive Detention and the Control of Sex Crime' (n 1) 15.

122 *Sentencing Act* (n 5) s 3.

123 Hazel Kemshall, 'The Historical Evolution of Sex Offender Risk Management' in Kieran McCartan and Hazel Kemshall (eds), *Contemporary Sex Offender Risk Management: Perceptions* (Palgrave Macmillan, 2017) vol 1, 1, 20.

124 Bernadette McSherry, 'Indefinite and Preventive Detention Legislation: From Caution to an Open Door' (2005) 29(12) *Criminal Law Journal* 94, 109–110.

> what use would it be if it had to be permanent? A penalty that had no end would be contradictory … and the effort made to reform him would be so much trouble and expense lost by society … But, for all the others, punishment can function only if it comes to end.[125]

Indefinite detention is often 'symbolic, nominal or rhetorical, and only rarely … contribute[s] substantially to the safety of the children they purport to protect'.[126] David Garland described this statutory response as 'expressive, cathartic actions, undertaken to denounce the crime and reassure the public', instead of providing an actual ability or capacity to control future crimes and reoffending if the offender is to one day be released.[127] Accordingly, whilst the practice of indefinite detention is not of a retributive character, it is unjust and ineffective in preparing sex offenders to reintegrate into the community. The emphasis on indefinite detention as a means of creating a safer society diverts attention away from the development of more constructive, equitable and efficient methods to manage convicted sex offenders living in the community.[128] Thus, there is a contrast in the practicality between conceiving an idea of upholding the safety of the community and acting upon it. Risk can never be wholly dispensed, but it can be managed. Arguably the best approach lies in emphasising appropriate rehabilitative mechanisms rather than maintaining a sole focus on restraint.

C *The Effect of the Decision in* Hore

The High Court's decision in *Hore* clarified the test for releasing persons on licence under s 59 by defining 'willing', which was not defined in the *Sentencing Act*, as the opposite of 'unwilling' in s 57(1). The definition of 'willing' will assist the Supreme Court in the future in determining whether to order release on licence, particularly, by clarifying that licence conditions may be considered — where conditions had been previously disregarded to the detriment of Hore and Wichen in the lower courts.[129] This decision also likely clarifies the test for discharging detention orders in s 58 as the word 'willing' appears in s 58(1a)(a) which is identical to s 59(1a)(a), hence it would likely be interpreted the same.[130]

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125 Michel Foucault, *Discipline and Punish: The Birth of the Prison*, tr Alan Sheridan (Vintage Books, 1995) 107 [trans of: *Surveiller et Punir: Naissance de la prison* (1975)].

126 Arie Freiberg, Hugh Donnelly and Karen Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts* (Report, Royal Commission into Institutional Responses to Child Sexual Abuse, July 2015) 12.

127 David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) 133.

128 Peter Marshall, 'An Analysis of Preventive Detention for Serious Offenders' (2007) 13(1) *Auckland University Law Review* 116, 142–3.

129 *Hore*: Supreme Court (n 25) 115 [101]; *Wichen*: Supreme Court (n 24) [124].

130 *Wichen*: Supreme Court (n 24) [110].

The High Court's rejection of the invocation of the principle of legality — which would have required the ordinary meaning be applied — was sensible. The definition of 'willing' that their Honours adopted from the lower courts promotes a 'coherent regime' for detention and release,[131] while also endorsing Parliament's paramount intention for s 59(1a) — to protect the community.[132] Their Honours' interpretation of 'willing' arguably creates a higher threshold than the ordinary meaning.[133]

While their Honours correctly held that licence conditions may be a consideration when determining willingness, *Hore* does not permit future applications under s 59 to be granted where a person does not meet the requisite standard of willingness even with the licence conditions in place.[134] An actual determination of willingness, in their Honours opinion, is still required rather than 'uncritical acceptance'[135] that the licence conditions will be effective or be complied with.[136] The High Court's interpretation, therefore, is consistent with Parliament's intention to protect the community while avoiding the 'harsh, and some may say cruel' outcome as noted by Kourakis CJ,[137] and, in some cases, the 'impossible' burden placed on the offender as noted by Hughes J,[138] which their Honours stated would result if conditions could not be considered.[139] Additionally, the High Court's decision does not thwart the intention of s 59(1a) which was one of the provisions that Parliament introduced to prevent the approach that was taken in *Humphrys* from reoccurring.[140] This is because in *Humphrys*, the Supreme Court released Humphrys on licence relying on the fact that external controls were in place even though there was no evidence that those controls would be effective, and in fact evidence suggested that the external controls would be circumvented by 'deceitful manipulation'.[141] Such approach is not endorsed by the High Court in *Hore*.[142]

Finally, their Honours' interpretation ensures that s 59 has utility and is more than a 'dead letter' in practice.[143] This approach is logical as it is unclear why Parliament would introduce both ss 58 and 59 if the test in s 59 could never be satisfied. Such interpretation will ensure persons who are at 'significant risk' of reoffending

131 Ibid.

132 *Parliamentary Debates*, House of Assembly (n 8) 581.

133 See *Hore* (n 28) 168–9 [41].

134 Ibid 173 [58].

135 Ibid 171 [50].

136 Ibid 173 [58].

137 *Wichen*: Supreme Court (n 24) [124].

138 *Hore*: Supreme Court (n 25) 114 [99].

139 *Wichen*: Supreme Court (n 24) [124]; *Hore*: Supreme Court (n 25) 114 [99].

140 *Parliamentary Debates*, House of Assembly (n 8) 586.

141 *Humphrys Appeal* (n 10) 346 [3], 355–60 [29]–[44].

142 *Hore* (n 28) 174–5 [64]–[65].

143 Ibid 173 [59].

are detained,[144] while those who may not pose a 'significant risk', if appropriate conditions are imposed, are not unnecessarily subject to the severe imposition of indefinite detention.

V Conclusion

The primary focus of the *Sentencing Act* is to uphold the safety of the community. However, in trying to apply the law, the Court is tasked with a heavy burden of balancing community protection with an individual's right to freedom. The High Court in *Hore* correctly determined that 'willing' for the purposes of s 59(1a) should have the converse meaning of 'unwilling' in s 57(1) and that licence conditions may be considered when determining willingness. This construction provides greater clarity for the Supreme Court when determining whether to release persons under s 59, as well as increasing clarity for those applying for release in the future. It also, importantly, promotes the very clear intention of s 59(1a) which is to protect the community by ensuring that persons are not found to be 'willing' unless they are not at 'significant risk' of failing to control their sexual instincts, while also not leaving the safety of the community solely reliant on external controls which may not protect it adequately. This arguably strikes the right balance between the rights of individuals and the community.

Although substantial criticism of and practical concerns with indefinite detention are highlighted, they should not invalidate the entire practice or render it into disuse. Rather, there needs to be a shift in rationales underlying psychiatric assessment, while redirecting the interpretation to a more retributive approach. To effectively ensure that risks are mitigated, terms and conditions of the offender's release should be devised. The allocation and deployment of adequate resources must occur to facilitate such conditions and to ensure appropriate monitoring of the offender. Should the courts be more cautious in ordering indefinite detention and loosen the threshold of release on licence? *Hore* has done so by drawing a metaphorical red line on the powers of s 57(7). The High Court's conclusion in *Hore* — that a person's conditions of release may help strengthen their willingness to self-control — directs attention to an important issue for the future of indefinite detention and release on licence in South Australia and in Australia. Its decision not only provides an imperative clarification, but implies a permissively construed interpretation of s 59(9) — one that steers toward a rehabilitative justice system that provides for an offender's reintegration into society, with conditions imposed. This case note sheds light and scrutiny on the ambiguity of this scheme in the hope that the courts and community alike might be ready to examine indefinite detention regimes more closely.

144 Ibid 170–1 [49].

*Lachlan Dorey**

TO PUBLISH OR NOT TO PUBLISH? *GOOGLE LLC V DEFTEROS* (2022) 403 ALR 434

> 'in its impact on the law of defamation, the Internet will require "almost every concept and rule in the field … to be reconsidered in the light of this unique medium of instant worldwide communication"'[1]

I Introduction

The development of internet technologies has shed light on the confusion surrounding the law of publication in actions for defamation.[2] As recognised by Kirby J, 'the remarkable features of the Internet … makes it more than simply another medium of human communication'.[3] It is therefore difficult to apply the law developed in the context of more 'traditional' forms of media. This difficulty was even pre-empted by the High Court of Australia ('High Court') in *Trkulja v Google LLC* ('*Trkulja*'),[4] where it was recognised that '[i]t is the application of [the law] to the particular facts of the case which tends to be difficult, especially in the relatively novel context of internet search engine results'.[5] Yet, the rules applicable to publication continue to be described as settled,[6] and even so far as 'tolerably clear'.[7] This appears to be far from the case, as courts continue to grapple with the meaning of publication.[8] Still, *Google LLC v Defteros* ('*Defteros*')[9] represents a win

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1 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 612 [66] (Kirby J) ('*Gutnick*'), quoting Lord Bingham of Cornhill, 'Foreword' in Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 2001) v, v.

2 Joachim Dietrich, 'Clarifying the Meaning of "Publication" of Defamatory Matter in the Age of the Internet' (2013) 18(2) *Media and Arts Law Review* 88, 88, 104. See also David Rolph, 'Publication, Innocent Dissemination and the Internet After *Dow Jones & Co Inc v Gutnick*' (2010) 33(2) *University of New South Wales Law Journal* 562, 562–4.

3 *Gutnick* (n 1) 642 [164].

4 (2018) 263 CLR 149 ('*Trkulja*').

5 Ibid 163–4 [39] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

6 David Rolph, 'The Concept of Publication in Defamation Law' (2021) 27(1) *Torts Law Journal* 1, 2.

7 *Trkulja* (n 4) 163 [39].

8 See, eg, *Fairfax Media Publications Pty Ltd v Voller* (2021) 273 CLR 346 ('*Voller*'). See also *Barilaro v Google LLC* [2022] FCA 650 ('*Barilaro*').

9 (2022) 403 ALR 434 ('*Defteros*').

for a digital intermediary[10] such as Google, as the High Court held that Google was not the publisher of a hyperlink to an article containing defamatory statements and imputations.[11]

This case note argues the overall outcome of the High Court's decision in *Defteros* was correct. However, it also argues the High Court's attempt to reconcile its approach with the principles outlined and applied in *Fairfax Media Publications Pty Ltd v Voller* ('*Voller*')[12] has further convoluted the law of publication. The body of law surrounding publication in the context of the internet has become more confusing than ever and the resulting issues must be properly addressed. Part II will illustrate the background facts, history of proceedings, and applicable legal principles. Part III will then provide an overview and critique of the reasons for the High Court's decision, before Part IV provides a comment on its broader impact on the interpretation of publication and likely subsequent statutory reform in this area.

II Background

A *Facts*

George Defteros was a solicitor who acted for Dominic Gatto and Mario Condello during Melbourne's 'gangland wars'.[13] Defteros and Condello were charged with conspiracy to commit murder in 2004, before charges against Defteros were withdrawn in 2005.[14] The prosecution of Defteros and Condello was highly publicised, including reports on the website of *The Age*.[15]

In 2016, Defteros became aware that using Google's search engine to run a search of his name produced part of an article published by *The Age* in 2004.[16] The title of the article, which appeared in a hyperlink to the complete article on *The Age*'s web page, was 'Underworld loses valued friend at court'.[17] Defteros claimed that the search result defamed him and instituted proceedings, asserting that Google was the publisher of the article on *The Age's* web page by providing the hyperlink in question.[18]

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10 See generally Parliamentary Counsel's Committee, Draft Part A Model Defamation Amendment Provisions (12 August 2022) 2 [1] ('Draft Provisions').

11 *Defteros* (n 9) 444 [34] (Kiefel CJ and Gleeson J), 451 [66], 453 [74] (Gageler J), 497 [240] (Edelman and Steward JJ).

12 *Voller* (n 8).

13 *Defteros* (n 9) 436 [1] (Kiefel CJ and Gleeson J).

14 Ibid.

15 Ibid.

16 Ibid 436 [2].

17 Ibid.

18 See ibid 436–7 [2]–[4].

B *Prior Proceedings*

The matter had been before the courts since 2016.[19] Justice Richards of the Supreme Court of Victoria found that Google was the publisher of the search engine results based on the significance of the provision of a hyperlink.[20] When the decision was appealed by Google to the Victorian Court of Appeal, Beach, Kaye and Niall JJA dismissed the appeal and maintained that Google was the publisher of the search results.[21] Google then sought special leave to appeal to the High Court on the question of whether it was the publisher of the hyperlinks, which was granted.[22]

C *Law of Publication*

The element of publication has been described as 'the foundation of the action' of defamation.[23] It is the act of making material available to a third party.[24] Justice Isaacs' statement in *Webb v Bloch* that it is the 'participation' in publication that attracts liability[25] has consistently been applied by Australian courts,[26] and was recently upheld by the High Court in *Voller*.[27] Thus, the test of 'participation' remains key, particularly in the context of third-party material.[28] What amounts to 'participation', though, is a difficult question[29] — something that the High Court continues to grapple with and did so in *Defteros*. Based on the majority in *Voller*, participation includes 'facilitating, encouraging and … assisting' the dissemination of the defamatory material.[30] Whether this test can be adequately applied to the unique circumstances in *Defteros*, though, is another difficult question.

19 *Defteros v Google LLC* [2020] VSC 219, [6] (Richards J).

20 Ibid [61]–[62].

21 *Defteros v Google LLC* [2021] VSCA 167, [89], [261].

22 *Defteros* (n 9) 437 [7]–[8] (Kiefel CJ and Gleeson J).

23 See *Powell v Gelston* [1916] 2 KB 615, 619 (Bray J).

24 See *Gutnick* (n 1) 600 [26] (Gleeson CJ, McHugh, Gummow and Hayne JJ). See also Patrick George, *Defamation Law in Australia* (LexisNexis, 2nd ed, 2012) 135.

25 (1928) 41 CLR 331, 363–4.

26 See, eg: *Noble v Phillips [No 3]* [2019] NSWSC 110, [54]; *Rush v Nationwide News Pty Ltd [No 2]* [2018] FCA 550, [124]–[125]; *Dank v Whittaker [No 1]* [2013] NSWSC 1062, [23]–[24]; *De Kauwe v Cohen [No 4]* [2022] WASC 35, [427].

27 *Voller* (n 8) 352 [12] (Kiefel CJ, Keane and Gleeson JJ), citing *Webb v Bloch* (n 25) 363–4.

28 *Voller* (n 8) 357 [32] (Kiefel CJ, Keane and Gleeson JJ).

29 David Rolph, 'Liability for Third Party Comments on Social Media Pages' (2021) 13(2) *Journal of Media Law* 122, 131. See Dietrich (n 2) 90.

30 *Voller* (n 8) 362 [55] (Kiefel CJ, Keane and Gleeson JJ), see also 378 [105] (Gageler and Gordon JJ).

III Decision

The majority in *Defteros*, comprising Kiefel CJ and Gleeson J, Gageler J, and Edelman and Steward JJ, held that Google was not the publisher of the article on *The Age*'s web page by providing the hyperlink.[31] Justice Keane and Gordon J dissented.

A *Majority*

Chief Justice Kiefel and Gleeson J suggested that because the creation of the hyperlink had 'no connection to the creation' of the article on *The Age*'s web page itself, the creation of the article 'was in no way approved or encouraged' by Google.[32] In this sense, the provision of a hyperlink did not constitute 'participation' in the publication as per *Webb v Bloch* and *Voller*.[33] Providing a hyperlink was therefore, at most, 'passive' involvement — Google merely 'assisted persons searching the Web to find certain information and to access it'.[34] This reasoning is sound. It is difficult to see how such 'passivity' in the creation or distribution of a publication can attract liability.[35]

The question, then, was whether the hyperlink, in and of itself, was within the scope of liability. On this point, Kiefel CJ and Gleeson J held search engine results 'do not come within the purview of publication',[36] as a hyperlink 'without endorsement or adoption remains content-neutral'.[37] This is an interesting finding, as the title of the article — which could be described as a defamatory imputation — suggests the hyperlink was not necessarily 'content-neutral'. What their Honours appear to be emphasising, though, is rather that more than simply providing the hyperlink is needed for 'participation' to be satisfied. In this sense, hyperlinks are 'content-neutral' until there is some further action by Google (ie promotion).

Justice Gageler took the position that the provision of a hyperlink, in combination with other factors, may 'amount to participation in th[e] process of publication'.[38] This is an important point, as previous decisions have indicated that liability may be incurred for search results.[39] While Gageler J did not reconcile these decisions, the possibility was left open for them to remain authoritative and/or binding. Further,

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31 See above (n 11).

32 *Defteros* (n 9) 444 [34].

33 Ibid.

34 Ibid 447 [49].

35 Cf *Voller* (n 8).

36 *Defteros* (n 9) 445 [41].

37 Ibid 446 [44].

38 Ibid 451 [66].

39 See, eg: *Gutnick* (n 1) 600 [26]; *Trkulja* (n 4) 156 [16], 163 [38]; *Google Inc v Duffy* (2017) 129 SASR 304, 358 [181] (Kourakis CJ), 401 [354] (Peek J), 467 [597] (Hinton J) ('*Duffy*'); *Tamiz v Google Inc* [2013] 1 WLR 2151, 2165 [34]–[35] ('*Tamiz*').

Gageler J described a relatively high threshold for establishing publication.[40] This is important as liability would otherwise be unjustly attracted for the most minor acts of 'participation'.

Justices Edelman and Steward made a similar finding, asserting Google was not a publisher because '[t]he critical step that results in publication is that of the person searching and clicking on the chosen hyperlink', not the provision of the hyperlink itself.[41] It was the lack of participation in searchers' actions that went against Google being a publisher[42] — there was no encouragement or enticement on Google's behalf.[43] Instead, the actions amounting to publication were entirely outside Google's control. Again, the point is made that '[m]ore is needed to be a publisher', as was argued by Steward J in *Voller*.[44] Consequently, Edelman and Steward JJ held Google 'in no way participated in the vital step of publication without which there could be no communication of defamatory material'.[45]

B *Justice Keane's Dissent*

Justice Keane's dissent was largely based on the idea of a 'symbiotic relationship between Google and *The Age*'.[46] His Honour contended that publication 'occurred by reason of the assistance intentionally provided by Google in the course of its business'.[47] There are several issues with his Honour's position. First, it is arguable that this construes Google's involvement too broadly. The provision of a hyperlink is a natural function over which Google has no active control — it is generated when a web page is created by a user.[48] The 'assistance', as described by Keane J, was likely intentional to some extent, but this does not mean Google has 'participated' in publication. As asserted by Keane J in *Voller*, there is no requirement 'that a person must intend to communicate the material … in order to be a publisher'.[49]

Second, Keane J's suggestion that 'Google's search engine cannot be accurately described as a passive instrument'[50] goes against the reality of its operation. This suggests that Google has ultimate control over whether publication occurs.

40 *Defteros* (n 9) 451 [66]–[68].

41 Ibid 493 [220].

42 Ibid 493 [221].

43 Ibid 495 [233].

44 See *Voller* (n 8) 406 [173].

45 *Defteros* (n 9) 493 [221].

46 Ibid 458 [101].

47 Ibid 457–8 [98].

48 'How Google Search Works', *Google* (Web Page) <https://www.google.com/intl/en_au/search/howsearchworks/how-search-works/>; Google, Submission to Council of Attorneys-General, *Stage 2 Review of the Model Defamation Provisions: Part A* (9 September 2022) 2 ('Google Submission').

49 *Voller* (n 8) 357–8 [35] (Kiefel CJ, Keane and Gleeson JJ).

50 *Defteros* (n 9) 458 [100].

While Google undoubtedly has some control, it must also be recognised that the search result — which is automatically and involuntarily generated by the search engine[51] — would not appear if the article was not published on *The Age*'s web page in the first instance. In turn, the article would not be viewed — and thereby published in a legal sense — unless the voluntary decision is made by the searcher to click on the hyperlink provided. With respect, Keane J exhibits a fundamental lack of understanding of the operation of Google's search engine. It is automated, passive, and involuntary.[52] Moreover, publication is largely dependent on the actions of third parties. Justice Keane's dissent is not persuasive.

C *Justice Gordon's Dissent*

Justice Gordon's dissent relied heavily on the premise that absolving Google of liability would be 'contrary to the strict publication rule'.[53] It is worth noting there are several issues surrounding strict liability and significant debate as to whether an element of fault should be introduced.[54] This is exacerbated by the fact that Gordon J goes on to use concepts such as 'intention', which is inextricably linked to fault, to justify her Honour's decision.[55] With respect, Gordon J's contradictory reasoning and confused treatment of the concept of strict liability means her Honour's dissent lacks weight. This is yet another instance of the courts convoluting the concept of strict liability in the law of defamation.[56] As observed by Anthony Gray, 'there is little left by way of justification for the imposition of strict liability'.[57] *Defteros* may be another indication of this.

Further, Gordon J's assertion that liability was attracted by way of 'identifying, indexing, ranking and hyperlinking [the article on *The Age*'s website] within the search result' takes an overly broad view of publication.[58] As highlighted above, these are automated and passive functions.[59] To consider these actions within the scope of publication is inconsistent with the previously narrower view of publication taken by the courts.[60] As put by Matthew Collins, liability for unintentional publication should not be incurred 'unless the publication is a direct cause or a natural and

51 'Ranking Results: How Google Search Works', *Google* (Web Page) <https://www.google.com/intl/en_au/search/howsearchworks/how-search-works/ranking-results/>.

52 'How Google Search Works' (n 48); ibid.

53 *Defteros* (n 9) 461 [109].

54 See generally: Anthony Gray, 'Strict Liability in the Law of Defamation' (2019) 27(2) *Tort Law Review* 81; Rolph, 'The Concept of Publication in Defamation Law' (n 6).

55 *Defteros* (n 9) 461–2 [109]–[110].

56 See, eg, *Voller* (n 8).

57 Gray (n 54) 86.

58 *Defteros* (n 9) 461 [109].

59 See above n 52 and accompanying text.

60 See above Part II(C).

probable consequence' of a party's actions.[61] Providing a hyperlink does not mean the article on *The Age*'s web page will be accessed by a searcher — this choice is independent of Google's involvement. Google cannot reasonably be held liable on this reasoning.

IV Comment

While the outcome in *Defteros* represents a rare win for Google, it may be a loss for the law of publication. The decision in *Defteros* means that courts in Australia have recognised several different circumstances which dictate liability for internet search results. For example: the provision of a hyperlink alone is not publication;[62] the provision of a hyperlink in a manner which may 'entice' a user to view the material to which it links is publication;[63] and the provision of a hyperlink and subsequent failure to remove the hyperlink upon reasonable notice is publication.[64] The High Court did not clarify whether *Defteros* overrules previous decisions in this area, or the extent to which it may operate concurrently with them.

However, Parliaments are seeking to introduce much-needed clarity in this area. As part of the Stage 2 Review of the Model Defamation Provisions,[65] the Draft Part A Model Defamation Amendment Provisions ('Draft Provisions') released provide a defence for publication of search results by search engine providers, such as Google:

> **9A Certain digital intermediaries not liable for defamation**
>
> …
>
> (3) A search engine provider for a search engine is not liable for defamation for the publication of digital matter if the provider proves:
>
> (a) the matter is limited to search results generated using the search engine from search terms inputted by the user of the engine rather than terms automatically suggested by the engine, and

61 Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 3rd ed, 2010) 73 [5.19].

62 *Defteros* (n 9) 451 [66] (Gageler J).

63 *Duffy* (n 39) 360 [187] (Kourakis CJ), 467 [599] (Hinton J). See also ibid 451 [66]–[68]. This encompasses 'sponsored' hyperlinks: *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435, 442 [3], 447–8 [18]–[24] (French CJ, Crennan and Kiefel JJ). While this case involved an action in misleading or deceptive conduct and not defamation, a key issue remained as to whether Google had 'published' the sponsored hyperlinks.

64 *Trkulja* (n 4) 156 [16], 163 [38].

65 See generally Attorneys-General, *Review of Model Defamation Provisions: Stage 2* (Discussion Paper, 7 April 2021).

(b) the provider's role was limited to providing an automated process for the user to generate the search results.[66]

This may be useful in reconciling the different positions taken by the courts in previous decisions. The defence uses the position in *Defteros* to suggest that search engine providers are prima facie not liable. Then, it appears factors from other decisions may be used in considering whether the search engine provider has played a 'limited' part in publication, or not. This could include:

1. *Voller*, where participation was held to be 'facilitating, encouraging and thereby assisting' publication;[67]

2. *Trkulja*, where intentional participation in conveying the material was held to amount to publication;[68]

3. *Google Inc v Australian Competition and Consumer Commission*, where Google was held as the publisher of hyperlinks which were sponsored;[69] and

4. *Google Inc v Duffy*, where the failure to remove search results once put on notice was held to amount to publication.[70]

The introduction of this defence may therefore be the best way to reconcile the different approaches taken by the High Court and other courts, while still essentially upholding the decision in *Defteros*.

Still, there is some debate surrounding whether this defence should be legislated. For example, the Law Council of Australia has taken the position that the defence may not be necessary due to the similar safe harbour already provided for in s 235 of the *Online Safety Act 2021* (Cth) ('*OSA*').[71] However, it appears — noting this has not been considered by the High Court as of yet — that the *OSA* safe harbour would only operate where a search engine provider has no knowledge or awareness of the allegedly defamatory content.[72] There is a possible scenario where a search engine provider does have knowledge but plays such a limited role in conveying the material that liability should not be attracted. In this scenario, the *OSA* safe harbour is not enlivened, but the proposed defence may be. This was alluded to by the eSafety Commissioner, suggesting that the defence in the Draft Provisions could

66 Draft Provisions (n 10) 2–3 [2].

67 *Voller* (n 8) 362 [55] (Kiefel CJ, Keane and Gleeson JJ), see also 378 [105] (Gageler and Gordon JJ).

68 See *Trkulja* (n 4) 163 [38].

69 (2013) 249 CLR 435, 442 [3], 447–8 [18]–[24] (French CJ, Crennan and Kiefel JJ).

70 See *Duffy* (n 39) 359 [185] (Kourakis CJ), 455 [555] (Peek J), 467 [598] (Hinton J). See also: *Tamiz* (n 39); *Byrne v Deane* [1937] 1 KB 818.

71 Law Council of Australia, Submission to Meeting of Attorneys-General, *Stage 2 Review of the Model Defamation Provisions: Part A* (19 September 2022) 10 [31].

72 See *Online Safety Act 2021* (Cth) s 235.

operate concurrently with the *OSA* safe harbour.[73] This may also be true for the current common law. Michael Douglas takes a different position: that this issue of liability was resolved in *Defteros* and therefore the suggested defence lacks utility.[74] With respect, this appears unlikely due to a lack of explicit comment on the application of past decisions in this area. Douglas also fails to recognise the impact of inconsistencies between *Voller* and *Defteros*.

This was and remains the key issue with *Defteros*, that the High Court distinguished its reasoning in *Voller* on a similar issue of publication within 12 months of the judgment.[75] In *Voller* the majority of the High Court held that liability was attracted for third-party comments on social media pages because the action of making the original posts 'facilitated' the comments.[76] This appears akin to the passive involvement of Google in *Defteros*. The creation of defamatory comments was outside the control of the alleged publishers, just as the creation of a hyperlink containing a defamatory statement was outside the control of Google. Yet, the outcomes of *Voller* and *Defteros* were opposite, and these decisions are therefore difficult to reconcile.

It could be argued that *Defteros* better aligns with the dissent of Steward J in *Voller*, where his Honour considered that more than 'passivity' was required for publication.[77] Given the issues posed by *Voller*, this shift may be desired. There are further issues with this, such as the implication of an element of fault,[78] but at the very least it is important to again recognise that a more restricted approach should be taken with respect to 'publication', as was the case prior to *Voller*. The dire need for statutory reform has again been emphasised by the High Court's own inconsistent reasoning, which may also quash debate surrounding whether the Draft Provisions lack utility.

Regardless of any disagreement regarding which standard of publication should be upheld, it cannot be denied that uniformity in this area is desired, as was noted by Gageler J in *Defteros*.[79] Any reform in this area must strive to achieve this uniformity.

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73 See eSafety Commissioner, Submission to Attorneys-General, *Stage 2 Review of the Model Defamation Provisions: Part A* (9 September 2022) 4.

74 Michael Douglas, Submission to Council of Attorneys-General, *Stage 2 Review of the Model Defamation Provisions: Part A* (9 September 2022) 3.

75 Of note, also, is the decision by the Federal Court in *Barilaro*. While the Federal Court does not clearly distinguish *Voller*, its decision could be interpreted as inconsistent with *Voller* in a similar manner, albeit less so, than the High Court's in *Defteros*: *Barilaro* (n 8).

76 *Voller* (n 8) 362 [55] (Kiefel CJ, Keane and Gleeson JJ), 378 [105] (Gageler and Gordon JJ).

77 Ibid 406 [173].

78 See Michael Douglas, 'Publication of Defamation by Encouraging Third Party Comments on Social Media' (2022) 138 (July) *Law Quarterly Review* 362, 365.

79 *Defteros* (n 9) 450–1 [65].

V Conclusion

The struggles of the courts in interpreting the principles of publication in the context of the internet may finally be eased to some extent. But, not because of the High Court's decision in *Defteros*. While the outcome of the decision was correct, the issue is with the High Court's convoluted reasoning, which further confuses this area of law. In turn, the extent to which *Voller* operates is now entirely uncertain. Parliaments look to come to the aid of the courts in this respect, providing a specific defence for the publication of search engine results.[80] However, it remains to be seen whether the operation of this defence is as effective as it appears it could be, or whether it is even legislated by Parliaments.

Meanwhile, it will be a difficult task for courts to reconcile *Defteros* and *Voller*, due to the opposite outcomes of each decision despite similar features of 'passivity'. Ultimately, the lack of uniformity and struggles in interpreting 'publication' in the age of strict liability may favour introducing an element of fault into publication. While not the explicit focus of this case note, this is a highly significant debate and is worth further consideration. But regardless of the position taken in this respect, two considerations must be paramount for any reform: uniformity and clarity. Without any such reform, it would be no surprise if the High Court were to contradict *Defteros* in the same manner as *Voller* in the near future.

80 Draft Provisions (n 10) 2–3 [2].

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